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The Abolition of Unfair Terms according to EU Legislation

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Abstract: In the member States of the European Union, Directive. 93/13 / EEC on unfair terms in Europe consumer contracts provides the legal interpretation on unfair terms in consumer contracts with professionals. However, experience and correlating the Romanian national court jurisprudence of other European countries demonstrate that the process of standardization and harmonization of European Union law in this matter supports deficiencies, still absorbing the directive of unfair terms and still giving contrary solutions in the courts. The national legislation, Law no. 193/2000 must be completed since the CJEU case law in the field, so mostly for solving these cases the procedure is cumbersome.

Keywords: unfair terms; contracts; EU legislation

1. Introduction

According to the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts[2], the purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer.

A contractual term shall be regarded as unfair if has not been individually negotiated, which is contrary to the requirement of good faith and when it's causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. That is why a term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.

The Romanian Civil Code[3] state that the parties are free to conclude any contracts and determine their contents, but within the limits of law, public order and morals, or if the stipulation of unfair terms in consumer contracts associated idea bad faith, this question can be qualified as unlawful, the penalty is absolute nullity.

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[2] Official Journal L 095, 21/04/1993 P. 0029 – 0034.
[3]Law no 287/2009 on the Civil Code republished in Official Monitor, Part I no. 505 of July 15, 2011.

Following the adoption of law 193/2000[1] transposing the provisions of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, the national legislation of Romania provides that it is not allowed that professionals to stipulate the unfair terms in consumer contracts. The sanction to be applied in the event of a clause as improper it is an absolute nullity.

2. Problem Statement

According to art 4 of the Directive and without prejudice to Article 7, the unfairness of a contractual term shall be considered, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the signing of the contract and to all the other terms of the contract or of another contract on which it is dependent. Appreciation of the unfair nature of the terms shall relate neither to the definition of 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 supplies in exchange, on the other, in so far as these terms are in plain intelligible language.

From this point of view, it can see that it's necessary to fulfill certain prerequisites for benefits both parties. Thus, any contractual benefit must meet both conditions concerning the usefulness of benefit and on its proportionality, ensuring the balance between contractual obligations.

Otherwise, the seller or the supplier, by introducing unfair terms, as defined by law[2], creates an excessive advantage in relations with applicants, exerting an abuse of economic power and this abuse raises a presumption of bad faith of the professional.

The lack of proportionality of benefits in cases of abuse of rights analysis is easily distinguishable, since the disproportion between the damage caused to the seller or the supplier and the benefits of the professional is very evident.

3. The Specific Case of Pre-Contract Type

In typical contracts, bank reserves the right to revise the current interest rate in case of significant change in the money market, communicating the new interest rate to the borrower. Although, when the agreement was signed the plaintiffs agreed to receive a fixed rate, the lender has made assessments on the timing of interest can be changed.

However, this is an unfair term because it was not been negotiated directly with applicants one adhesion contract, according to which content is determined unilaterally by the will of the creditor, the other party limited itself to accepting contract terms. This is the case when they making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone.

Another situation we encounter in contracts wich allow the trader to obtain money from the consumer, or for non-completion of the contract by the latter, without providing compensation in an amount

[1] Law 193/2000 on unfair terms in contracts concluded between professionals and consumers – Republished pursuant to Art. 80 of Law no. 76/2012 for the implementation of Law no. 134/2010 on the Code of Civil Procedure, published in Official Monitor, Part I, no. 365 of 30 May 2012.

[2] '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 (Art. 3, c), the *Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*.

equivalent existence and for the consumer for non-contract the trader. These provisions are also considered unfair terms, so there are regarded as not individually negotiated, but have been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.

National Court, to the extent that it considers as unfair contractual provisions, will force tha bank to remove the contents of contractual provisions and any reference concerning "any other costs payable" by this name as included understanding the risk commission/fee renamed administration.

As regards the scope of the expressions "in the event of a contingency", the Court will find that they are improperly intoduced in contracts, as the bank does not define the term of adhesion unforeseen, nor specify which cases you can apply that provision. In this case, the unfairness lies in "the trader right to unilaterally change the terms of the contract without a valid reason which is specified in the contract" clause being deemed abusive under article 1, point A of the Annex to Law 193/2000.

National Courts appreciate that are abusive contractual provisions intended to affect the credit agreement on "changes the interpretation of any law or regulations applicable" that may arise from the signing date or later."

However, there are terms which establish borrower's obligation that "within 15 days of the date on which it was notified in writing by the bank "to pay additional amounts", in order to compensate for cost bank increases, or other reimbursements. So, besides the fact that a consumer has to bear own risk (deterioration of the exchange rate, lower income, so on), it is obliged to bear the risk contingency for any changes of interpretation provisions of any law, rule or regulation that may occur from signing or later. Thus, "bank forces the consumer to undergo contractual conditions which had no real opportunity to get acquainted from contract" - clause considered abusive by Law 193/2000, article 1 pt. b).

In this way, the disproportion between the rights and contractual obligations of both parties is evident, which obliges the consumer to pay disproportionately high amounts in case of failure of contractual obligations by it compared to the losses incurred by the trader" (art. 1 point I of the Annex to the Law).

4. Referring Cases to the Court of Justice

As there are still many issues related to the interpretation of Law no. 193/2000, given how Member States transposes according to specific national legal traditions and their economic realities, most national courts have suspended pending cases and referred questions to the Court of Justice. Although the ruling upon the interpretation or validity of EU law is the Court of Justice of the EU, which is the court 's task to draw the appropriate conclusions from the Court's response, removing the application of the national rule in question, if there is necessary.

Interlocutory reference procedure is a mechanism to ensure the unity of interpretation and application of EU law. That procedure constitutes an essential means to impose national jurisdictions correct application of EU law, allowing not only the EUCJ to clarify the meaning of particular provisions meanings, but to impose certain obligations to the judge, such as that of remove existing provisions contrary to law or obligation to provide compensation for damage due to failure by the Romanian State obligations imposed by the EU.

In this regard, frequently asked questions included the following aspects:

For example, in Pannon GSM Zrt cause. Erzsébet against Sustikné Győrfi, Judgment of the Court (Fourth Chamber) of 4 June 2009[1], the ECJ held that "Article 6 (1) of Directive 93/13 / EEC of 5 April 1993 on unfair terms in contracts consumers must be interpreted as meaning that an unfair contract term is not binding on the consumer and that it is unnecessary in this regard, that the consumer has previously successfully challenged such a term. National court to examine ex officio the unfairness of a contractual term where it has available legal and factual elements necessary for that purpose. When you consider that such a clause is unfair, the court did not apply, unless the consumer objects.

In Pannon GSM Zrt Cause. Erzsébet against Sustikné Győrfi[2], Judgment of the Court (Fourth Chamber) of 4 June 2009, the ECJ also ruled that the national court is required to examine ex officio the unfairness of a contractual term where it has available the legal and in fact necessary in this regard.

In Océano Grupo Editorial and Salvat Editores Case[3], the Court ruled that in the case of a contract between a consumer and a seller or supplier under the Directive, a clause drafted in advance by a vendor or a supplier that has not been the subject of individual negotiations, which establishes that the court has jurisdiction to resolve all disputes arising under the contract is the court in whose jurisdiction the registered office of the seller or supplier, meets all the criteria to be classified as abuse in relation to the Directive.

5. Conclusions

In line with ECJ case law that the national court to determine whether a contractual term such as that in the main proceedings meets the criteria to be classified as abusive within the meaning of Article 3 (1) of Directive 93/13. In this way, the national court must consider the fact that a clause in a contract between a consumer and a seller or supplier, which is inserted without having been individually negotiated and which confers exclusive jurisdiction on the court in the county in which the registered office of the seller or supplier may be considered abusive.

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[1] The same was stated in the judgment of 27 June 2000 Case Océano Grupo Editorial SA v Rocío Murciano Quintero (C-240/98) and Salvat Editores SA v José M. Sánchez Alcón Prades (C-241/98) José Luis Badillo Copano (C-242/98), Mohammed Berroane (C-243/98) and Emilio Viñas Feliú (C-244/98). Application for a preliminary ruling: Juzgado de Primera Instancia nº 35 of Barcelona - Spain.

[2] Application for a preliminary ruling: Budaörsi Városi Bíróság - Hungary. Directive 93 /13 / EEC - Unfair terms in consumer contracts - Legal effects of an unfair term - law and the national court to examine ex officio the unfairness of a term conferring jurisdiction - Criteria for assessment.

[3] Judgment of the Court dated 27 June 2000, Case Océano Grupo Editorial SA v Rocío Murciano Quintero (C-240/98) and Salvat Editores SA v José M. Sánchez Alcón Prades (C-241/98), José Luis Badillo Copano (C-242/98), Mohammed Berroane (C-243/98) and Emilio Viñas Feliú (C-244/98). Application for a preliminary ruling: Juzgado de Primera Instancia nº 35 of Barcelona – Spain.

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