Theoretical and Practical Aspects of Unfair Terms in Consumer Credit Contracts

Doina UDRESCU
doina.udrescu@ugal.ro
Dunarea de Jos University of Galati, Romania
Monica COCOR
Court of Appeal, Iasi, Romania

The transformations taken place after 1989 in Romania also imposed explicit regulations in protecting consumers in their relationship with the suppliers of Goods or Services as per Law 296/2004 on Consumption Code – the consumer is "the natural person or group of natural persons gathered in associations who purchases, acquires, utilizes or consumes products or services beyond his professional activity." "Amongst the banks in Romania, 99.99% have unfair terms in their credit contracts with the population. Of all the cases, we haven't lost any so far and neither shall we. Once the sentence pronounced, the bank was obligated to indemnify the amounts of money obtained from the client through such unfair terms" said the president of ANPC.

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1. Relevant Provisions

An essential dimension of consumer's protection within the bank credit contracts aims at the removal of unfair terms from these agreements. The entire protection system taken over by our internal law is based on the idea that a consumer finds himself in an inferior position towards the trader as regards both the negotiation power and the information level. This situation puts him in a position to adhere to the conditions previously elaborated by the trader, with no possibility to influence their contents. Even though it is not forbidden using contracts with previously elaborated contents as per art. 5 of Law 193/2000, it is essential to give the consumer through such mechanism the possibility to understand, negotiate and accept its contents.

By adopting Directive 93/13/CEE of 5 April 1993, transposed into national legislation with Law 193/2000 and further amendments, the European and national legislators in some circumstances sought to mitigate the principle *pacta sunt servanda* by giving the judicial body the ability to compel modification to contract terms or termination of the contract to the extent that the contract contains unfair terms.

Such intervention is not likely to defeat the principle of the mandatory force of the contracts established by art. 1270 of the New Civil Code (former art. 969, par. 1 of the Civil Code) as the freedom of contract is not identical to an absolute or discretionary one. A contract has force of law between the parties as it is presumed to be dominated by good faith and utility for the contracting parties. The full judicial force is only recognized to those agreements which are not against the constitutional principle of good faith or morality. Otherwise, it cannot be enforced against the parties, the third parties or the judicial bodies.

By adopting the Directive 2008/48/CE of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC transposed into national legislation with Government Urgency Ordinance 50/2010 amended by Law 288 of 28 December 2010 on consumer credit contracts, the European legislator *sought to provide all consumers of the Community a high and equivalent level of protection of their interests and to create an efficient internal market in the field of consumer credit.*

Directive 2008/48 is a *minimum* directive, thus allowing a member state to keep or introduce legal national provisions appropriate to the ones in the present directive or certain provisions on credit contracts which do not cover the field of application of the present directive such as provisions on credit contracts for amounts of less than EUR 200 or more than EUR 75,000. The member states could also apply the provisions of the present directive to a linked credit which does not fall under the definition of a linked credit contract covered by the present directive. Thus, the provisions on the linked credit contract could be applied to credit contracts which only partially serve to finance a contract for the supply of goods or services.

The implementation of the law on consumer protection over the judicial relations between consumer and bank means to determine the client as consumer and the bank as trader (the terminology used in the legislation is not a unitary one).

As regards the client as ***consumer,*** according to the law on consumer protection, it derives from the fact that the client is the natural person who concluded and executed the credit contract with the bank for purposes beyond commercial, industrial, handicraft or liberal activities (satisfying thus the requirements imposed by point 13 Annex of Law 296/2004, art. 2, point 2 of Urgency Ordinance 21/1992, art. 2, par. 1 of Law 193/2000). The jurisprudence of The Court of Justice of the European Union outlines the consumer as ***a vulnerable part in terms of economics and less experienced in legal matters.*** On same line of thought, the community jurisprudence states that who acts as professional cannot be considered consumer and benefit from special competency rules stipulated in the agreement of 17 September 1968 (regarding the judicial competency and application of provisions in civil and commercial matters) in the field of contracts concluded with consumers (CJCE 19.01.1993, case C 89/91, Shearson).

As regards the bank as ***professional/trader/economic agent***, it derives from the fact that the bank is a legal body authorized to provide a (financial) service to consumers (point 1, 7 and 43 of Law 296/2004, art. 2, point 3 of Urgency Ordinance 21/1992, art. 2, par. 2 of Law 193/2000). Art. 7, point 5 of Government Urgency Ordinance 50/2008 defines the notion of creditor as a ***legal body***, including the branches of the credit institutions and non-bank financial institutions from abroad carrying out activities in Romania which grant or engage to grant credit loans during their commercial or professional activities.
It should be noted that the provisions of Directive 2008/48 have to be applied regardless of whether the creditor is a legal body or a natural person. And yet, the directive stipulates that it does not prejudice the member states' right to limit granting credit loans, as per the community legislations, to legal bodies or certain legal bodies. Thus we have to consider the option of the Romanian legislator who stipulates that in case of contracts falling under the Government Urgency Ordinance 50/2008, only a ***legal body*** may be creditor.

The legal relations falling under the legislation on consumer protection ***compel the trader*** (in the preliminary phase as well as during execution of the contract concluded with the consumer) ***to take on a series of obligations*** amongst which ***the obligation to refrain from introducing unfair terms in the consumer contracts.***

Art. 40 point 4 of the Government Urgency Ordinance 50/2010 on consumer credit contracts refers precisely to the following, in regard to the unfair terms forbidden to be introduced in the credit contracts:

a) *The consumer is obligated to keep the confidentiality of the provisions and contractual conditions;*
b) *The creditor may declare the maturity of the contract or unilaterally terminate it or sanction the consumer in case his reputation affected;*
c) *The creditor may declare the early maturity of the loan in case the consumer do not fulfill his obligations in other credit contracts concluded with other creditors;*
d) *The creditor imposes on the consumer the conclusion of an assurance contract for the assets pledged as collateral with a company accepted by the bank.*

It is important to mention that consumers cannot waive the rights given by the present Urgency Ordinance as precisely stipulated by art. 80.

As regards the retroactivity of the Law for the approval of the Government Urgency Ordinance 50/2010 on consumer credit contracts, *by Decision 1656 of 28 December 2010 of the Constitutional Court on the objection of unconstitutionality of this Law*, the Constitutional Court notes that the urgency ordinance has already produced legal effects materialized mainly in additional documents to the consumer credit contracts. The effects produced by art. 95 of the Urgency Ordinance ceased on the day the law for approving the urgency ordinance was deliberated, while the obligations it stipulated had to be fulfilled by creditors up to that respective day. Under the circumstances, the Chamber in charge to decide modified the text of the urgency ordinance with the approving law, with no retroactive application; therefore, the provisions of art. 95, as modified, have to be read and interpreted along with provisions of art. II par. 1 of the law stipulating that the additional documents concluded and signed until the law became effective in order to be in line with the Government Urgency Ordinance 50/2010 will produce their effects as per the contractual terms agreed by the parties. Such being the case, the amendments to art. 95 of the urgency ordinance cannot become effective, despite the unclear text of the law, but from entry into force of the Approving Law of the urgency ordinance which would thus eliminate the effects produced by the urgency ordinance until the entry into force of the Approving law and would operate retroactively.

2. The notion of unfair term

According to art. 4 of Law 193/2000, art. 78 of Law 296/2004 and art. 2 point 16 of Urgency Ordinance 21/1992, **an unfair term** is that term included in the contract without being directly negotiated with the consumer and by itself or along with other contract provisions creates, to the detriment of consumers and contrary to the requirements of good faith, a significant imbalance between the rights and obligations of the parties. By law it is presumed the lack of direct negotiation of the contractual terms if we are confronted with contracts previously written and/or with general sale conditions.

Directive 93/13 states that *"a contractual condition not individually negotiated is considered unfair and creates a significant imbalance between the rights and obligations of the parties deriving from the contract to the detriment of consumers".* Art. 3 of the directive offers two criteria in defining an unfair term: on one hand, its contradiction to the requirements of good faith and on the other hand, the significant imbalance created to the detriment of consumers, in their contractual relation with the professional.

The defining criteria are unstable, even redundant. Under the circumstances, can be considered of good faith the professional when requires the consumer to execute a contractual term that favours him, the professional, substantially, to the detriment of the consumer? As regards the assessment of the good faith, the directive stipulates that the negotiation power of the parties should be given special attention and it should be known whether the consumer has been encouraged to give his consent for the term in question and whether the goods or services have been sold or furnished on express request of the consumer; the requirement of good faith may be fulfilled by the trader when he acts correctly and equitably in respect to the other party whose legitimate interests should be considered.

The principle of good faith indicates the mutual respect of the contracting parties, the adoption of a fair and reasonable behavior which takes account of the legitimate interests of consumers, substantiating even an objective approach to the contractual imbalance appreciated as a result of an imbalance in the negotiation power of the parties. As per art. 1170 of the New Civil Code the parties should act in good faith both at negotiation and conclusion of the contract as well as *during its entire execution*. They cannot eliminate or limit such obligation.

The notion of contractual imbalance implies an assessment of the advantages and disadvantages for each contracting party of the litigious term. Nevertheless, the definition leaves a wide margin of appreciation of the advantages and disadvantages to the judge so that he can decide whether that litigious term is unfair or not.

The directive reveals a certain amount of specifications regarding this appreciation (art.4). First of all, the unfairness of a term should be assessed in a relative concrete manner, taking account of the "nature of goods and services covered by the contract".

Afterwards, such assessment must be carried out "in relation to all circumstances occurring at the contract conclusion and to all contract terms at the moment of the contract conclusion". The respective indication seems to contradict the definition given to the unfair term. If indeed the term is the one causing the contractual imbalance, the result can be assessed only when the professional terminates the execution of the contract. It should be admitted therefore, that the unfairness of a term could be determined at this time also.

Finally, the unfairness may be the result of a combination of terms, either within the same contract or, eventually, in regard to the terms of another contract connected with the one in dispute. It is therefore normal ***that the national judge have the obligation to assess the unfairness of a term by examining the circumstances specific to the litigious contractual relation along with the advantages and disadvantages of the respective term.*** CJEU ruled in this regard by judgment of 1 April 2004, ***Freiburger Kommunalbauten*, aff. C 237/02.** The Court explains in the considerations of the judgment that ***it can interpret the general criteria used by the community legislator in order define the notion of unfair term*** as stipulated by directive 93/13 but ***cannot rule on applying such general criteria to some particular terms which should be examined depending on the circumstances relevant to that specific case".***

But CJEU can carry out such assessments in the cases when the litigious term is elaborated in the exclusive advantage of the professional without any favorable consideration for the consumer such as a term conferring jurisdiction (CJEU of 27 June 2000, ***Oceano***, aff. C 240/98).

In another judgment, C137/08 of 2010/11/09 – VB Penzugyi Lizing, centered on a request of a preliminary ruling elaborated as per art. 234 CE by a Hungarian legal body, the court explains that ***"the interpretation of <unfair term> falls under the jurisdiction of the Court of Justice of the European Union"*** as mentioned in art. 3, par. (1) of Council Directive 93/13/CEE of 05 April 1993 regarding unfair terms in the contracts concluded with consumers, ***as well as the criteria that the national court can or must apply when examining a contractual term in relation to this directive, as the above-mentioned***

court, considering these criteria, has jurisdiction to rule on the qualification of a specific contractual term depending on the circumstances relevant to each case.

In the field of credit contracts, the terms considered unfair are various, most of them regarding the interest increase, the risk commission perceived, the unilateral change of the yearly interest rate, the unilateral change in the commission level as well as the unilateral declaration of early maturity and the subsequent repayment of the loan, the terms on restrictions to build, rent and so on.

A relevant example is **the term regarding the interest increase**. It goes without saying that the term invoked by the bank in the notification is one in which the parties are on equal positions (in case the reference index varies by minimum 0.25 percentage points (plus/minus) as compared to the initial value, the bank may change the interest rate, at any time, as per its own decision. The new interest percentage is applied on the existing balance of the credit).

Such a term is an unfair one *ab initio*, as it excludes, by the way it is formulated, the possibility of assessing the solidity of the reasons to unilaterally modify the contract. The bank is the one which decides the moment of the financial imbalance on the market and she is the one changing the interest rate. There is no real negotiation and no parity between the parties.

By introducing such terms, a significant imbalance occurs between the parties as the interest may increase with no real possibility for the client to check the grounds of such increase and he may even be exposed to the risk of being classified as bad debtor in the Central Credit Register without having any fault in the execution of the contractual relations which can affect him economically and morally.

Also, the term related to the interest rate is presumed unfair when it is not clearly expressed in the contract; in one paragraph it is stated that the interest rate is a fixed one during the contract and in the next paragraph it is stated that the bank may however change it unilaterally depending on the economic circumstances, meaning that the interest rate should be a fixed one but by the unilateral will of the bank, it becomes variable.

When the type of interest is not clearly specified in the contract, it is presumed a fixed one as such an interpretation is favorable to the one undertaking the obligation.

Another unfair term frequently used is unfortunately the one regarding the risk commission. It is unfair because:

- It is in fact a masked interest; the yearly financial declaration of the bank stands as a proof because this commission is registered as interest income in the bank bookkeeping; the commission cannot be considered a price of money as the price of money is the interest and if this commission were considered a price of money, the presumption of unfair term would be even stronger as for the same service, the bank collects two prices;
- It is paid for the same service for which interest is already paid;
- It is meant to ensure the bank against the Portofolio Risk or bad loans which means that this risk is not borne by the bank or the bad debtors but by the good debtors.
- The unfairness of the commission results also from the fact that by the time of the legal action or even later, the clients did not have payment delays; normally the bank should reimburse the amounts taken as risk commission (as it never occurred); the amount will be restituted only if the bank is obligated to by the court.
- The commission is of n% in monthly payments (but it is not known if per year or per month or per day; nevertheless, the bank collects it every month since the beginning of the contract) and applied to the initial value of the contract or to the credit balance.

Criteria for determining whether the consumer credit contract has terms which create significant imbalance:

- All risks shall be borne by the consumer. All losses including those that are not from the client's fault (the crises, unpredictability) are borne by the client. The initial situation – already affected by the unfair terms – is becoming even worse due to the economic crisis which only the client pays for, not the bank (e.g. the bank unilaterally reserves the right to convert the currency of the credit only if the change in the currency rate is not in its advantage).
- The interest, although it should be a fixed one as per the contractual terms and law, is variable depending on the bank will or the fluctuations on the financial market, because by adopting an unfair term the bank has ensured the variability of the interest outside the client's will and it is applied and interpreted as per its convenience;
- A commission for management, risk, risk monitoring is perceived or a minimum obligatory reserve payable on monthly basis and applied to the credit balance;
- A fee for an assurance policy with a company accepted by the bank;
- Guarantees both material and personal constituted by third parties;
- Additional guarantees in case of depreciation of the initial ones;

- Delay penalties;
- The credit contract is executory title which absolves the bank from any common law process in order to obtain an executory title against the consumer;
- The credit is transferable to the debts collectors without the client's consent; in case the assignee is a bank subsidiary or branch, they do not even have to inform the client;
- For any payment delay, the consumer is put on the black list of bad debtors both at the Loan Office and the Central Credit Register of Romanian National Bank with the possibility of being banned from taking any credit for the next 4 – 7 years;

Once the conditions are identified, the unfairness of the term is presumed as per art. 4 of Law 193/2000 and its Annex. The presumption of unfair term may be cancelled only by written proof of the bank, by contracts negotiated thoroughly not just parts of it (art. 4, par. 3, second thesis: if a trader insists that a pre-elaborated standard term has been negotiated directly with the consumer, it is his obligation to produce proof in this regard; therefore, proof cannot be made with witnesses or with questioning and much less with expertise as this is not proof produced by the bank but caused by it; a proof cannot be made unless it existed before its presentation.

The French Jurisprudence classifies as unfair, terms like the one which allows the bank to block at any time the client's credit card, the one which stipulates that, after a three-month period, the data in the account statement is considered as approved by the client without this being included in the written contract or other document and which the client had no knowledge of when concluded the contract. As per art. L 132-1 of the Code of Consumption, the French jurisprudence prohibits the terms by which only one part has the exclusive right to interpret a certain term in the contract and the right to terminate the contract in a discretionary manner without conceding the same right to the consumer (Code of Consumption, art. 132 – 1).

3. Removal of unfair terms

The directive is quite incomplete for this matter. First, it states that the respective unfair terms do not create any obligations for consumers (art. 6) which leaves to the member states the choice to adopt the most adequate solution. It is often taken into account the annulment of the term, meaning that the rest of the contract remains valid, except when it cannot exist without the term considered unfair (partial nullity system).

As per the CJEU jurisprudence, the protection system implemented by Directive 93/13 is based on the idea that consumers find themselves in an inferior position towards a seller or supplier as regards both the negotiation power and the information level which put them in the situation to adhere to the conditions pre-elaborated by a seller or supplier without the possibility to influence their contents.

Considering such inferiority, according to art. 6 par. 1 of directive 93/13, the unfair terms do not create any obligations for consumers. As results from the jurisprudence, it is an imperative provision meant to substitute the formal balance between the rights and obligations of the parties with a real balance intended to restore parity of the parties.

The judge's possibility to examine, of his own motion, the unfairness of a term is an adequate method to reach the result stipulated by art. 6 of Directive 93/13, namely that those terms do not bind on individual consumers, and also to contribute to achieving the objective stipulated by art. 7 of same directive, since such examination may have a dissuasive effect to the use of unfair terms in contracts concluded by traders with consumers.

The Court of Justice of the European Communities, by interpreting this directive, established in the following cases ***Oceano Grupo Editorial S.A. versus Rocio Murciano Quintero (C-240/28), Salvat Editores SA versus Jose M. Sanchez Alcon Prades (C-241/98), Jose Luis Copano Badillo (C-242/98), Mohamed Berroane (C-243/98) and Emilio Vinas Feliu (C-244/98)*** that the protection stipulated by this normative act confers the national judge the possibility to assess, ***of his own motion***, the unfairness of a contractual term. Since such examination presupposes the pre-existence of a contract, signed by the parties, which has already produced, entirely or partially, its effects, it is undoubtedly true that the execution, for a certain amount of time, of the obligations undertaken by consumer cannot prevent verification of its contents by the judicial body. The protection system proposed by the directive responses to the idea that *the unequal situation between the consumer and professional cannot be compensated but by a positive intervention from outside the contract.* As per art. 7 of the directive, par. 1, member states are obliged to implement the required efficient measures *in order to put an end to the use of unfair terms*, and, as per par. 2, such measures should include the permission given by a judicial body to consumers' associations to assess whether some general terms are unfair and to get them banned if the case even if such terms have not been used within some specific contracts. The jurisdiction of the courts to examine, even of their own motion, the unfairness of a term is a proper method, on one hand, to reach the

result sought by art. 6 of the directive, that is prevention from cases in which individual consumers would be obligated to follow an unfair term, and on the other hand, to reach the objective from art. 7, since the examination of the court itself may have a dissuasive effect and may prevent from the use of unfair terms in contracts concluded by professionals with consumers.

The ECJ recognized to the consumer in the case **C-473/00 Cofidis**, the right to the protection disciplined by the European legislation even in situations when he did not denounce the unfairness of the terms for various reasons. The Court states that the protection conferred to consumers by the directive is applied even in the situations when the consumer, who concluded with the professional a contract with unfair terms, fails to notice the unfairness of the terms either because he is not aware of his rights or is forced to apply them due to the costs and judicial procedures involved. The same judgment states that directive 93/13/CEE is against any internal legislation which, within a case filed by a professional against a consumer, based on the contract concluded between them, forbids the national judge to invoke, of his own motion, the unfairness of a term from the contract.

The Judgment of the European Court of Justice of 26.10.2006 pronounced in the case ***Elisa Maria Mostaza Claro vs Centro Movil Milenium SL, Cauza C-168/05*** states the following:

"The importance of protecting the consumer determined the community legislation to stipulate in art. 6, par. 1 of the directive that unfair terms in a contract concluded between consumer and professional are not binding on the consumer. This is an imperative provision which, considering the inferior position of one the contractual parties, is meant to replace the formal balance between the rights and obligations of the contracting parties established by the contract, with a *real balance* which restores the parity between the parties. Moreover, the directive that aims at consolidating the consumer's protection, as per art. 3, par. 1, letter t) of the Treaty of European Communities, is an indispensable measure for the completion of the tasks assigned to the European communities and mainly for the increase of the life standards and conditions on their territories (see, by analogy, art. 81 TEC). The nature and importance of the public interest on which is based the protection conferred by the consumer's directive ***justifies more that the national court be obligated to assess, of its own motion, the unfairness of a contractual term***, compensating thus the imbalance between consumer and professional, seller or supplier.

The Court also decided in its judgment dated 06.10.2009 in the case **c 40/2008 Asturcom Telecomunicaciones** that *"art. 6 should be considered a rule equivalent to the national rules as within internal legal order it represents a rule of public order".* Thus, "Directive 93/13 must be interpreted in the sense that ***a national court, notified with a request of enforcement of an arbitrary sentence, appreciates the nullity of the arbitrary agreement and cancels the sentence arguing that the respective agreement contains an unfair arbitrary term".*** As already mentioned, the Court motivated its judgment by the fact that the provisions of the community right in the field of consumers' protection are provisions of public order. Consequently, it results from the preceding considerations that the community right imposes an obligation to control on the national court.

Still in connection with the interpretation of art. 6, CJEU pointed by judgment in the case Pannon GSM in C243/2008 that *"art. 6 should be interpreted in the sense that unfair contractual terms are not binding on consumer and thus it is not necessary for the respective consumer to have successfully challenged such a term beforehand".* The Court underlines that the ***role of the national judge in the field of consumers' protection is not to simply rule on the unfairness of a contractual term*** but ***to impose the obligation of examining, of one's own motion, this issue.***

4. Solutions of the ECJ on consumers' protection in bank credit contracts

As regards consumers' protection against deceiving practices, the community jurisprudence says that the national court should consider the expectations, determined by the jurisprudence, in case of ***an average consumer quite well-informed, careful and circumspect, taking account of the social, cultural and linguistic factors (standard consumer).*** However, the community legislation does not exclude the possibility that, in case of difficulty in assessing the deceiving nature of the statement or advertising in question, the national court should resort to a survey amongst consumers or a report made by experts as useful element in taking a decision (CJEU 16.07.1998, case C-210/96, **Gut Springenheide**). In same field, the Court of Justice of the European Union stipulates that the national court must assess the case as per the principle "subsequent reconstitution of the event": the court must consider the well-informed, careful and circumspect consumer at the moment of purchase excluding any information not available at that moment as well as consider the information well-known even by means of the media, press, etc. Therefore, a careful chronological distinction between the various types of information must be carried out so as not to project in the past the information available only in the trial (CJEU 28.01.1999, case C-303/97, **Sektkellerei**). We also consider useful the statements of the Court of Justice of the European Union in those cases when the conclusion of a bank credit contract is the result of a deceiving

advertising used by the credit institution. It should be also noted that in the field of consumers' protection regarding contracts concluded outside commercial premises and their protection against unfair terms, the notion of consumer is generally given to a natural person or group of natural persons gathered in an association that does not act as professional. Therefore, in the mentioned fields, the notion of consumer does not cover legal bodies.

The legislation of CJEU contains important specifications on the consumers' protection within the bank credit contracts in relation with the contracts concluded outside commercial premises. Therefore, although in principle, the "door-to-door" selling directive excludes the contracts on rights related to real estate from the application field (same as our national legislation which transposed the directive – art. 6, letter b) of amended Government Ordinance 106/1999), the CJEU has stated that, in case of a credit contract guaranteed with real estate concluded outside commercial premises in order to acquire such property , the consumer has the right to benefit from the protection conferred by the above-mentioned directive (CJ 13.12.2001, **case C-481/99, Heininger and Bayerische Hypo/ Vereinsbank AG).** The Court has also indicated that Directive 85/577 precludes the national legislator from giving one year time from contact conclusion to exercise the right to revoke, as per art. 5, in case the consumer did not have the information stipulated in art. 4 of the mentioned directive.

Moreover, the community legislation has established that in case of a third party in relation with the bank credit contract, who accepts to conclude, outside the commercial premises, a contract of guarantee which represents a guarantee for the execution of the bank credit contract (which he is not part of), it is applicable the protection conferred by the mentioned directive (CJ 17.03.1998, case C-45/96, Dietzinger) on condition that he do not guarantee a loan contracted by a person within his professional activity. It is useful therefore to mention that under the circumstances, the consumer (even the guaranteeing third party) may use during a certain period of time the right to unilaterally terminate the credit contract and the Contract of Guarantee concluded outside the commercial premises. In the same judgment the court indicates that directive 85/577 also precludes the national legislator from giving one year time from contract conclusion to exercise the right of withdrawal if the consumer has not been informed on such right.

By the case **Caja de Ahorros y Monte de Piedad de Madrid c 484/08** the court confirms the states' right to apply a greater protection to consumers than the minimum established by the directive and allows the national courts to verify in the credit contracts the unfairness of the terms and the adequacy of the price or retribution, on one hand, for the goods or services furnished in their return, on the other hand, **even though such terms are clearly and intelligibly written.** Thus, the court has stated that: "as its twelfth consideration stipulates, *the directive accomplished only a partial and minimal harmonization of the internal legislations on unfair terms*, recognizing, at the same time, the member states' possibility to provide consumers a higher protection level than the one established by the directive. Thus, the directive stipulates in art. 8 the possibility of member states to adopt or keep the strictest provisions compatible with the treaty from the field disciplined by the directive in order to provide a maximum protection level to consumers. *The member states cannot be prevented from keeping or adopting*, as regards the whole field disciplined by the directive, including its art. 4, par. 2, *rules stricter than the ones stipulated by the directive on condition that they provide a higher protection level to consumers*. Art. 4 par.2 and art. 8 of the directive do not preclude a national regulation which would permit a judicial control over the unfairness of the contract terms and the adequacy of the price or retribution, on one hand, for the goods or services furnished in their return, on the other hand, even though such terms clearly and intelligibly written.

A Court's judgment of 16 November 2010 in the case C-76/10 Iveta Kokovska, centered on a request for a preliminary ruling elaborated as per art. 267 by a judicial body in Slovakia, indicates:

"Directive 93/13/CEE of the Council of 5 April 1993 on unfair terms in the contracts concluded with consumers imposes on a national court, notified with enforcement of an arbitrary sentence, Res judicata, ruled in the absence of the consumer, to assess, even of its own motion, the unfairness of the penalty stipulated by the credit contract concluded between the supplier of financial services and consumer, penalty applied in the above-mentioned sentence, in case the court has elements regarding the situation de jure and de facto required in this regard, and, as per the national procedural rules, the above-mentioned court may proceed to such assessment within similar procedures based on the national law.

The national court in question has the obligation, considering all circumstances occurring at contract conclusion, *to establish whether a credit contract term, as the one in this case, which binds the consumer to a penalty in a disproportionately large amount, must be considered as unfair* as per art. 3 and 4 of Directive 93/13. If so, ***this court is obligated to determine all consequences deriving from it as per the internal law, in order to ensure that the respective term does not bind on the consumer.***

In such circumstances, failure to indicate the yearly interest in a consumer credit contract, indication of essential importance as per Council Directive 87/102/CEE of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, amended by Directive 98/7/CE of the European Parliament and of Council of 16 February 1998, may represent a decisive element in the assessment made by a national court whether a term in a consumer credit contract, regarding its costs, in which such indication does not exist , is clearly and intelligibly written as per art. 4 of Directive 93/13. If this is not the situation, ***the respective court, considering all circumstances occurring at contract conclusion in question to the main proceedings, has the possibility to assess, even of its own motion, whether the failure to indicate the real yearly interest in the term regarding the cost of the respective credit may classify the term as unfair*** as per art. 3 and 4 of Directive 93/13. Even so, despite the possibility to assess the respective contract in terms of Directive 93/13, Directive 87/102 must be interpreted in the sense that it allows the national court to apply, of its own motion, the provisions which transpose art.4 of the latter directive on national law and which stipulate that failure to indicate the real yearly interest in a consumer credit contract has as a consequence the fact that the approved credit is considered free of interest and costs.

5. Conclusions

A correct analysis of the terms in the credit contracts guarantees compliance with the objective of the two normative acts – Law 193/2000 (general law) and Government Urgency Ordinance 50/2010 (special law), which is to establish, keep or, depending on the case, restore the contractual balance. Failure to comply with the legal special provisions and ignoring the jurisprudence of CJEU applicable to this type of contract generates a possible risk of abuse, which the Romanian legislator aimed to eliminate as expressly (art. 3 par. 2 of Law 193/2000).

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9. *OG nr. 174/2008 pentru modificarea si completarea unor acte normative privind protectia consumatorului asupra clientelei bancare*