

THE ACTIVE ROLE OF THE JUDGE IN THE FIELD OF UNFAIR TERMS LITIGATION

Ph.D. student **Liviu-Titus PAVELIU**¹

Abstract

Unfair contract terms mark a delicate area in the field of consumer protection given the premise in which the consumer finds himself. This field of private law stems from the idea that the consumer needs an enhanced protection which from a legal standpoint may consist of introducing of measures of substantial law that can provide support in the precontractual phase, with evidence and even in understanding the legal consequences at hand. At a first glance, these comprise most of the benefits a consumer is granted and may choose to utilize in a litigation procedure against a professional in case on unfair contract terms. However, there is also a lesser known benefit that comes in the form of the obligation of the national courts to sanction on its own motion and in any procedural phase the occurrence of unfair contract terms. This line of thought has support within the Romanian legal system, but the decisive arguments in this sense com in the form of the case law of the Court of Justice of the European Union from the past decades.

The purpose of this paper is to analyze the hystorical evolution of the active role of the court in civil law litigation, especially from the perspective of unfair terms cases in which consumers are parties to the proceedings, and to highlight the process that the Romanian judges have to follow in solving this type of cases.

Keywords: EU law, unfair contract terms, case law, litigation

JEL Classification: K12, K41

1. Introduction

Over the course of time the field of unfair terms has achieved significant progress in removing the effects of such terms from consumer contracts, however, too often the protection granted by the was not sufficient and needed support from other institutions in order to ensure the real protection that was envisioned by the creators of Directive 93/13/EEC regarding unfair terms in consumer contracts. This legislation marked the legal ground for the defense of consumers when they entered contractual relations that would turn to be disadvantageous due to how the contracts were concluded. However, business practices also improved in order to find ways around this defense. While such an approach can be viewed as being of bad faith, and while it cannot be easily proved from a legal standpoint, the professionals also benefit from having a vast experience in legal and economic risk assessment and premium legal assistance which very often is unavailable to the consumers due to limited resources.

Starting from the objective set out in art 6 of the Directive, according to which “unfair terms used in a contract concluded with a consumer by a seller or supplier *shall*, as provided for under their national law, *not be binding* on the consumer [...]” and the obligation of the national lawmakers under art 7 of the Directive to “ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms [...]”, we are of the opinion there are two available solutions. The first one is of practical nature and it implies that the role of the judge has to be a more active one in the cases which involve consumers by assuring a more through legal evaluation of the content of the contract, even if the consumer did not understand to request this. The second option marks the effort to elaborate legislation to the highest degree where most complex premises in which the consumer finds himself can be already regulated in order to ease his burden to attack unfair terms, but the drawback of this approach is that it still relies on the consumer to be able enough to invoke that in litigation proceedings. Given this approach might prove ineffective in covering these entire situations, we consider that this solution was refused on the grounds that the inexperience of the consumer cannot be covered by just expanding legislation.

¹ Liviu-Titus Paveliu - Bucharest University of Economic Studies, titus.paveliu@gmail.com

An important element to keep in mind when analyzing EU legislation in the field of consumer protection is that all this effort is made in order to develop the Internal Market. Thus, the EU law maker did not limit the scope of the legislation just to set out minimal standards at a national level to protect its citizens, but to harmonize legislation in order to facilitate cross-border transactions. While the legal culture of consumers may vary from one country to another within the EU, it is safe to assume the once a consumer needs to sign a contract in another Member state, for example he buys goods online or when is traveling regularly to abroad and needs local telephone services, or even financial services, he finds himself basically in an even weaker situation than in his home country. The opinion of the European Economic and Social Committee in the legislative process leading up to the enactment of Directive 93/13/EEC highlighted the urgent need to boost consumer confidence in regard to entering cross border transactions. The Committee showed that while said confidence would benefit from a uniform set of rules for consumer legislation, it would have an undesired effect of weakening the predictability of national legislation in the field of contract law, where the ultimate role in ensuring the application of the law belongs to the judges². This led to the conclusion that a directive would better serve this cause by approximating European legislation with national legislation on a case by case basis by the judges, due to the fact that they hold the biggest regard to the culture and tradition of the national legal order³. This we can assume that even if the final solution would have been to go extreme lengths to enact exhaustive legislation, this would not have necessarily yielded the support of the consumer, even less so if the consumer could not afford to have legal assistance. The decision made at the time backed the idea that consumer confidence in a cross-border transaction should be best served to rely on the belief that the legal system can be best served to counteract his lack of legal knowledge in a given case.

2. Case law analysis of the role of the judge in proceedings related to unfair contract terms

After consulting the case law of the Court of Justice of the European Union and articles 6 and 7 of the Directive, we can concur that the best means to fight unfair terms at a national level is to encourage national courts to act on their own motion in sanctioning such terms in order to ensure that they are not binding on the consumer. The EU lawmaker adopted a list of terms, not only to simply underline a series of cases which should be sanctioned, but to also give varied legal grounds to aid consumers and judges when they bring contracts to the attention of legal evaluation.

In this regard, the Court was often tasked by the national courts, over the course of the last two decades, to interpret the applicability of the provision of the annex in specific situations, and in its responses it highlighted the fact that the national judges *have* to act on their own motion in order to counteract the practice of unfair terms. In the following sections we will present why the defended interest is of public and not of private nature when it comes to unfair terms. Furthermore, we will see that even if sanctioning unfair terms may come into a contradiction with procedural norms, EU law will prevail in the sense that in the end the unfair term should not be binding on the consumer. For a better understanding of this legal reasoning and practical phenomenon we will take a closer look at a few of the more relevant case law of the CJEU on this matter.

2.1 Océano Grupo Editorial and Salvat Editores (C-240/98)

Océano Grupo Editorial SA v Rocío Murciano Quintero (C-240/98) is the first case in which the Court of Justice of the European Union had to respond to a request for a preliminary ruling to interpret Directive 93/13/EEC regarding on unfair terms in consumer contracts. The Court also settled through this decision⁴ the combined cases Salvat Editores SA v José M. Sánchez Alcón Prades (C-

² Opinion on the proposal for a Council Directive on unfair terms in consumer contracts (91/C 159/13) in Jurnalul Oficial nr C 159, din 17. 6. 1991, p. 35.

³ *idem*

⁴ Cases dated 27.06.2010 Océano Grupo Editorial SA vs Rocío Murciano Quintero (C-240/98) Salvat Editores SA impotriva José M. Sánchez Alcón Prades (C-241/98), José Luis Copano Badillo (C-242/98), Mohammed Berroane (C-243/98) and Emilio Viñas Feliú (C-244/98).

241/98), José Luis Badillo Copano (C-242/98), Mohammed Berroane (C-243/98) and Emilio Viñas Feliú (C-244/98).

The first question for the preliminary ruling focused on the issue of jurisdiction in case of dispute, i.e. if a contractual term, which was not negotiated directly with the consumer and was specified to fall under the territorial jurisdiction of the district court where the seller or supplier's headquarters is located may be regarded as unfair according to Article 3 of Directive 93/13/EEC. The secondary issue raised was whether a court can claim on its own motion the unfairness of such terms, when it is necessary to determine if the court responsible for the resolution of a dispute has the necessary territorial jurisdiction.

Case facts. The Spanish court Juzgado de Primera Instancia nº 35 de Barcelona (Court of First Instance) had to settle a number of disputes resulting from consumers' failure to meet their obligations under a contract for sale of an encyclopedia. The defendants were individuals who had purchased encyclopedias for personal use, with the obligation to pay at a later date for the goods received. The sales took place between May 1995 and October 1996. Subsequently, between July and December 1997, the companies who had sold the books to the defendants decided to sue, following a procedure similar to the payment order in Romanian law. The Barcelona Court was concerned by the fact that none of the consumer-defendants resided in the city where the seller was located. This raised the court's suspicion regarding the validity of such cases, in view of the existing relevant legal provisions at the national and EU levels. As a result, the Spanish Court decided to submitted questions to the Court of Justice of the European Union (referred to as the "Court") for a preliminary ruling.

Legal facts. According to Spanish law the contractual provisions, terms and clauses which apply in general to the sale of goods or services need to meet the requirement of good faith. They must also maintain a balance between the parties' rights and obligations to avoid the appearance of unfair terms. Lastly, to the extent such terms lead to a negative imbalance for the consumer, such terms will be sanctioned as being void⁵. Specialized legislation complements this provision, and following Directive 93/13/EEC and its Annex, it adds the express provision that "provisions granting jurisdiction to a court other than that corresponding to the consumer's domicile, or the place of performance of the obligation are to be regarded as unfair".⁶ In this case, from a theoretical point of view there were legislative and judicial practice arguments to support rejecting the plaintiff's request. However, the Spanish court was not sure whether it could dismiss the cause on its motion or if it was necessary for the defendants to use these arguments in their defense. Thus, the court decided not to subpoena the defendants in the case and the passed on the question on how to interpret Directive 93/13 / EEC regarding the active consumer protection against unfair terms to the Court.

The Court argued its position in the preliminary ruling that the seller's unilateral decision on choosing the court that will have the territorial jurisdiction over any disputes arising from the contract, other than the one responsible for the area where the consumer resides, is likely to affect the consumer's contractual status. More specifically, it is quite likely that the consumer does not have the necessary resources to come to the court chosen by the seller/supplier. Starting from the premise that the consumer has limited financial resources relative to the plaintiff, any court costs to be incurred, the lack of familiarity and distance from the court's location would likely discourage the consumer to appear in court. This in practice would lead to the consumer giving up the right to defend his/her case in court.⁷ Thus, absence of a negotiation with the consumer regarding this clause is likely to create an imbalance between the parties and is contrary to the requirements of good faith. As such, the clause allowing for any dispute between the contractual parties to fall under the jurisdiction of the court where the seller's headquarters is located, fulfills the requirements of unfair terms as defined by Article 3, paragraph 1 of Directive 93/13/EEC and Article 1(q) of the Directive's Annex.

On the second issue raised by the Barcelona Court, the Court stated that the Art. 6 provisions in the Directive regarding unfair terms sanction would be ineffective if consumer protection would

⁵ Spanish legislation, article 10 (1) (c) and (4), Law no 26/1984 regarding consumer protection, law that operates as *lex generalia*.

⁶ Spanish law no. 7/1988 regarding 'General contract terms'

⁷ See paragraph 22 of case C-240/98 *Salvat Editores SA v José M. Sánchez Alcón Prades* (C-241/98), José Luis Copano Badillo (C-242/98), Mohammed Berroane (C-243/98) and Emilio Viñas Feliú (C-244/98).

be dependent on his/her knowledge of the occurrence of such terms. The argument was based on the consumer's behavior and financial situation. Thus, the defendant's lack of legal knowledge and resources necessary to secure the services of a lawyer would exponentially decrease the consumer's chances to be able to identify and successfully invoke unfair terms in a court case. The Court concluded that the national court has the obligation to identify the existence of an unfair contractual term on its own motion, in order to facilitate consumer protection the way it was meant by the system set up by Directive 93/13/EEC. In addition, the Court held that this obligation must be fulfilled especially in cases in which jurisdiction/territorial jurisdiction is awarded to a court as a result of an unfair contractual term. To note that foreign legal doctrine⁸ criticized this decision not on its merits, but on the specificity of the solution given. Thus, the Court indirectly ruled on how legislation should be implemented in this particular case, and not in general terms, as dictated by Union European law.

Thus, the Grupo Océano case is recognized as first the Court's rulings having as objective the interpretation of Directive 93/13/EEC. Implicitly, it has also marked the first time the role and need for active intervention by the national courts in implementing the consumer protection mechanism against unfair contractual terms.

2.2. Cofidis SA v Jean-Louis Fredout (C-473/00)

Case C-473/00 Cofidis SA v Jean-Louis Fredout marked the second preliminary ruling by the Court of Justice of the European Union in which it ruled on the court's role in combating unfair terms.

The French court raised the question whether a national court may determine of its own motion the unfairness of a term, even if the defendant's statute of limitation on his right of action has passed, according to the provisions of the French law and as was the case here. Through this ruling the Court continued to develop the idea that national courts must act on their own motion so that the purpose of Art. 6 and 7 of Directive 93/13/EEC are effectively met. More specifically, denying the effects of unfair contract terms and providing consumers adequate and effective means to defend themselves.

Case facts. The Tribunal d'instance de Vienne in France was notified on August 24, 2000 to settle a dispute concerning Mr Fredout's failure to pay his obligations under a consumer-credit contract concluded with Cofidis SA. The contract between the two parties was signed on January 26, 1998, when Mr. Fredout signed the contract based on some marketing informational material regarding a credit offer. The flier had been drafted unintelligibly in a certain section, and used the word "free" in a misleading way, potentially leading the consumer into believing that the credit would be without interest or administering fees. The national court's request to the Court did not concern the case validity, but the role of the prescription period and to what extent it hinders the protection of consumer rights.

Legal facts. In this case, Cofidis and the French Government used two procedural arguments to reject the appeal. The first covered the fact that the Court does not have jurisdiction over national legislative measures that do not target the requirements imposed by the Directive, namely terms with prescribed time-limits. The second argument was that, in the present case, the terms of the credit agreement followed a model contract established by French law, thus implicitly would not be contrary to the requirement of consumer-credit contract term clarity provided by the Directive's Art. 4. In the Court's view, the consumer's confusion regarding the cost of the consumer-credit contract was not the result of the legal contractual provisions' substantial lack of clarity, but because of the way they were presented, respectively in a deceptive manner which made him unaware of the real contractual provisions. Implicitly, this clause was not negotiated with the consumer, thus was drawn contrary good faith requirements and capable of creating an imbalance between the parties. Thus, having met the requirements of Directive's Art. 3(1), the Court had the jurisdiction to consider the term in this case without entering in the substance of the contractual provisions. Once the Court found an unfair term, it ruled on the compatibility of the requirements of the Directive's Art. 6 and 7 and the French

⁸ P. Rott, What is the Role of the ECJ in EC Private Law? A Comment on the ECJ judgments in *Oceano Grupo*, *Freiburger Kommunalbauten*, *Leitner* and *Veedefald* HANSE LAW REVIEW (HanseLR) Vol. 1 nr. 1/2005, p.11.

legislation on consumer protection.⁹ More specifically, the national court determined that imposing a time limitation on the consumer's right of action is an obstacle in identifying unfair terms in the contract concluded between Cofidis and Mr Fredout. The Court of Justice of the European Union supported this argument and held that if a term is unfair, but cannot be classified as such because of procedural restrictions, it will produce detrimental legal by binding the the consumer, which is contrary to the Directive's Art. 6. In addition, prescribing the action period is used by the seller in its favor because, due to the relatively short term, the plaintiff can wait for its expiration and sue the consumer afterwards, thus holding an advantage from a procedural standpoint.

An important detail in the present case is the court's role in identifying the existence of an unfair term, which was previously addressed in the combined cases *Océano Grupo Editorial and Salvat Editores* (C-240/98). Thus, since also the national court would be constrained to invoke the unfairness of the term only during the period prescribed, the Court held that we are in a similar situation in which the Directive's Art. 7 is violated by the fact that the national legislature has not provided to the consumer that "adequate and effective means exist to prevent the continued use of unfair terms in contracts [...]."

By qualifying the action of prescribing consumer rights as an obstacle in achieving the Directive's objectives, the Court has chosen to extend the interpretation given in the *Océano Grupo* case regarding the effectiveness of consumer protection. In conclusion, the Court held that the Directive "precludes a national provision which [...] prohibits the national court, on expiry of a limitation period, from finding, of its own motion or following a plea raised by the consumer, that a term of the contract is unfair."

Viewed from a different perspective,¹⁰ this case brought more than a simple ruling on the interpretation of Directive 93/13/EEC. It marked the expansion of the directives' indirect effect in the field of unfair terms. Thus, a consumer must be protected, whether he is aware or not of his rights, or whether it wants to defend such rights. In the latter case, the consumer's choice is affected by his fear of incurring supplementary expenses related to going to court.

Case C-473/00 *Cofidis SA v Jean-Louis Fredout* marked the second decision regarding Directive 93/13/EEC and continued the development of an active role for courts in combating unfair terms, opened up by the ruling in the *Océano Grupo* case.

2.3. Elisa María Mostaza Claro v Centro Móvil Milenium SL (C-168/05)

In the decisions of cases *Cofidis* (C-473/00) and *Océano Grupo* (C-240/98) Case C-168/2005, the Court had to rule on a preliminary ruling question where it reiterated the role of national courts to act of their own motion in combating unfair terms. The case *Elisa María Mostaza Claro* against *Centro Móvil Milenium SL* (C-168/05) restated the Court's previously held rulings and expanded the scope of their application also to arbitration decisions regarding a judge's the obligation to identify and note of his own motion the unfairness of a contractual term.

Case facts. The question before the Court came from the court judging the dispute between *Centro Móvil Milenium SL*, a telecommunications service provider, and *Elisa María Mostaza Claro*, a Spanish consumer. Due to a disagreement regarding the contract subscription length, the service provider moved against the consumer through an application for summons to court of arbitration unilaterally established by him under the contract. The consumer did not contest the legal grounds brought before the court, and only sought to bring a defence on the merits. Subsequently, the arbitration court ruled against the consumer. The consumer decided to appeal the ruling in a common law court, arguing that the provision which imposed arbitration procedures would constitute unfair terms for the purposes of national and European legislation.

⁹ Art. L. 132-1 of the French consumer code at that time provided that the sanction for unfair terms is to deem them as unwritten. This sanction has a legal regime similar to relative nullity which can be invoked directly in 5 years or by way of defense at any time. In regard to consumer contracts the statute of limitation was reduced to 2 years by way of direct claim.

¹⁰ S. Grundman, D. Mazeaud, *General Clauses and Standards in European Contract Law.*, capitolul 8, *The General Clause or Standard in EC Contract Law Directives, A Survey on Some Important Legal Measures and Aspects in EC Law*, Kluwer Law International, Haga, Olanda, 2006, p.145

Legal facts. The Spanish legislation in force before the adoption of the measures provided by Directive 93/13/EEC were in line with European standards with respect to the list of terms which may be regarded as unfair following the Directive's Annex. Since in this case, from the point of view of Spanish procedural law the consumer was deprived of her right to appeal the arbitration term in the mobile subscription contract, the only possibility remained to request a finding of unfair terms for that clause, based on the provisions of paragraph 1(q) of the Directive's Annex.¹¹

The Spanish court charged with ruling on the consumer's appeal found without a doubt in favor of the consumer – the term was unfair. However, the consumer's lack of action during the arbitration phase, together with the related procedural sanctions raised the question whether the court may annul the arbitration award. This question led to the request for a preliminary appeal to the ECJ.

The manner in which the ECJ gained jurisdiction over the matter was similar to that in Case *Freiburger Kommunalbauten* (C-237/02). In both cases, the Court was not allowed to rule on the application of the general criteria set out in the Directive, this falling exclusively under the jurisdiction of the national courts. However, the Court took advantage of this opportunity to reiterate that the judge may declare of his/her own motion the unfairness of a term. ECJ referred in its ruling also to the *Cofidis* (C-473/00) case stating that the "power of national courts has been regarded as necessary for ensuring that the consumer enjoys effective protection, in view in particular of the real risk that he is unaware of his rights or encounters difficulties in enforcing them." In this respect, it is to be expected that a consumer may encounter such difficulties especially when faced with the difficulty of defending themselves in proceedings providing an unfavorable context for the consumer, such as was the Spanish defendant. Therefore, although the Court could not rule expressly, it hinted that if the national law's special rules are likely to hinder the judge's active role in removing the effects of unfair terms, the legislation as a whole impedes the implementation of the Directive's objectives.

An indirect effect of Court's position was to generate further amendments of the Spanish legislation, removing provisions that prevented the courts to determine of their own motion the illegality of arbitration terms under conditions similar to the present case.

Although the Court was limited in the scope to which it could give a categorical answer to the question, this provided yet another example of how the use of general wording in the European legislation, and in particular in the Directive's Art. 6 (1), is ideal for the EU to reach its objectives regarding consumer protection. The Directive's formulation does not bind the judge to a sole sanction, but gives him/her the legal basis to intervene in a variety of ways to bring the contractual parties on equal footing. Thus, we conclude that the public interest, as promoted through this Directive, provides a sufficient legal basis for the judge to exercise an active role in deciding on issues of contractual relations between sellers/suppliers and consumers with regards to unfair terms.

2.4. Pannon GSM Zrt. v Erzsébet Sustikné Győrfi (C-243/08)

In the case *Pannon GSM Zrt. v Erzsébet Sustikné Győrfi* the Court ruled again on the jurisdiction of the court, as assigned by an unfair term, and developed the conditions and context in which a judge may of its own motion determine the unfairness of a term.

Case facts. In 2004 Mrs. Győrfi concluded a contract with Pannon for the provision of mobile telephone services. The contract contained a clause setting that the court with jurisdiction in the territory where the provider's headquarters were located had exclusive jurisdiction in the case of a contractual dispute. When the consumer ceased to pay for the provider's services, Pannon applied with the competent court under the contract for an order for payment. Within the prescribed time-period, the consumer filed a petition opposing the order for payment, thus turning into a contentious case. It should be noted that Mrs. Győrfi suffered from a physical disability, which objectively prevented her from traveling hundreds of kilometers to the contract-specified court. Upon verifying the case, the national court held that the court having jurisdiction in the area of the consumer's

¹¹ Point 1 letter q of Directive 93/13/EEC refers to the situation where, „(q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract” should be regarded as unfair.

domicile should be judging on the case according to Hungarian law. However, the procedural law provisions prevented the court from taking a decision in the context of the arguments made or not made by the parties, and thus made such a request for preliminary ruling from ECJ and stayed the proceedings.

Legal facts. According to Hungarian law, the court may seize itself *ex officio* of a breach of its jurisdiction only when it is deemed exclusive. Although cases such as this did not fit in this category, the unilateral imposition of a court by a supplier/seller, even when carrying alternative jurisdiction, while not sanctionable under the mandatory rules of procedure, maybe sanctioned based on the unfairness of the contractual terms according to consumer protection legislation. According to Hungarian procedural law, the discussion on jurisdiction can only take place on the first day of the hearing. The defendant did not understand she needed to prepare a defense in this regard. As a result, the judge had doubts whether to determine on its own motion in favor of the defendant the unfairness of the claimant's terms, which also determined the court's jurisdiction to hear the case.

The Court answered by referring to its case law, which had repeatedly presented the intervention of the court of its own motion in the classification of a clause as unfair not only as a right but also a duty. The logic behind this position derives from the power imbalance between the consumer and the provider of services/seller, in conjunction with the contractual imbalance caused by the latter's unilateral imposition of unfair terms.

If the court's intervention would be subject to the same procedural limitations of the consumers regarding statute of limitation, then the presumption regarding the experience of the consumer would have no effect, because if the consumer did not act and thus the judge would be limited by that, then he would not be able to act on its own motion. Thus, in the vast majority of the cases (which are also the cases where the consumer would fail to act) the national court would be compelled not to intervene in any way.

Thus, the Court ruled in paragraph 28 of its judgment that "Article 6(1) of the Directive must be interpreted as meaning that an unfair contract term is not binding on the consumer, and it is not necessary, in that regard, for that consumer to have successfully contested the validity of such a term beforehand." In order for those terms not to carry legal effects, the national courts' intervention is necessary in this regard. In subsequent cases, the Court established the limits of this interpretation's implementation, but this case did not fall outside these limits.

In present case the Court determined that even at this stage in the proceedings, the national court may intervene and rule in accordance with European legislation by invoking its provisions on consumer protection principles as basis for its intervention. First, the essential fact which facilitated this intervention resulted from the timing when the proceedings were suspended. If preliminary appeal had been made after the start of the trial on the merits, the court would have had to violate procedural law provisions to later return to the issue of its jurisdiction. Second, the Court nuanced the court's obligation to intervene of its own motion as being dependent on the consumer's intentions once s/he received the explanation on the legal implications of removing those unfair terms.¹²

This interpretation, although logical in the context of the system created by the Directive, could create a debate on the nature of the protected interest, i.e. whether the consumer's protection can be classified as being public interest or not. This intervention should not be conditioned on the consumer's decision, on whether those terms have or not an effect on him/her. If the protected interest was considered a private interest, from a theoretical point of view, the court could not support having an active role in this context. Analyzing the overall case law, we can argue that the interest being protected is indeed public. Thus, in the *Cofidis* case (C-473/00) the Court decided that the consumer must be protected even if s/he is or is not aware of their rights, which is incompatible with the idea of private interest. Through the judgment given in the *Pannon* case (C-243/08) the Court reiterated that the consumer's action or inaction does not condition the court's right to determine of its own

¹² Paragraph 33 of the judgment in Case C-243/08. In performing this obligation, the national court is not required, however, under the Directive, to disapply the clause in question if the consumer, after the court informed him, does not intend to invoke the unfairness and non-binding.

motion the unfairness of a term. However, if the consumer expressly wishes to continue the proceedings without removing those terms, the court shall have to comply with that decision.

3. Conclusions

The Romanian Civil Procedure Code states at article 22 the role of the judge in finding the truth. This marks the limits as to how much the judge can intervene, given that he is constrained to only rule on what was requested, except when the law states differently. The court practice in Romania has not come to the realization that protecting the consumer against unfair terms is a matter of public, and not private, interest. Thus, the judges were not even aware that they should investigate aspects of the case, different from those set out in the claims. The fact that case law of other Member States where consumers won proceedings even in the phase of enforcement marks a radical shift from the conventional perception in regard to the reach of consumer protection. Similarly, the case law of the CJEU that supports the intervention of the court *ex officio* even where the consumer has no other legal remedies at his disposal to use because he did not have the correct legal approach, grants a different perspective on how the interaction between EU law and national law should be made. Professionals are right to point that the forced application of consumer protection to the detriment of conventional legal reasoning might lead to lessening of the predictability and credibility of the national legal order. However, a more balanced approach leads us to believe that the imperative manner of the prioritization of EU law has support in the form of a legal and an economic argument which offer a big picture approach.

We must remember that the derogatory application of the law occurs only in areas where the consumer painted himself into a corner from a legal stand point, and EU case law comes to his aid in this regard because there is no point in granting a preferential treatment to consumers if they do not understand to exercise those rights. Better yet, if I accept that a consumer might not fully understand his rights that stem from a contract, we find it hard to believe that they might be aware of provisions present throughout consumer legislation¹³. Even less so it is a stretch to think that they might be aware of what other advantageous interpretations are handed down by the CJEU case law, which by definition treat issues of the highest matter in this field. The counterargument is that the consumer cannot defend himself by claiming to not know the law, but neither should he, because that is the job of his representatives or lawyers. Thus we arrive to the aforementioned economic argument, namely that the consumer does not have the resources to defend himself in court at the same level as his counterpart.

If we were to add an element of cross-border transactions, even if a consumer would be able to hire a lawyer, his confidence as to how realistic his chances of winning a case are so low that he might be inclined to give up altogether, and would only conclude contracts with foreign professionals only if he had no other options. Thus we find ourselves reverting to the origin of the European legislation, reminding ourselves that the purpose of this legislative intervention is to facilitate contractual relationships between parties who reside in different Member States. If a consumer does not have the belief that he is protected when he enters a contractual relationship within his own country, he would even more so be discouraged to do so with a party from another Member State. While harmonized legislation goes a long way in achieving this goal, we deem that the national judge plays a central role in assuring that this mechanism functions at an EU level, because he is the best suited to ensure that the national provisions are in line with those of the EU in order to provide the consumers with a suitable economical and legal environment to conduct contractual relationships.

Bibliography

1. P. Rott, *What is the Role of the ECJ in EC Private Law? A Comment on the ECJ judgments in Oceano Grupo, Freiburger Kommunalbauten, Leitner and Veedfald*, „Hanse Law Review” (HanseLR) Vol. 1 no. 1/2005

¹³ For example Law no.193/2000 regarding unfair contract terms, Law no. 296/2004 regarding the Consumer Code, or Emergency Ordinance no. 50/2010 regarding credit contracts concluded with consumers

2. S. Grundman, D. Mazeaud, *General Clauses and Standards in European Contract Law., Chapter 8, The General Clause or Standard in EC Contract Law Directives, A Survey on Some Important Legal Measures and Aspects in EC Law*, Kluwer Law International, Haga, Olanda, 2006

3. Directive 93/13/EEC on unfair terms in consumer contracts, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:en:HTML>

4. Case C-240/98 - Océano Grupo Editorial and Salvat Editores, <http://curia.europa.eu/juris/liste.jsf?num=C-240/98>

5. Case C-473/00 – Cofidis, <http://curia.europa.eu/juris/liste.jsf?&num=C-473/00>

6. Case C-168/05 - Mostaza Claro, <http://curia.europa.eu/juris/liste.jsf?&num=C-168/05>

7. Case C-243/08 - Pannon GSM Zrt. v Erzsébet Sustikné Györfi, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=74812&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=45368>