# ACTION FOR DECLARING THE ABUSIVE CHARACTER AND FOR ASCERTAINING THE ABSOLUTE NULLITY OF SOME CLAUSES FROM A CREDIT CONTRACT CONCLUDED BETWEEN A PROFESSIONAL MERCHANT AND A CONSUMER. CONDITIONS OF ADMISSIBILITY FROM THE PERSPECTIVE OF THE SPECIAL LAW AND OF THE COMMON LAW. EFFECTS ON THE DEVELOPMENT OF THE CONTRACT

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**Abstract**

*The Council Directive 93/13/EEC on unfair terms in consumer contracts was transposed into the Romanian legislation under the Law no. 193/2000 on unfair terms in the agreements concluded by professionals and consumers.*

*The above legislation sets the legal framework of consumer protection, defines both the consumer and professional and establishes the conditions to be cumulatively met in order for a term to be declared unfair.*

*The above-mentioned legislation does not institute a juris et de jure presumption regarding the unfairness of the terms listed in the annex, therefore the supervisory body and courts of law are called upon to assess in each case subjected to control whether a certain term is unfair or not.*

*The Council Directive 93/13/EEC and the Law no. 193/2000 do not impose, exhaustive definitions for the professional and the consumer status and do not exclude the incidence of other provisions of internal law, either lex specialis or lex generalis, for determining such status.*

*The above-mentioned legislation does not exclude the possibility to invoke other grounds for nullity specified in other lex specialis or in lex generalis in a trial for ascertaining the unfairness of the terms and the nullity of certain clauses. Thus, an analysis of the specific jurisprudence reveals a juxtaposition of distinctive legal grounds.*

*Not lastly, the above-mentioned legislation does not expressly provide whether the courts of law are competent to modify a term which was declared unfair, nor does it provide the circumstances under which an agreement could be executed after the elimination of the unfair term. The above-mentioned legislation provide in terminis solely the incumbent nature of the consumer's agreement for the continuation of the contractual relationship. In this context, the relevant materials for finding solutions which could lead to safeguarding the agreement are the C.J.E.U. case-law and the Romanian law.*

**Keywords:** *credit contract; consumer; abusive clauses; nullity; the carrying out of the contract.*

## Introduction

The objectives of the paper are focused on shaping the legal regime of this type of legal action and on highlighting its peculiarities, while harmonizing the internal legislation with the European legislation, changing at national level the paradigm of the system for regulating the relations of private law in the context of the existence of a manifest inconsistency in the regulatory framework in defining the concept of „professional" and the increased frequency of The study addresses the topic of consumer rights protection in concluding and executing contracts concluded by them with professionals, by means of an action for finding unfair terms in these contracts, regulated by the European Union legislation and the national law.

The analysis is of particular importance since the approach of this procedural protection mean shows the legislator's concern for safeguarding the contractual balance by setting up measures in favour of the weak contractor, who has to resort to the contracts concluded with the professionals that represent the constancy of social and economic relations of satisfying the general interests court cases in which the allegedly unfair nature of contractual terms is claimed.

In order to meet the stated objectives, the approach must go from the exhaustive presentation of the internal and European legal framework, from underlining the basic concepts, to highlighting the common elements, but especially particular elements of the action in finding the unfair nature of the terms in the concluded contracts between professionals and consumers in determining the consequences of admitting such an action, highlighting the main guidelines of a rich judicial practice of the Romanian courts and the Court of Justice of the European Union.

The need for this study emerged from the fact that there is a wide jurisprudence in the matter, but that the problem of the particular nature of the action in finding the unfair terms has been poorly addressed in the doctrine, and that it needs highly welcome theoretical specifications.

## The content itself

By Law no 193/2000 on unfair terms in the contracts concluded between professionals and

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consumers, the Council Directive 93/13/EEC on unfair terms in consumers contracts was transposed into the Romanian legislation and between the two legal acts there are no notable differences.

*Article 1 of the Law no 193/2000 specifies the types of contracts concerned*, namely those relating to the sale of goods or the provision of services, and the article 3 paragraph 1 extends the scope of the law and to other contractual instruments (requisition orders, delivery bills, tickets, vouchers), provided they refer to the pre-established general conditions.

Article 1 sets out three guiding principles, all in favour of consumers:

1. the types of contracts announced must contain clear contractual terms, for which understanding no specialty knowledge is required;
2. in the event of doubt as to the interpretation, the unclear terms shall be interpreted in favour of the consumer;
3. it is forbidden for professionals to stipulate unfair terms. From this perspective, the contracts the Law no 193/2000 refer to can be considered contracts with terms prohibited by law, and they are, in this context, part of the forced contracts category.

*In the article 2 of the Law no 193/2000 „the consumer" and „the professional" are defined.*

With the abolition of the Romanian Commercial Code of 1887, which operated with the notion of „trader" and provided the Law no 287/2009 on the Civil Code operates with the notion of „professional", who is defined as the person operating an enterprise, the definition proposed by the article 2 paragraph 2 of the Law no 193/2000 for a professional appears doubtful and contradictory to the purpose of the law itself, since in the traditional activities associated with trade the legislator unjustifiably adds liberal professions.

Besides, it should be noted that in the initial form of the legal act to which we refer the legislator referred in the title of the law to the contracts concluded between traders and consumers, in which case we can conclude that the protection regime provided by the legal act analyzed concerns the situation of the professionals-traders. An argument in this respect is also the provision in the article 4 paragraph 2, which discusses the general conditions practiced by the merchants (emphasis added) on the market of the respective product or service.

*Article 4 of the Law no 193/2000 establishes the legal status of the terms considered to be abusive.*

From the examination of this ample article the following theses are broken:

1. The premise of qualifying a term as unfair is its non-negotiated nature. It is considered as not non-negotiated directly with the consumer the term that was established without giving the consumer the opportunity to influence its nature, meaning in which the article 4 paragraph 2 of the law refers to pre-formulated standard contracts or to the general conditions of sale practiced by traders on the concerned product or service market.

The non-negotiated nature is not removed when only certain terms were negotiated if, for the rest of the contract, a global assessment leads to the conclusion that it was pre-established by the professional.

Related to the non-negotiated character of the term, the legal act analyzed provides in the article 4 paragraph 3 the final thesis that if the professional claims that a standard term was negotiated directly with the consumer, the professional has the burden of proof of this aspect, by way of derogation - we underline - from the *actori incumbit probatio* rule, since in the actions for annulment the professional is a defendant.

In this way, the legislator constituted in terms of evidence a consumer's favour regime, establishing virtually a presumption of non-negotiation of terms in the pre-formulated contracts, a relative presumption that the professional may overturn according to the principle *in excipiendo reus fit actor*.

It is necessary to emphasize that the wording of the Law no 193/2000 unquestionably reveals that the legislator understood to establish in favour of consumers a special regime that will protect them from possible imbalance in the contractual relations with the professionals and this regime mainly concerns the moment of conclusion of the contract and the stage of the negotiations, this is why the analysis of all the conditions required to verify the unfair nature of a term must relate to those two moments, being, in that logic and in terms of the unfair nature of the terms, quasi-irrelevant that a contract was enforced with regard to retrospective character of the nullity sanction attached to that unfair nature.

The evidence thesis to be traced and proved by the professional – trader concerns a stage prior to that of the agreement of will, namely the negotiation phase, from the logical-grammatical interpretation of the evoked legal text, and it can be reasonably inferred that the legislator does not give unconditional preference to the aspect formally related to the signing of the contract, but to the way the agreement of will is achieved and the real possibility for the consumer to discuss the terms proposed by the professional, negotiate them and accept them knowingly and in accordance with their own interest.

In this logic, we have to highlight, *exempli gratia*, grace in the loan agreements, which are most frequently denounced, that it is irrelevant that the borrowers - consumers signed the loan agreements and the fact that they have opted for a particular type of pre-formulated contract from a series of similar contracts of the same type, as long as the legislator does not consider sufficient to adhere to the contract or the choice between several types of adhesion contracts, but firmly requires proof of direct negotiation of the contract in its entirety or some of its terms, respectively the proof of those discussions prior to the conclusion of the contract showing the borrower's agreement was reached regarding the content of the denounced term.

2. The terms considered to be unfair are set out in an exemplary annex to the law.

We appreciate that this inventory of unfair terms in the annex to the law cannot lead to the conclusion that these terms are unfair *de plano*.

In this respect, we evoke the provisions of the article 4 paragraph 1 of the legal act examined, which states that the contractual term is considered to be unfair, which „by itself or with other provisions of the contract, creates a significant imbalance between the rights and obligations of the parties, to the detriment of the consumer and contrary to the requirements of good faith".

The provisions of the paragraph 5 of the article 4 cited above lead to the same conclusion, which provide the parameters against which the unfair nature of a contractual term is assessed (emphasis added):

a) the nature of the products or services which are the subject of the contract at the time of its conclusion;
b) all the factors that led to the conclusion of the contract;
c) other terms of the contract or other contracts on which it depends.

The annex 1 to the Law no 193/2000 comprises a list containing terms considered as unfair and the Annex to Directive no 93/13/EEC is relative to the terms referred to in the article 3 paragraph 3 of the Directive.

Both legal acts show that in the accompanying annexes there is an inventory of some terms *that can be considered unfair* .

None of the legal reference acts provides that in the annexes there is an exhaustive inventory of the terms considered unfair.

None of the legal acts mentioned provides *in terminis* that the terms mentioned are presumed to have *per se* - in the absence of any other conditionings - an unfair character.

On the contrary, by reference to the article 3 paragraph 3 of the Directive, even in the title of the Annex, the conclusion that imposes is that the inventory of the terms in the Annex does not contain unfair terms only to the extent they meet the other conditions required to declare their unfair nature.

Under the circumstances, we consider that the reference to a certain typology of the terms contained in an exemplary list, not limitative, cannot in itself lead to the conclusion that those terms are presumed *juris et de jure* as unfair, since the absolute legal presumptions must be expressly stated in unequivocal terms not deducted *per a contrario* or by other interpretative considerations, in which case it is proposed to consider that the annex to a legal act may derogate from the rules which make up the body of that legal act.

Consequently, we consider that there can be no absolute presumption of the unfair nature of the terms mentioned in the annexes cited and that this unfair nature must be proved in the circumstances of the article 4 of Law no 193/2000, respectively under the article 3 and following of the Directive no 93/13/EEC.

3. According to the article 4 paragraph 6 of the Law no 193/2000, certain terms cannot be censored from the point of view of their unfair character:

„The assessment of the unfair nature of the terms is not associated either with defining the main object of the contract or with the quality of meeting the price and payment requirements on the one hand and the goods and services offered on the other, to the extent these terms are expressed in a readily understandable language".

Although the text outlined seems to censor those intimate terms related to the contract price and the specific nature of the consideration, the exemption is only partial and justifiably operates only when the terms are expressed in easily understandable language.

The doctrine and the jurisprudence consistently established that whenever a term of the kind provided in the article 4 paragraph 6 of the law does not meet the requirement of clear and easily comprehensible expression, it can be examined under the same article in terms of its unfair nature.

This is the case, for example, of the terms regarding the interest and bank charges, where the courts, retaining their essential character, nevertheless made an assessment of the unfair nature precisely because of the unclear expression and concluded that the positions expressed and assumed by the litigants show that the borrower and the lender had different representations of the interest variability rate at the time of the conclusion of the contract; this aspect, in conjunction with the absence in the special contract concluded with each borrower, a contract which necessarily singularizes the terms of the agreement and to which all the assumed concrete obligations have to be reported, of any indication regarding this variability criterion makes the contractual provision relating to the variable reference interest be considered unquestionably a provision expressed in terms of maximum equivocal, which authorizes the examination of this term in the light of the provisions of the article 4 paragraphs 1 and 2 of Law no 193/2000.

The courts went further and analyzed, referring to the specificity of the contracts concluded and the particular form of the denunciated terms, that the expression in a readily understandable language cannot be limited to a correct grammatically, morphologically, syntactically and semantically and that easily intelligible language means that in the case of conventions, each of the contracting parties should have the unambiguous representation of the nature and extent of its own acquired rights and obligations and of the rights and counterparts of the other side.

4. We consider that, in order to establish/declare the unfairness of a term, it must meet cumulatively the requirements of the article 4 paragraphs 1 and 6 (if it is an essential term of the contract) of the law, respectively the term was not negotiated directly with the consumer, was not expressed in a language that is easy to understand and creates, contrary to the requirements of good faith, by itself

or together with other provisions of the contract, a significant imbalance between the rights and the obligations of the parties. They are, in fact, the conditions for the admissibility of the action for annulment, to which is added the requirement-premise of the existence of a contract concluded between a professional and a consumer, a contract which, as provided by the article 3 paragraph 2 of the Law no 193/2000 does not fall under any other legal text in force.

Also from the point of view of the admissibility conditions, we consider that it is necessary to specify that the law in the analysis concerns the contracts for the sale of goods and the services, mentioned in the article 1 paragraph 1 of the law. In this context, we note that the provisions of the article 7 of the Law no 193/2000 have an improper or rather incomplete wording, given that the contracts provided by the legislator include, together with successive enforcement contracts, also contracts with *unoictu* execution, which would require that the resolution be mentioned and sanctioned together with that of termination, expressly provided.

For reasons to be further shown, we consider that the action to establish the unfairness of contractual term, based on the provisions of the article 4 of Law no 193/2000 has the effect of ascertaining the absolute nullity of those terms, which, in accordance with a consistent doctrine and case-law on that point, requires an examination of the grounds for nullity and of the requirements imposed by the article 4 paragraphs 1 and 6 of the law at the time of the conclusion of the contract.

For this particular type of action, however, the examination of the significant imbalance requirement between the rights and obligations of the parties exceeds this reference moment of the conclusion of the contract and is, in reality, placed in the overwhelming majority of cases in the next time, that of the execution of the contract.

This is because the consumer's rights are actually harmed not at the time when an unclear term is stipulated and left exclusively at the hands of the professional – trader, but at the time when the latter uses it. The establishment and collection of a fluctuating interest rate, generally increasing, depending on changes considered significant in the financial market, the anticipated maturity of the balance in case of alleged devaluation of the collateral, the increase of the principal to be repaid when the exchange rate fluctuates, etc. are significant in this respect.

The wording of the text of the Law no 193/2000 implicitly shows that an action for finding the unfairness of the contractual terms can be promoted also during the course of the contract and the provisions of the article 6, article 7, article 12 paragraph 4, article 14 of the law can be interpreted as such. It reinforces the idea that the assessment of the contractual imbalance is inevitably placed on the executive realm, exceeding the moment of conclusion of the contract, when the terms in question have only the potential to create an imbalance between benefits.

In many of the judgments pronounced, the Court of Justice of the European Union ruled on the moment of the conclusion of the contract as the one to which it relates, including the establishment of the imbalance between benefits. It is relevant the judgment of the Court (Second Chamber) of 20 September 2017 in case C-186/16 Ruxandra Paula Andriciuc and others against Banca Românească S.A., in which the Court stated the following:

„The article 3 paragraph (1) of the Directive 93/13 is to be interpreted as meaning that the assessment of the unfairness of a contractual term must be made in relation to the time at which the contract is concluded, taking into account all the circumstances the professional might have known at the time and were likely to influence the subsequent performance of the contract in question. It is for the referring court to assess, having regard to all circumstances of the main case and taking into account, in particular, the expertise and knowledge of the professional, in the present case of the bank, regarding possible fluctuations in foreign exchange rates and the risks inherent in the contracting of a foreign currency loan, the existence of any imbalance within the meaning of that provision" [1].

It is retained from the grounds of that judgment that „It follows that, as the advocate general observed in points 78, 80 and 82 of these conclusions, the assessment of the unfairness of a contractual term must be made in relation to the time at which that contract was concluded, taking account of all circumstances of the case which the professional could have known at that time and which were likely to influence the subsequent execution of the contract, a contractual term involving an imbalance between the parties which would not occur until the performance of the contract.

In the present case, it is apparent from the order for reference that the term in question in the main case, inserted in foreign currency loan contracts, states that the monthly repayment rates of the loan must be made in the same foreign currency. Such a term places the risk of foreign exchange to the consumer in case of devaluation of the national currency in relation to that foreign currency.

In that regard, it is for the referring court to assess, in the light of all circumstances of the main case and having regard, in particular, to the expertise and knowledge of the professional, in this case the bank, as to possible fluctuations in foreign exchange rates and risks inherent in contracting a foreign currency loan, in the first place, the possible non-compliance with the requirement of good faith and, second, the existence of any significant imbalance within the meaning of the article 3 paragraph (1) of the Directive 93/13.

In order to ascertain whether a term such as that at issue in the main dispute, contrary to the requirement

[1] The judgment can be found at http://curia.europa.eu/juris/document/document.jsf?text=&docid=194645&doclang=RO

of good faith, a significant imbalance between the rights and the obligations of the parties to the contract, to the detriment of the consumer, the national court must verify whether the professional by acting fairly and fairly towards the consumer, it could reasonably be expected that the latter would accept such a term following an individual negotiation (see, to that effect, the Decision of March 14 2013 Aziz, C415/11, EU:C:2013:164, points 68 și 69)"[2].

Or, while the judgement firmly referenced at the reference point of the conclusion of the contract, the Court of Justice of the European Union itself cannot categorically separate the timing of the contract to be executed while referring to the placement of foreign exchange risk in the consumer's task, which implies the execution of the contract.

That is why we believe that the approach of this kind of action must be done with maximum finesse and taking into account its specificity, which, for a fair and judicious application of the requirement to assess the significant imbalance between the parties' performance must be transgressing from the moment of the formation of the contract at the time when it is enforced, but without thereby confusing the unpredictability mechanism, provided it is based on a non-negotiated term, contrary to good faith and potentially harmful, therefore virtually null.

Moreover, we believe that in order to understand the peculiarity of the action based on the article 4 of the Law no 193/2000 should be referred to the virtual nullity institution, the effects of which shall be objectified during the execution of the contract. Since an abrupt and strict approach to assessing the significant imbalance between benefits only from a theoretical perspective by limiting at the time of the conclusion of the contract is not intended to make that procedural remedy an effective remedy to protect the consumer since an assessment *in abstracto* imposed even to a professional, especially in the case of those long-term loan contracts, is unrealistic and makes the stated intention of protecting the consumer a dead letter.

*Action to establish the unfairness of contractual terms.Characters and effects*

The provisions of the Law no 193/2000 do not link *in terminis*, but only implicitly the action for finding/declaring the unfair nature of contractual terms of the nullity action, but that is undoubtedly apparent from the corroborated examination of the article 6, and article 7 and article 12 paragraph 4 of the law, legal texts which refer to the fact that the terms found to have unfair nature do not have any effect on the consumer, that they will be deleted/removed from the contract and the consumer who opposes an adhesion contract containing unfair terms has the right to invoke the nullity of the term by way of action or exception, according to the law - we emphasize - before the common law court.

The systematic interpretation of the analyzed legal texts leads to the conclusion that the declaration/finding of the unfair nature of a term (some terms) is the premise and also the cause of its nullity, a *sui generis* nullity cause, based on the non-negotiated character (which can be subsumed to the lack of consent) and the injurious character of contractual balance.

Although the type of nullity is not provided in the Law no 193/2000, we consider that it can only be absolute nullity. In order to reach this conclusion, we proceed from the very purpose of the Law no 193/2000, to establish a legal protection regime for the consumer in contractual relations with the professional – trader, which implies vigorous sanctions for violation of the rules of protection issued for this purpose, public order rules in our appreciation.

Secondly, if we start from the sanction related to the non-negotiated nature of the term/terms, we can conclude that the legislator has understood to protect the parties' willingness to consent, which presupposes the existence of consumer's consent to the insertion of contractual terms. Or, under the Civil Code regime of 1864 (under which the Law 193/2000 was adopted), the lack of consent at the conclusion of the act is sanctioned with absolute nullity, according to the provisions of the article 948 point 2 of the Civil Code.

Last but not least, related to the provisions of the article 12 paragraph 4 of the law, referring to the nullity regime deduced from the interpretation of the provisions of the article 2 of the Decree no 167/1958 (in force at the time of the adoption of the Law no 193/2000), only absolute nullity could be invoked at any time, either by way of action or by way of exception.

Establishing the type of nullity implied by the unfair character of a (some) contractual term(s) is of particular interest, because in the wording of the Law no 287/2009 regarding the Civil Code the rule is the relative nullity, as it results from the interpretation of the provisions of the article 1252: „In cases where the nature of the nullity is not determined or is not unquestionably apparent from the law, the contract is reversible". In the present case, according to the preceding arguments, the nullity is absolute, as it is clear from the law.

A constant problem in court practice has been the possibility for the consumer to invoke also the grounds for common law nullity, in addition to the unfair nature and disregard of the provisions laid down by the special law.

We appreciate this accumulation as possible, considering that the provisions of the article 12 paragraph 4 of Law no 193/2000 confers the right of the consumer to invoke the nullity by way of action or exception, under the law (emphasis added). Or, as long as there is no obligation on the consumer to use only the route provided by *lexspecialis*, we consider that he

[2] idem

has open the way of common law in which he may juxtapose grounds for nullity provided by consumer protection law and grounds for nullity provided for by common law, the purpose of the action being one and the same, namely the lack of efficiency of the terms that are contrary to the law.

In accordance with the principle of safeguarding the contract (*favor contractus*), the Romanian legislator in 2000 reaffirmed the settled rule of nullity, namely partial nullity, endorsing it in the article 6, article 12 paragraphs (3)-(4) and the article 13 paragraph (1) of the legal act above mentioned.

Therefore, the rule is to continue the performance of the contract after the cancellation of the terms found to be null, provided that it can still be executed in the absence of these terms and provided that the consumer agrees to do so.

The latter condition seems somewhat bizarre, and can be regarded as a consumer-recognized surplus of protection. This is because, for the assumption that the contract may continue after the abolition of unfair terms, it must be acknowledged that this also benefits the consumer, who does not contest the contract as a whole. In that case, the expression of the consumer's consent appears to be excessive, especially as it has been given the reparation function of the nullity penalty, which is the removal of the term and the full repair of the damage suffered by the parties in the previous situation (*restitutio in integrum*).

Where the contract no longer produces legal effects after cancellation of a term/some terms, the consumer is granted the right to request termination (we have shown in the previous one that the termination in the contracts with enforcement at a time), with damages. We consider this provision to be inappropriate, since the impossibility to execute the contract leads to the application of the sanction of its obsolescence.

## Conclusions

In the analysis made we aimed to tackle the following research directions of the topic chosen:

Thus, we identified the types of contracts covered by the Law no 193/2000 and we highlighted the principles imposed by this legal act for the elaboration of the contracts concluded between professionals and consumers and we characterized these contracts as contracts with terms prohibited by law considering the legal prohibition to insert unfair terms in them.

I have synthesized the legal definitions of the professional and the consumer, highlighted the inadequate and inappropriate nature of the professional definition, and concluded, with regard to the provisions of the new Civil Code, but also to the original title of the law and certain legal provisions that survived the changes that occurred in the course, that the legal act refers to the category of professionals-traders.

We have extensively presented the legal regime of unfair terms, with theoretical arguments and examples of judicial practice.

Finally, we highlighted the characters, the specificity and the effects of the action in finding the unfair nature of some contractual terms.

We appreciate that the present study will be a starting point, an opportunity for reflection and a theoretical and practical guide to understanding and solving actions to establish the unfair nature of contractual terms, being - to the author's knowledge - the first attempt to synthetically and systematically tackle the issues addressed.

We consider that the researched field is far from exhausted and future directions of analysis will have to go towards the crystallization of the definitions of the professional and the trader, the delimitation between the actual consumer and the irregular traders, depending on the type of activity carried out, towards the position the conventions concluded between the consumers and liberal professions has in the wording of these contracts.

We also believe that there are still arguments to be exploited in relation to the type of nullity implied by a term declared unfair in the context of the regulation of the new Civil Code, especially from the point of view of the characterization of the economic public order, but also from the perspective of the formation of the will agreement as the expression of consent and the aspect of lesion regulation.

Last but not least, we consider that the interferences between the institutions of unpredictability and the nullity action, as well as between the institution of termination/cancellation and the caducity or other causes of ineffectiveness of legal acts may be exploited in a beneficial sense.

**References**


- The Council Directive 93/13/EEC
- The Law no. 193/2000