

ANALYTICAL FRAMEWORK OF THE DEFINING IDEAS OF THE NOTION OF "CONSUMER" FROM THE PERSPECTIVE OF DIRECTIVE 93/13/EEC AND THE JURISPRUDENCE DEVELOPED ON ITS SIDE

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ABSTRACT: *The evolution of the law on unfair contractual terms contained in contracts concluded with consumers and the change in the function of equity of the contract law of consumer, lead to discussions regarding the approach of the notion "consumer". The consumer, as well as the competition, contributes to the general regulatory objective of the internal market, so that both claim legal provisions to ensure effective protection but also to stimulate economic activity, which leads to the realization of a right of consumption of a hybrid nature, with more severe implications and sanctions.*

The present paper aims to outline an analytical framework of the defining ideas of this notion, with a special look at the stretch in time, under the auspices of the judicial dialogue between our country and the Court of Justice of the European Union.

KEYWORDS: *consumer; professional; C.J.E.U. jurisprudence; contractual justice; unfair terms.*

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1. PRELIMINARIES

The new contractual justice developed on the basis of the preliminary judgments issued by the Court of Justice of the European Union regarding the trials related to consumer law is based on important messages sent to the member states, revealing the deficient application of European Directive 93/13/EEC¹, respectively the legislators' omissions to make the directive operable in the context of its own civil law and civil procedural law. (M.Jozon, 2017)

Directive 93/13/CEE is an instrument for regulating the internal market of the European Union, and, as a consequence, its purpose is aimed at its consolidation, being foreign to the assessment of the social consequences of the declaration of the unfair

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¹ Transposed into our legislation through Law no. 193/2000 regarding abusive clauses in contracts concluded between professionals and consumers, Republished - M.Of. no. 543 of 03.08.2012.

character of the contractual clauses contained in the agreements concluded with consumers . The interpretations offered by the European court on this normative act are based on the purpose of its elaboration, and are therefore carried out from the perspective of market considerations. On the other hand, contract law and the resolution of related issues remain the responsibility of the national judge, to be assessed in relation to the domestic legal norm (M.Jozon, 2017).

The Court of Justice of the European Union established the principle according to which the protection of consumers against clauses contained in non-negotiated, abusive contracts is of public order², requiring national courts to proceed with the verification, *ex officio*, of their fairness, in relation to the situation of the consumer involved.³ By doing so, the European court assigned a particularly important role to national courts, that of an institution charged with market surveillance (Jozon, 2020). Gradually the related legislation acquired a hybrid nature, which combines private and public law, which had direct consequences on the contractual law established in the member states.

In these circumstances, the preliminary referral procedure has become the main tool for legitimizing the new role assigned to the judicial system, being intended to remove the difficulties in theorizing and conceptualizing progress in the field of unfair terms contained in contracts concluded with consumers.

In the present study, we aim to summarize one of the implications of the European court in the area concerned, which made concrete the profound impact of the directive on our system of civil law and civil procedure, regarding the temporal effect of the quality of "consumer".

2. HIGHLIGHTS REGARDING THE DEFINITION OF THE NOTION OF "CONSUMER"

According to the provisions of art. 2, (b), form Directive 93/13/EEC, "consumer" means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession (C.Toader, 2014).

The consumer is considered a vulnerable legal subject (Neamț, 2021), in a position of inferiority to the professional, who manifests himself as a real expert in the field concerned. Therefore, for the benefit of the consumer, a presumption of ignorance of the essential information, necessary for understanding the assumed contractual clauses and the related economic and legal consequences, is materialized. However, this is valid strictly as long as the consumer is not acting for professional purposes.

Thus, 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

² In this regard, the judgment handed down in the related cases C-240/98 and C 244/98 *Oceano* of June 27, 2000, case law directory 2000 I-04941.

³ The judgment delivered in the consolidated cases C243/08 *Pannon GSM* of June 4, 2009, jurisprudence directory 2009 I-04713. In the same sense are the following CJEU decisions: Decision of the *Caja de Ahorros y Monte de Piedad de Madrid*, EU: C: 2010: 309, point 34); Case C-26/13 (*Arpad Kasler* against *OTP Jelzalogbank Zrt*), presented in paragraphs 67, 72, 73, 74 but especially 75; Case C-241/98, where the Court of Justice of the European Union showed that it recognizes the judge's power to declare *ex officio*, as void, the abusive clauses of a contract.

considered to always aim for the satisfaction of a personal benefit or family life, otherwise, it is not susceptible to fall under the auspices of this quality.⁴

Acquiring the quality of consumer is associated with the acquisition of the quality of party in a contract concluded with a professional. The asymmetry between a consumer and a professional must also be maintained during its execution, until the legal relations are completed. But the problem arises of clarifying how long this consumer quality lasts over time. In other words, is the full performance of the contract likely to mitigate it and lead to the loss of the protection granted by Directive 93/13?

National jurisprudence has provided different solutions to the problem in question. Some of the courts have decided that it is relevant in the present situation to observe the incidence of absolute nullity as a sanction for abusive clauses, considering the general interest protected.⁵ In relation to the non-prescriptive regime related to it, it was decided that the full execution of the contract is irrelevant. On the other hand, judgments were issued that established the idea that the sanction that intervenes in the case of unfair terms is a *sui generis* one that can only have effects for the future, so that the situation of completed contracts no longer fell within the scope of Directive 93/13 /EEC.

By the ruling rendered in the related cases of Francisco Gutierrez Naranjo v. Cajasur Ba Banco SAU (C-154/15), Ana Maria Palacios Martinez împotriva Banco Bilbao Vizcaya Argentaria SA (BBVA (C-307/15), Banco Popular Espanol SA împotriva Emilio Irlés Lopez, Teresa Torres Andreu (C-308/15), The Court of Justice of the European Union summarized a series of valuable principles regarding the solution of the problem in question, ruling in the sense that: "*According to Article 6 paragraph (1) of Directive 93/13, the member states establish that abusive clauses used in a contract concluded with a consumer by a professional, in accordance with domestic law, does not create obligations for the consumer.*

This provision must be considered as a rule equivalent to the national rules which, within the domestic legal order, have the character of public order rules (see in this regard the Judgment of May 30, 2013, Asbeek Brusse and de Man Garabito, C 488/ 11, EU:C:2013:341, point 44).

In addition, it is an imperative provision that aims to replace the formal balance established by the contract between the rights and obligations of the co-contractors with a real balance, likely to restore equality between the latter (Judgment of June 14, 2012, Banco Español de Crédito, C 618/10, EU:C:2012:349, paragraph 63).

Given the nature and importance of the public interest that is the protection of consumers, who find themselves in a situation of inferiority in relation to professionals, Directive 93/13 imposes on the member states, as it emerges from Article 7 paragraph (1) thereof in conjunction with the of its twenty-fourth recital, to provide adequate and

⁴ In this regard, we recall Decision no. 441 of March 2, 2016 of the High Court of Cassation and Justice, pronounced on appeal by the Second Civil Section, in which the court ruled that a natural person who concluded several credit agreements with a bank for the purpose of refinancing other loans, respectively to purchase different buildings that he later rented, cannot be included in the category of consumers, protected by Directive 93/13/CEE.

⁵ "*The consequence of establishing the abusive character of some clauses in the credit contract is equivalent to establishing their absolute nullity, the existing sanction in the case of relative nullity not being applicable, namely the annulment of the respective clause. Therefore, since it cannot be a matter of relative nullity, they are not applicable the provisions of art. 3 paragraph (1) from Decree no. 167/1958, the absolute nullity can be invoked at any time, the plaintiffs' right to action cannot be considered time-barred.*" - Î.C.C.J., Second Civil Section, Decision 686 of February 21, 2013.

effective means "to prevent the further use of abusive clauses in contracts concluded with consumers by sellers or suppliers [read "professionals"]" (Judgment of April 30, 2014 , Kásler and Káslerné Rábai, C 26/13, EU:C:2014:282, paragraph 78).(...)

It follows from all the preceding considerations that Article 6(1) of Directive 93/13 must be interpreted in the sense that it opposes a national jurisprudence that limits in time the restitutionary effects related to the finding of abusive character, in the sense of Article 3(1) of this directive, of a clause contained in a contract concluded by a professional with a consumer only to the sums unjustifiably paid in the application of such a clause, after the pronouncement of the decision which found this abusive nature in a court of law."

Despite these judgments of the European court, being referred to an action for finding abusive clauses in relation to a credit contract finalized by early repayment, the Mureş Specialized Court assessed that the issue of extending the consumer status over time is likely to affect the balance between the two major principles, that of the high degree of consumer protection, respectively the security of the civil circuit. Under these conditions, it was considered appropriate to refer the European court in order to establish some limits of the application of the mechanism for the protection of consumer rights through a request for a preliminary decision based on the provisions of art. 267 TFEU, the file C-699/18 was created before the European court, to which the case C-698/18 was connected.

3. ESTABLISHING THE TEMPORAL EFFECT OF THE QUALITY OF "CONSUMER" FROM THE PERSPECTIVE OF THE DECISION OF THE C.J.U.E. PRONOUNCED IN CASE C-699/18

The factual circumstances that formed the basis of the preliminary ruling in case C-699/18 were the following: in May 2003, the plaintiff concluded a credit agreement with a banking unit to satisfy a personal need, i.e. the purchase of a property . The loan was repaid in advance, in full, in March 2005. In July 2016, the plaintiff filed an action with the courts with the object of establishing the abusive nature of several clauses contained in this credit agreement, basing her procedural approach on the provisions of Law 193/2000 on abusive clauses in contracts concluded between professionals and consumers, republished, and invoking her capacity as a "consumer" in relation to the contractual provisions complained of. In addition, it was requested to declare them absolutely null and void and to refund any amount paid under them, with the application of the related legal interest from the time of payment until the date of effective refund.

In its defence, the defendant bank argued that the plaintiff no longer had the status of "consumer" as the contractual relations had ended more than ten years ago, through early repayment.

In the first instance, the plaintiff's action was fully admitted. At the appeal stage, the Mureş Specialized Court decided to suspend the judgment of the case and to address two preliminary questions to the Court of Justice of the European Union, as follows:

"1. The provisions of Directive no. 93/13/EEC of the Council regarding abusive clauses in contracts concluded with consumers are opposed, respectively recitals 12, 21 and 23 of the preamble of the directive and art. 2 lit. b), art. 6 para. (1), art. 7 para. (2) and art. 8 of the directive of a set of judicial means, in the application of the principle of procedural autonomy combined with those of equivalence and effectiveness, consisting of a judicial action of common law, non-prescriptive, which seeks to establish the abusive character of

some clauses in contracts concluded with consumers and a common law personal, patrimonial and prescriptive legal action, which pursues the objective of the directive to remove the effects of any obligations born and executed by virtue of a clause found to be abusive on behalf of the consumer?

2. If the first question is affirmative, the same provisions oppose an interpretation arising from the application of the principle of security of civil legal relations according to which the objective moment from which the consumer should or should have known the existence of an abusive clause would be the moment of termination of the credit agreement in the framework of which he had the quality of consumer?"⁶

The European court ruled that given the importance and nature of the public interest on which the entire legal construction of consumer protection is based, the related national rules must occupy the rank of public order rules, the courts having the obligation to remove the application of the clauses abusive. Directive 93/13/CEE must be interpreted in the sense that it is necessary to assess that an unfair contractual provision has never existed, only in this way consumer protection is ensured. Therefore, the finding of abusive nature must have as a consequence the restoration of the situation in law and in fact from all perspectives, including, aim at the restitution of the amounts paid based on the respective clause, which prove to be unpaid.

The Court of Justice of the European Union recognizes the fact that this consumer protection is not absolute, but, in the absence of a regulation in Union law, it is up to the internal public order of each state to establish such a regulatory framework regarding the methods of promotion and supporting the actions in establishing the abusive character.

Following this reasoning, the Court answered the first question in the sense that: "*Article 2 letter (b), art. 6 para. (1) and art. 7 para. (1) of Directive 93/13/CEE must be interpreted in the sense that they do not oppose a national regulation which, although it provides for the imprescriptibility of the action in establishing the nullity of an abusive clause used in a contract concluded between a professional and a consumer, is subject to a term of prescription the action that seeks to invoke the restitutionary effects of this finding, provided that this term is not less favorable than that applicable to similar actions of a domestic nature (principle of equivalence) and does not make in practice impossible or excessively difficult the exercise the rights conferred by the legal order of the Union, in particular by Directive 93/13 (principle of effectiveness).*"

Regarding the second question, the European court wanted to emphasize *ab initio* that in what is regarding the principle of effectiveness, the aspect of whether a national provision makes it impossible or excessively difficult to apply Union law can only be investigated in relation to the place that this provision occupies within the procedure as a whole, the way it unfolds and its particularities before various national courts. It has been stated that the reasonable deadlines regarding the promotion of the actions, established in the idea of protecting the interest of legal security, are not contrary to the Union law as long as they respect the interferences related to the duration, in the sense that they offer the consumer a sufficiently long period of time for him to prepare and formulate his

⁶ Mureş Court, Case C-699/18, BRD Groupe Societe Generale Approximation of legislation; consumer protection, published in the Romanian Journal of European (Community) Law no. 1 of 2019, in the Jurisprudence section.

defense.⁷ Under these conditions, the three-year limitation period was assessed as being consistent with the Union principles, and the moment from which it starts to run will be determined.

It was held that in relation to the existing asymmetry between the consumer and the professional, more precisely, considering the inferior position of the consumer, a limitation period that begins to run from the date of full execution of the contract is not likely to provide the consumer with effective protection and therefore makes it excessively difficult to exercise this consumer right conferred by Directive 93/13/EEC. Therefore, the full execution of the contract is not likely to retroactively change the fact that, at the time of its conclusion, the consumer was in this position of inferiority. The definition of the notion provided by the provisions of art. 2, lit. b) of Directive 83/13/CEE do not include any element that would allow establishing the moment at which a person ceases to hold the status of "consumer" and therefore lose the protection offered by this normative act.

In relation to the principle of equivalence, the Court emphasized the fact that, subject to the similarity of the action in question which can be the subject of control only by the national court, the interpretation according to which the action for restitution of sums paid under abusive clauses should be subject to a limitation period that begins to run from the date of the full execution of the contract and not from the moment of finding the abusive nature, it is equivalent to the establishment of different procedural modalities, more disadvantageous than those established by Directive 93/13. The principle of legal security is not likely to justify such a difference in treatment.

Considering these arguments, the European court formulated the following answer regarding the second question: "*Art. 2 lit. (b), art. 6 para. (1) and art. 7 para. (1) of Directive 93/13, as well as the principles of equivalence, effectiveness and legal certainty must be interpreted in the sense that they oppose a jurisprudential interpretation of the national regulation according to which the judicial action for the restitution of sums paid without being due on the basis of an abusive clause used in a contract concluded between a consumer and a professional is subject to a three-year limitation period that runs from the date of full execution of this contract, when it is presumed, without the need for verification, that, at that date, the consumer should have been aware of the abusive nature of the clause in question or when, for similar actions, based on certain provisions of domestic law, the same term does not begin to run until the judicial determination of the cause of these actions.*"

Basing itself on this preliminary decision, the Mureş Specialized Court found that all the legal requirements were met in order to operate the protection referred to in the Directive so that by Decision no. 686 of December 3, 2020 rejected the bank's appeal, maintaining the decision of the trial court. This remained irrevocable by Decision 729 of November 25, 2021 of the Târgu-Mureş Court of Appeal.

4. LEGAL ANALYSIS OF THE DECISION OF THE C.J.U.E. PRONOUNCED IN CASE C-699/18

In the light of the Principle of procedural autonomy (R.I.Orza, 2019) conferred on the member states, established by the provisions of art. 8, para. (1) of Directive 93/13 in

⁷ In the same sense is the judgment pronounced on October 29, 2015, BBVA, C-8/14, EU: C: 2015:713.

conjunction with the provisions of recital 21 of the same normative act, the manner of the procedures intended to guarantee the protection of the rights of litigants depends on the internal legal order of the member states.⁸ Under the auspices of this autonomy, the Romanian legislator established the regime of absolute nullity as becoming incident in the hypothesis of abusive clauses (Terzea, 2021). The main rule governing absolute nullity resides in the fact that it can be invoked by any interested person, at any time, being imprescriptible (art. 1249 Civil Code) (Brațu, 2020). Moreover, this sanction is best adapted to the spirit and objective of the high level of consumer protection in relation to unfair contract terms. At the same time, this is in full accordance with the principles of equivalence and effectiveness of Union law.

Under these conditions, it can be stated that consumer protection takes precedence over legal security, the Romanian legislator conferring a procedural regime that fully respects the ideals of Union law, but, in particular, taking into account the purpose of the directive (Ș.-R.Ștefan, 2020).

In parallel with the process of establishing the absolute nullity of abusive clauses, Romanian law also establishes a means of reaction with regard to patrimonial issues, more precisely, the action for the restitution of services performed by the consumer affected by the abusive clauses, which is subject to a general limitation period for 3 years . (Andrei, 2016)

Therefore, in our law, a duality of regimes is taking shape: a more severe one, which aims to establish the abusive nature of the contractual clauses, non-prescriptive and with retroactive effects, respectively, one based on this first approach, through which the patrimonial restitution of benefits, which is prescriptive, within the general term of 3 years.

These two regimes represent effective and appropriate measures to put an end to consumer harm, reconciling a high level of control and preventing the use of unfair terms with consumer protection. The means of reaction are therefore compliant with the directive.

The European court has repeatedly⁹ affirmed the character of the public order rule of the provisions of art. 6 of the Directive, respectively, the possibility of invoking it ex officio by the national court which "*must establish all the consequences arising, according to national law, from the finding of the abusive nature of the clause in question, to ensure that said clause does not create obligations for the consumer .*"¹⁰ The effects established by art. 6 applies throughout the duration of the contract, but also after its termination, and, in this context, the question of affecting the principle of legal security arises.

Aiming at this aspect, through the second question addressed by the Mureș Specialized Court, it was sought to establish whether the moment of termination of the contractual relationship can be assimilated from a legal point of view as the starting point of the limitation period.

⁸ C.J.U.E., judgment of 30 May 2013 delivered in the case of *Asbeek Brusse and de Man Gabarito*, C-488/11, EU: C:2013:341, parag. 42.

⁹ C.J.U.E., judgment of 30 May 2013 delivered in the case of *Asbeek Brusse and de Man Gabarito*, C-488/11, EU: C:2013:341, parag. 44; Judgment of October 6, 2009, *Asturcom Telecomunicaciones*, C-40/08, EU:C:2009:615, parag. 52; Order of 16 November 2010, *Pohotovost*, C-76/10, EU:C:2010:685, parag. 50.

¹⁰ C.J.U.E., judgment of 30 May 2013 delivered in the case of *Asbeek Brusse and de Man Gabarito*, C-488/11, EU: C:2013:341, point 49.

However, the consumer is effectively aware of the abusive nature of the contractual clauses only when they have been declared as such by a court of law. In order to fully comply with the spirit and letter of the directive, this action regarding the establishment of abusive nature can only be submitted under the auspices of absolute nullity, only in this way the desired effective protection of the consumer is ensured. Imposing on him the task of knowing the abusive nature of the clauses at the time of concluding the contractual relationship is equivalent to an excessive limitation of the results that the directive seeks to guarantee in the field concerned, but also a disproportionate burden.

Thus, in the light of the principles of effective repair, consumer protection and effectiveness, the imposition of a starting moment of the limitation period as the date of termination of contractual relations is contrary to the provisions established by means of the directive. In other words, once this quality of "consumer" is established, the legal protection and all related implications will last for an unlimited period, without being affected from any perspective by the finality of the contractual relations.

5. CONCLUSIONS

The consumer, as well as the competition, contributes to the general regulatory objective of the internal market, so that both claim legal provisions to ensure effective protection but also to stimulate economic activity (C. Toader, 2014), which leads to the realization of a right of consumption of a hybrid nature, with more severe implications and sanctions. The implementation of Union law is exercised within the institutional and procedural autonomy of the member states, provided that the principle of equivalence and the principle of effectiveness are respected¹¹. The measures adopted by the Member States must reconcile a high level of control with consumer protection, which determines a balance between citizens' trust in the normative act, legal security and legitimate expectations.

Abusive clauses are considered to be absolutely void, and as a consequence must be removed from the contractual field (J.Goicovici, 2016). It is up to the national judge to establish all the consequences arising from this approach, but which must strictly respect the ideals and governing principles of the directive, since "*whenever we are dealing with a norm in the sphere of consumer law, the relevant provisions of it has a presumed imperative character, being able to be included in the scope of police laws*" (I.F.Popa, 2016).

Following this reasoning by referring to the Principle of the Protection of the Weak Party corroborated with the Principle of the Effectiveness of the Protection (Reich, 2014), a priority of the consumer was established, so that the legal security invoked by a professional cannot justify the limitation of the consumer's rights resulting from Union law¹².

We conclude by emphasizing the major importance of the analyzed decision, which through its determinations substantiates the basic idea of the directive in all aspects.

¹¹ The decision handed down on September 10, 2014 in the case of Monika Kusionova imp. SMART Capital a.s. C-34/13, ECLI:EU:C:2014:2189.

¹² See Judgment of 13 December 2001, Heininger, C-481/99, EU:C:2001:684, point 47; as well as the Opinion of Advocate General Antonio Tizzano of 18 April 2002, Cofidis, C-473/00, EU:C:2002:239, point 62.

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