

ABOUT THE RECENT INTERPRETATION OF CJEU IN THE MATTER OF UNFAIR TERMS OF CONSUMER CREDIT CONTRACTS RELEVANT MEANINGS FOR THE NATIONAL CASE LAW

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Abstract. *The original formula established by the EU legislator for the repression of unfair terms (by the use of the criteria for the establishment of the abusive character – the lack of negotiation of the clause, the significant unbalance between the rights and obligations of the parties and the infringement, by the professional, of the good faith requirement) was consolidated by the developments made at case law level through the exercise, by the Court in Luxembourg, of its interpretative function.*

*The study starts with a diachronic view of the solutions that highlighted the manifest tendency of CJEU to provide the effective protection of consumers by the admission of the judicial control performed ex officio over the unfair terms in *Océano Grupo*, *Mostaza Claro* and *Cofidis*, such judgments being also reconfirmed on occasion of the ulterior interventions from *Pannon GSM*, *Asturcom Telecomunicaciones* and *Pénzügyi Lízing* or, with particular reference to the consumer credit contracts, in *Banco Español de Crédito* and, lately, in *Aziz (I)*. Afterwards, following a general description of the casuistic background of the disputes between credit consumers and banks in Romania (II), the analysis of the juridical meanings of the interpretations related to the recent *Kásler* case law from the 30th of April 2014, respectively *Sánchez Morcillo* and *Abril García* case laws from the 17th of July 2014 may not be extended also by the realistic assessment of the effects thereof in our national law and of the (potential) implications that are relevant for the Romanian courts of law (III).*

Key words: *reference for a preliminary ruling, unfair terms, protection of consumers, consumer contracts, consumer credit contracts, terms relating to the exchange rate.*

JEL Classification: *K12, K33*

I. Contribution of CJEU Case Law in the Matter of Unfair Terms of Consumer Credit Contracts - A General Overview

§1. Brief Preamble

1. Consumer's Right to an Effective Jurisdictional Protection. The case law interventions of CJEU contributed to the consolidation of the effective jurisdictional protection principle laid down in the provisions of Article 7, paragraph (1) of Directive 93/13,² and, subsequently in Article 47, corroborated with Article 38 of FREU Charter³ and, more often than not, highlighted the tension between the principle stating the priority of the EU law and the procedural autonomy of the Member States.

2. The Rationale Underlying the Examination by the National Court of Its Own Motion of the Unfair Nature of a Contractual Term. Taking into account the weak position of the consumer vis-a-vis the seller or the supplier (as regards both his bargaining power and his level of knowledge), the protection formula promoted by the imperative provisions of Article 6, paragraph (1) of the directive, according to which unfair terms do not create obligations for the consumer is aimed at replacing the formal balance created by the contract between the parties' rights and obligations by an actual balance meant to reestablish the equality of the parties. In order to ensure the protection guaranteed by Directive 93/13 and given that the inequality of the consumer and the seller or supplier can only be corrected by positive action unconnected with the actual parties to the contract, the Luxembourg Court, by means of the preliminary forwarding mechanism,

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² The above mentioned provision establishes the Member States' obligation to ensure in the interests of consumers, a series of "adequate and effective means (our italics) to prevent the further use of unfair terms in the contracts concluded between consumers and sellers or suppliers".

³ By the provisions of Article 47 on the right to an effective remedy and to a fair trial (in case of any breach of the rights and freedoms guaranteed by the law of the Union), corroborated with Article 38 of the Charter, the effectiveness of consumer protection is thus granted a constitutional meaning.

acknowledged the power and subsequently, the obligation of the national court to review of its own motion the unfair nature of a contract term.

§2. Examination of the Court's Own Motion of Unfair Terms - A Solution of the Luxembourg Court for the National Court

3. *Océano Grupo* - Power of the National Court to Examine of Its Own Motion whether that Clause (Conferring Jurisdiction) is Unfair. The arguments of the Court of Justice in favor of admitting an examination of one's own motion of unfair terms were initially formulated in the decision delivered in *Océano Grupo Editorial* and *Salvat Editores*⁴ regarding the unfair nature of a jurisdiction conferring term, this solution marking the initiation of an extensive case law series.

The Court notices that the aim of Article 6 of the Directive would not be achieved if the consumer were himself obliged to raise the unfair nature of such terms; indeed, ignorance of the available rights or the too high lawyers' fees as compared to the amount at stake may deter the consumer from contesting the application of an unfair term. The Court thus retains that effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion. In the end of its argument, the court also shows that the national court is obliged, when it applies national law provisions predating or postdating the adoption of the said directive to interpret those provisions, so far as possible, in the light of the wording and purpose of the Directive. The requirement for an interpretation in conformity with the Directive requires the national court to decline of its own motion the jurisdiction conferred on it by virtue of an unfair term. As remarked in the doctrine, although it was not the interference of the Court in the civil procedure of the Member States that was aimed at in this decision⁵, the case law frame promoted in *Océano Grupo* illustrates the metamorphosis of the powers of the national court under the influence of community law⁶ and it will be subsequently refined in *Cofidis*⁷ where the interpretations focus on the acknowledged scope of such prerogatives.

4. *Cofidis* - Scope of the Acknowledged Powers of the National Court. The ambitious approach proposed by the Court by its decision of 21 November 2002 - received in the French doctrine mainly with critical appreciations⁸ - basically ignored a limitation period provided by a French regulation (more precisely, by Article L. 311-37 of the Consumer Code). With reference to the proceedings aimed at the enforcement of unfair terms brought by sellers or suppliers against consumers, the Court appreciated that the fixing by a national provision of a (2 year) time-limit on the court's power to set aside such terms, of its own motion or on the ground of an exception raised by the consumer is liable to affect the effectiveness of the protection representing the object of Article 6 and 7 of Directive 93/13/EEC as for sellers or suppliers it would be sufficient to wait until the expiry of the time-limit fixed by the national legislature and to subsequently request to continue to execute the unfair terms that they would continue to use in contracts⁹.

5. *Mostaza Claro* – From the Right to the Obligation of the National Court to Assess of Its Own Motion the Unfair Nature of a Term. After the first solutions given in *Océano Grupo* (2000) and *Cofidis* (2002), the content of the unfair terms will result in cascade decisions, thus

⁴ Case C-240/98-C-244/98, *Océano Grupo*, [2000] ECR I-4941. In this concrete case, the contracts entered by several consumers that are residents in Spain for the purchase by installments of encyclopedias included a term according to which the local jurisdiction to settle any contractual claims was conferred on the courts in Barcelona, a city in which none of the buyers (brought to court for failing to pay the price on the due date) was domiciled, but where the seller had its principal place of business.

⁵ See Élise Poillot, *Droit européen de la consommation et uniformisation du droit des contrats*. Préface by Pascal de Vareilles-Sommières, Librairie Générale de Droit et de Jurisprudence, Paris, 2006, p. 155, n° 315.

⁶ See I. Delicostopoulos, *Le procès civil à l'épreuve du droit processuel européen*. Préface by Serge Guinchard, Librairie Générale de Droit et de Jurisprudence, Paris, 2003, apud Élise Poillot, op. cit., p. 155, n° 315.

⁷ Case C-473/00, *Cofidis SA v. Jean-Louis Fredout*, [2002] ECR I-10875.

⁸ See Cyril Nourissat, *Droit communautaire et forclusion biennale: l'étrange effet utile de l'esprit de la directive „clauses abusives” note sous CJCE, 21 novembre 2002 aff. C-473/00, Cofidis SA v. Jean-Louis Fredout*, Recueil Dalloz, Cahier droit des affaires, 2003, n° 7, 13 février, *Jurisprudence, Commentaires*, p. 486, Monique Luby, *Trop ne vaut rien ! (Ou quand la CJCE ébranle le régime juridique des clauses abusives)*, in *Contrats, concurrence, consommation*, 2004, n° 1, janvier, *Chronique*, p. 6 et seq.

⁹ See paragraph 35 of *Cofidis*.

legiferating the court assessment of its own motion¹⁰ whether a contractual term is unfair. In 2006, in *Mostaza Claro*¹¹ with reference to an unfair arbitration term, the Court stated that the nature and the importance of public interest on which the protection granted by the directive to the consumers is founded justify *the obligation* (our italics) of the national court to assess of its own motion whether a contractual term is unfair.

The reiteration of identical arguments also characterize the subsequent interventions of the *Court of Pannon GSM, Asturcom Telecomunicaciones (2009) and Pénzügyi Lízing (2010)*.

6. Pannon and Pénzügyi Lízing or about the Obligation of the National Court to Examine of Its Own Motion the Unfairness of a Term Conferring Jurisdiction. In order to ensure the effectiveness of the protection intended to be given by the provisions of Directive 93/13, *Pannon GSM*¹² underlines that the role attributed to the national court is not limited only to the mere right to rule on the possible unfairness of a contractual term, but also consists of the obligation to examine that issue of its own motion, where it has available to it the legal and factual elements necessary for this purpose¹³. Moreover, in *Pénzügyi Lízing*¹⁴, it was stipulated that the national court in charge with settling the opposition formulated by a consumer against a demand for payment has to assess of its own motion whether a term conferring exclusive local jurisdiction (and which is also included in the loan contract concluded by the parties) is included in the scope of Directive 93/13 and, if so, it is bound to examine *of its own motion whether the respective term is unfair*. The approach promoted by the Court was, of course, liable to affect (again) the principle of the procedural autonomy of the Member States. In its critical assessments, doctrine¹⁵ could only establish the exceptions associated to the enforcement of this principle (and), during the assessment of the court's own motion of unfair terms, the procedural autonomy acknowledged for the Member States in order to safeguard the rights granted by the EU law being traditionally tempered by the condition that national law must comply with the Community law principles of equivalence and effectiveness¹⁶.

7. Asturcom Telecomunicaciones – The Principle of Effective Protection vs. the Principle of Res Judicata. On the other hand, the powers that the EU law understands to bestow upon the national courts cannot prejudice the principle of legal safety and the principle of res judicata. However, the limitations imposed by the latter, seemed, unfortunately to have a rather formal value when the controversial decision *Asturcom Telecomunicaciones*¹⁷ was delivered.

Thus, according to the Court's interpretations, the national court hearing an action for enforcement of a *final* arbitration award is bound to determine of its own motion *the unfair nature of an arbitration term included in a contract concluded between a seller or supplier and a consumer to the extent in which, according to the internal procedural rules, it can make such an assessment as part of similar measures*. Criticized for its ambiguous argumentation and leaving the impression that "it gives with one hand and takes with the other", the "cryptic" decision in *Asturcom* reflects the tendency of the Court of Justice to undermine the res judicata principle by emphasizing

¹⁰ See Natacha Sauphanor-Brouillaud, Élise Poillot, Carole Aubert de Vincelles, Geoffray Brunaux, *Traité de droit civil. Les contrats de consommation. Règles communes* sous la direction de Jacques Ghestin, Librairie Générale de Droit et de Jurisprudence, Paris, 2013, n° 964, p. 971.

¹¹ Case C-168/05, *Elisa María Mostaza Claro v Centro Móvil Milenium SL*, [2006] ECR I-10421.

¹² Case C-243/08, *Pannon GSM Zrt. v Erzsébet Sustikné Györfi*, in Rep. 2009, p. I-4713.

¹³ See paragraph 31 of *Pannon GSM*.

¹⁴ Case C-137/08, *VB Pénzügyi Lízing Zrt. v Ferenc Schneider*, in Rep. 2010, p. I-10847.

¹⁵ See Y. Houyet, *L'application d'office du droit de l'Union européenne par les juges nationaux*, in *Journal de droit européen* n°167 – 3/2010, p. 69 et seq. (the author establishes that «l'autonomie ainsi conférée aux États membres est cependant encadrée par les principes européens de coopération, d'équivalence et d'effectivité»).

¹⁶ The effectiveness principle requires that national procedural rules should not make the enforcement of EU law impossible or excessively difficult. The equivalence principle presupposes that national law must ensure that any action based on Community law is subject to procedural rules at least as favorable as those provided for a similar action based on domestic law (or, in other words, the procedural rules for the enforcement of EU law cannot be less favorable than those stipulated by the national legislation, which govern the exercising of similar rights).

¹⁷ Case C-40/08, *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira*, in Rep. 2009, p. I-9579.

the effectiveness principle¹⁸ and it is, in the opinion of other doctrinal voices, also a confirmation of the fact that the interaction between European consumer law and arbitration is always detrimental to the latter¹⁹.

8. Rampion and Godard and Martín Martín: Protection against Unfair Terms of Consumer Credit Contracts, Namely in the Contracts Negotiated Away from Business Premises. Going back to the competence of the national court to raise of its own motion a number of consumer protection aspects²⁰, in the *Rampion and Godard*²¹ (2007) case law on the interpretation of the provisions of the (former) Directive 87/102 on consumer credits, the Court will retain in exchange that the national court has (only) the capacity to discuss of its own motion the consumer's right to claim damages from the person granting the credit. The same approach will also be reconfirmed in *Martin Martín*²²(2009), where, based on the interpretation of the provisions of Article 4 of Directive 85/577 on contracts negotiated away from business premises, the Court admits that the national court can declare of its own motion that a contract falling within the scope of that directive is void on the ground that the consumer was not informed of his right of cancellation, even though the consumer at no stage pleaded that the contract was void before the competent national courts.

§3. The Effectiveness Principle and Unfair Terms - Recent Applications

The more recent solutions delivered in *Invitel, Banco Español de Crédito* (2012) and *Aziz* (2013) are characterized by the same constant tendency of the Court to guarantee the compliance of the principle of effective consumer protection against unfair terms, illustrating what the doctrine calls the remedial function of this principle²³.

9. Invitel and Aziz – Two Examples of the Remedial Function of the Effectiveness Principle. In *Invitel*²⁴ the debate led, *inter alia*, to the effects of an action for an injunction brought in the public interest and on behalf of consumers, by the Hungarian National Consumer Protection Authority against the *Invitel* mobile phone company (which had included in the general terms of the contracts a number of clauses on additional costs, without specifying the manner in which such costs are calculated). After underlining the preventive nature and the objective to discourage any actions for an injunction, CJEU states that the provisions of Article 6, paragraph (1), corroborated with Article 7, paragraph (1) and (2) of Directive 93/13 must be interpreted as meaning that it does not preclude the declaration of invalidity of an unfair term included in the general terms of consumer contracts in an action for an injunction, (...) from producing, in accordance with that legislation, effects with regard to all consumers who concluded with the seller or supplier concerned a contract to which the same general terms apply, including with regard to those consumers who were not party to the injunction proceedings²⁵. As a result, not only the effect that the invalidity of the term has for the individual contract in which the contested terms are included, is envisaged, but also the future effect of the further interdiction of the respective unfair terms.

*Aziz*²⁶ raised the issue of the inadequate character of the means available to the consumer against the mortgage enforcement proceedings initiated on the grounds of a loan contract that

¹⁸ See Mihai Șandru, Evelina Oprina, *Discuții privind posibilitatea anulării hotărârii arbitrale de către instanța de executare. Notă la hotărârea Asturcom (cauza C-40/08) în contextul legislației române*, in the volume *Forța juridică a hotărârilor arbitrale*, coordinated by Daniel-Mihai Șandru, Andrei Săvescu, Ed. Universitară, Bucharest, 2012, p. 6 et seq.

¹⁹ A. Oprea, *Cauza Asturcom și rolul judecătorului național în materie de clauze de arbitraj abuzive introduse în contractele de consum*, in *Revista Română de Arbitraj* no. 4/2011, p. 1-7.

²⁰ For a detailed study of the relevant CJEU case law, see Mihaela Mazilu-Babel, *Dreptul fundamental la un nivel ridicat de protecție asigurat consumatorului de credite și obligația corelativă impusă instanței naționale*, available at www.juridice.ro, consulted on 19 November 2014.

²¹ Case C-429/05, *Max Rampion and Marie-Jeanne Godard v Franfinance SA and K par K SAS*, [2007] ECR I-8017.

²² Case C-227/09, *Eva Martín Martín v EDP Editores SL*, in Rep. 2009, p. I-11939.

²³ See Norbert Reich, *General Principles of EU Civil Law*, Intersentia, Cambridge, 2013, p. 97.

²⁴ Case C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, available at curia.europa.eu.

²⁵ See paragraphs 43 and 44 of *Invitel*.

²⁶ CJEU, 14 March 2013, C-415/11, *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, available at curia.europa.eu.

contains unfair terms. According to the Spanish regulations, the court of first instance, namely the instance before which the consumer requested the establishment of the unfair nature of a term, lacked the possibility to adopt provisional measures, more exactly, could not stay the mortgage enforcement proceedings. Practically, in case the mortgage enforcement proceeding is completed before the court of first instance should establish the unfair nature of the terms included in the mortgage loan contract²⁷ and, as a result also the invalidity of such mortgage enforcement proceeding, the effectiveness of the protection ensured by the directive is compromised. Since the court of first instance is precluded from staying the enforcement proceedings, that declaration of invalidity allows the consumer to obtain only subsequent protection of a purely compensatory nature (*consisting exclusively in the payment of damages*) which "would be incomplete and insufficient and would not constitute either an adequate or effective means of preventing the continued use of that term, contrary to Article 7(1) of Directive 93/13"²⁸. And, the Court continues to argue, "That applies all the more strongly where, as in the main proceedings, the mortgaged property is the family home of the consumer whose rights have been infringed, since that means of consumer protection is limited to payment of damages and interest and does not make it possible to prevent the definitive and irreversible loss of that dwelling"²⁹.

10. Banco Español de Crédito – Consolidating the Credit Consumer Protection against Unfair Terms. Without imposing on the national court the *obligation to assess of its own motion the unfair nature of a term during a simplified and quick debt recovery procedure, in Banco Español de Crédito*³⁰, the Court stipulated however that the Spanish regulation preventing the court before which an application for payment had been brought to assess of its own motion, in *limine litis* or at any another stage during the proceedings, though it already had all the legal and factual elements necessary for the task available to it, whether terms contained in a contract on the moratory interest are unfair, where the consumer had not lodged an objection, is liable to undermine the effectiveness of the protection intended by Directive 93/13³¹. Likewise, after testing the proportionality of the remedy with the objective of the directive, in case the invalidity of an unfair term is established, it is considered that the national court cannot supplement the contract by amending the content of the respective term³².

The impact of the case law examples above mentioned on the legal practice of the Member States is, of course, far from negligible. Before developing the significance of the recent preliminary decisions delivered by CJEU on the *Kásler* (30 April 2014) and *Sánchez Morcillo and Abril García* (17 July 2014) cases and evaluating their relevance for the national law and the case law of Romanian courts, we will further present in detail an overview of the disputes between credit consumers and banks.

II. The Typology of the Cases Aimed at Eliminating Unfair Terms in the Romanian Law

11. General Assessment. The extensive case law material resulted out of the transposition in our national law of Directive 2008/48 on consumer credit contracts (by GEO no. 50/2010) pointed out the increasing use of safeguarding mechanisms made available to the consumers (by

²⁷ In this concrete case, the terms considered included the default interest clause, the acceleration clause of the contract and the clause on unilateral quantification of the unpaid debt.

²⁸ See paragraph 60 of *Aziz*.

²⁹ *Idem*, paragraph 61.

³⁰ Case C-618/10, *Banco Español de Crédito SA v Joaquín Calderón Camino*, available at curia.europa.eu.

³¹ See paragraph 53 of *Banco Español de Crédito*.

³² According to the argumentation presented in paragraph 69 of the decision, the possibility to allow the national court to revise the content of unfair terms "would contribute to eliminating the dissuasive effect on sellers or suppliers of the straightforward non application with regard to the consumer (...), in so far as those sellers or suppliers would remain tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be modified, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers or suppliers".

Law no. 193/2000³³, as republished) against unfair terms and, in particular, the need to improve the available legal treatment and instruments with a view to eliminating their efficiency. We will not discuss now the concept of "contractual terrorism"³⁴, which seems to be, for certain doctrine experts, "the ghost haunting Europe"³⁵, "the war between banks and clients", about which, Mugur Isarescu, the governor of the Romanian National Bank said (on 27 November 2014) that it should stop or "the shrew (that is the bank, our underlining) that needs to be tamed" (the beautiful Shakespearean metaphor being used to refer to the equation of a conflict that its author could not have possibly foreseen...) However, a synthetic perspective on the more relevant case law episodes related to the legislative changes operated in the field, seems to be very useful.

12. Evolution of the Regulations on Measures Sanctioning Unfair Terms. Types of Disputes between Consumers and Banks. In the chronology of trials initiated by consumers against banks, three "waves" have been identified in doctrine terms³⁶, starting from

i) individual and so-called class actions (which brought together in fact the actions taken by several consumers organized in consortiums) having as object the annulment of unfair terms regarding mainly various untransparent formula for the calculation of interest (such as the variable interest rate - DRV - used by BCR³⁷) or the risk commission referred to as administration commission³⁸, plus the actions by which ANPC requests the establishment and sanctioning of the contravention consisting of the provision of unfair terms in consumer contracts, up to

ii) the class action stage³⁹ promoted by the National Consumer Protection Authority or by the representative consumer protection associations according to the terms stipulated by the amendments brought to Law 193/2000 (more precisely, by Articles 12 and 13), by Law no. 76/2012 enforcing Law no. 134/2000 on the Civil Procedure Code (which came into effect on 01 October 2013)⁴⁰. According to Article 13, paragraph (1) of this Law, in case it establishes the existence of unfair terms, the court shall force the professional to change all acceptance contract in progress, as

³³ In its initial form, Law no. 193/2000 instituted two categories of actions sanctioning unfair terms: individual actions taken by the consumer prejudiced by the contract concluded in violation of the lawful provisions and the action by which the National Consumer Protection Authority (ANPC) requests the establishment and sanctioning of the contravention consisting in the stipulation of unfair terms in contracts concluded with the consumers, a case in which, according to Article 13, paragraph (1) of the law, the court, if it established the existence of unfair contract terms, applied a civil sanction and ordered, under the sanction of damages, the amendment of the contractual terms, to the extent the contract continued to be in force or the annulment of such contract, with the payment of damages, if case be.

³⁴ This legal metaphor was initially used by Philippe Malaurie when commenting on a decision of the French Cassation Court, being subsequently taken over by other French authors, such as Denis Mazeaud or Bertrand Fages; for further information, see Gheorghe Piperea, *Terorism contractual*, 12 May 2014, available at www.juridice.ro

³⁵ See Gheorghe Piperea, *O stafie bântuie Europa: terorismul contractual*, in *Revista Română de Dreptul Afacerilor* no. 5/2014.

³⁶ See Marieta Avram, *Clauzele abuzive în contractele de credit – o temă incandescentă în dreptul național și cel european*, 17 June 2014, available at www.juridice.ro, consulted on 18 November 2014.

³⁷ For a comment on the first irrevocable decision delivered by ICCJ (High Court of Cassation and Justice) against BCR, establishing the invalidity of the DRV clause (and including the administration commission), civil decision no. 3913/13.11.2013, File no., 17947/3/2011), see G. Piperea, *Soluție ICCJ ref. dobânda tipică variabilă*, 11 March 2014, available at www.juridice.ro, consulted on 19 November 2014, the author underlining that by the delivered solution, ICCJ put into practice the CJEU solutions and the guidelines indicated in *Invitel, Camino and Aziz*.

³⁸ In these cases, the courts mainly delivered solutions by which they established the invalidity of the unfair terms and, as a result of the partial invalidity of the contract, ordered that the parties be restored to their pre-contractual positions by the return of the amounts collected on the grounds of the unfair terms, namely by forcing the banks • to return the amounts collected as risk or administration commission, • to pay the lawful interest calculated according to Article 3, paragraph (1) of GO 9/2000, as subsequently amended and completed, for every amount of money paid to the bank as risk commission (irrespective of the name under which such amount was charged, that is risk or administration commission), the lawful interest calculated as of the date the commissions were collected and up to the repealing of GO 9/2000, and respectively, • the payment of the lawful penalty interest calculated according to the provisions of Article 3, paragraph (2) of GO 13/2011 for every amount of money paid to the bank as risk commission as of the coming into effect of the legislative act indicated and up to the actual returning of such amounts.

³⁹ Although called "class actions", the regulation of such actions by the Romanian legislature did not borrow the characteristic elements of these actions in the original systems where they were consecrated; thus, as already mentioned in our legal literature, there is no system in place for the action notification and no mechanism for the authorization of the action initiator by the prejudiced consumers, either an *opt-out system* (the American model which consecrated class actions), or an *opt-in system* (the French model), see Emilia Mihai, *Class action și clauzele abuzive*, in *Revista Română de Dreptul Afacerilor* no. 7/2013, p. 37, Gheorghe Piperea, *Class action à la roumaine*, *idem*, p. 25 et seq.

⁴⁰ According to the ANPC officials, after 01 October 2013, such actions were initiated against a number of 11 banks and non-banking financial institutions: out of these, ECONOMICA.net identified a series of disputes against 5 banks (BCR, OTP Bank, Raiffeisen bank, Volksbank, Banca Romaneasca) and against one non-banking financial institution (Credit Europe Bank IFN).

well as to eliminate all unfair terms from the pre-formulated contracts, meant to be used during their professional activity.

If we read Article 12 of Law no. 193/2000, we can easily notice a difference of approach between the action conferred to ANPC and that conferred to the representative associations. Thus, according to Article 12, paragraph (1) of the Law, when ANPC establishes the use of acceptance contracts containing unfair terms, it will be able to request the court (the law court having jurisdiction over the domicile or registered office of the professional) "to force the latter *to change the contracts in progress, by eliminating such unfair terms*"; however, according to Article 12, paragraph (3), the representative consumer protection associations suing the professionals that use acceptance contracts that include unfair terms will be able to request the court "to order *the cessation of their use, as well as the amendment of the contracts in progress by eliminating the unfair terms*".

The extended (*erga omnes*) effects⁴¹ of the decisions admitting such class actions (the bank is to eliminate the terms established to be unfair out of all contracts in progress, as well as out of all future contracts) represent the novelty element, but also the challenge of the new regulation. A favorable decision delivered on a class action can be invoked against the bank by any interested person, such as a consumer who did not request the invalidity of the term included in the contract concluded with the bank or that who, in its individual action, had not obtained a favorable solution. Of course, it is inevitable that such consequences affect the principle of relativity of court decision effects and the *res judicata* principle and have already triggered critical reactions from experts. However, the application of the provisions of Article 12, paragraphs (1)-(3) of the Law does not affect the consumer's right to invoke the invalidity of an unfair term by way of action or by way of exception. In case the action is admitted, the effects of the decision apply only to him (unlike the decisions admitting class actions that can be invoked by any consumer that entered a contract with the professional sued by ANPC or by the representative consumer protection associations).

These are but a few of the reasons that invite us to reflect on the legal status of class actions in the elimination of unfair terms and not in the least on the economic mechanisms that underlie the occurrence of conflicts between banks and consumers. A realistic analysis can only be made if we place ourselves "at the border between legitimate claims and emotional interpretations", taking also into account the recommendation to move "from a biased approach to a responsible approach of the crediting relation"⁴².

and, finally, iii) actions requesting the court to force the banks to convert into RON the credits granted in CHF, according to the exchange rate valid on the loan advance date. As the first legal precedent in this field was registered in our legal practice only a short time ago, by the delivery on 13 November 2014 of an irrevocable decision of Galati Law Court admitting such a claim filed by a Volksbank client - this debate is of great interest. The tendency of the Romanian client to denounce the unfair terms of the credit contracts concluded in CHF has become even more pregnant after the delivery by CJEU of its answers to the preliminary questions formulated by the Hungarian Supreme Court in the Kásler case. A realistic evaluation of the real impact of the recent interpretations of the Court in the Kásler law case (and subsequently, in the *Sánchez Morcillo and Abril García cases on the foreclosure of mortgages*) over our law and legal practice in the field needs to be made. In a first stage, their legal significance is to be outlined and then, based on the analysis of the conclusions formulated by the Court, the relevance of the same for our internal law, as well as the solutions delivered in the national case law is to be highlighted.

⁴¹ For further details in this field and on the deficiencies of the *erga omnes* effects of court decisions delivered in class actions for the elimination of unfair terms, see L. Bercea, *Efectele erga omnes ale hotărârilor judecătorești pronunțate în acțiunile în eliminarea clauzelor abuzive din contractele standard de consum*, in *Revista Română de Dreptul Afacerilor* no. 7/2013, p. 41-50.

⁴² See Elena Iacob, Managing Associate Zamfirescu Racoți & Partners, *Acțiunile colective pentru eliminarea clauzelor abuzive din contractele bancare – la granița dintre revendicări legitime și interpretări emoționale*, 2 October 2013, available at www.juridice.ro, consulted on 20 November 2014.

III. Legal Significance of the Decisions in the *Kásler* and of the *Sánchez Morcillo and Abril García* Cases.

Relevance for the Romanian Law and National Case Law

§1. *Kásler* or Again About Consumer Protection against Unfair Credit Contract Terms

13. State of fact and preliminary questions. In the *Kásler case*⁴³, the debate focused on the unfairness of a contract term relating to the exchange rate applicable to the installments of a loan denominated in a foreign currency. The mortgage loan concluded by the *Kásler* spouses in May 2008 with OTP bank amounted to 14,400,000 Hungarian forints (representing the equivalent value of EUR 46,867) was based on a particular mechanism: when the bank disbursed the loan - which was advanced in forints, it calculated *the amount lent in CHF at the buying rate of exchange applied by the bank, and when collecting the monthly installment, it calculated the amount of the same by reference to the selling rate of exchange for CHF* applied by the bank on the day before the due date. This credit calculation formula implied at the time an annual percentage rate of charge of 7.43%, which was lower than that applicable to the credits denominated in forints, the bank thus encouraging its clients to enter a contract under the respective terms.

The *Kasler* spouses brought an action against OTP, claiming that Clause III/2 was unfair. They submitted that that term, in that on the installment collection date, it uses a different exchange rate for the currency than that applicable when advancing the loan, confers the bank "a unilateral and unjustified benefit". The court of first instance and the court of appeal upheld the plaintiffs' arguments. By the preliminary questions, Kúria (The Hungarian Supreme Court), which was referred to to settle the appeal, requested the Court of Justice to establish

i) whether the contractual term concerning the rate of exchange of the currency applicable to a loan contract denominated in a foreign currency falls within the definition of the main subject-matter of the contract or refers to the quality/price ratio of the provided service

ii) to what extent it may be stated that such terms are drafted in a clear intelligible manner so as to be excepted from the assessment of their unfairness according to the directive on unfair terms and

iii) finally, in case the contract cannot continue in existence after eliminating the unfair term, whether the national court is entitled to replace the respective unfair term with a supplementary provision.

14. Assessment of the Exercise by CJEU of its Interpretative Role in the *Kasler* Law Case - A Doctrinary Evaluation. Ever since the first doctrinary evaluations of the CJEU decision of 30 April 2014, it was stated that the *Kásler* decision was quickly appropriated in the eyes of the consumers' public perception as a "favorable" decision, which could underlie any new class actions aimed at establishing the unfairness of the credit contracts denominated in CHF and requesting the "freezing" of the exchange rate to the contract conclusion date⁴⁴. However, in the spirit of a balanced and completely unbiased interpretation, the author emphasizes the "neutral" character of this decision, about which she states that in reality, "it is neither favorable to the consumers, nor unfavorable to the banks"⁴⁵.

In the context of the power conferred by Article 267, TFEU, the Court is (also) responsible for interpreting the general criteria allowing the assessment of the unfairness of the contractual terms that fall under the scope of the directive. In the *Kásler* case, the Court only proceeds to the interpretation of certain provisions of Directive 93/13/EEC on unfair terms; its additional remarks refer this time not to the control mechanism based on the substance of unfair terms as stipulated under Article 3, paragraph (1) of the Directive (which establishes the 3 conditions - the negotiable character of the term, the significant imbalance and the breach of good faith by the professional), but to the meaning of Article 4, paragraph (2) of the Directive. The actual assessment of the unfairness of disputed terms in the credit contract shall be carried out by the national court and, as

⁴³ Case C-26/13, *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt*, available at curia.europa.eu.

⁴⁴ See Marieta Avram, *op. cit.*, available at www.juridice.ro.

⁴⁵ *Idem*.

we will see, the Court lets the referring court to make the necessary concrete verifications. Given the content of the preliminary questions, 3 aspects become relevant in the interpretation grid of the decision.

15. What are the terms referring to the main subject-matter of the contract? The first aspect to be determined is i) whether the term setting the exchange rate for the monthly repayment installments is part of the (*main, our Italics*) subject-matter of the contract, namely if the exchange rate difference is part of the contract price.

As a preliminary aspect, we have to review the content of the provisions of art. 4, paragraph (2) of the Directive, namely that:

"Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language".

This interdiction related to the mechanism for reviewing the unfairness of terms in terms of the main subject-matter of the contract shall be interpreted, according to the Court, in a strict manner⁴⁶ and can only be applied to the terms laying down the essential obligations of the contract⁴⁷ but, as the Court emphasizes in its argumentation, it is for the national court alone to rule on the classification of that term in accordance with the particular circumstances of the case⁴⁸. In particular, the Kásler decision is relevant because the national court is given the criteria based on which a contractual terms is to be considered to represent an essential obligation of the contract, namely "the nature, general scheme and the stipulations of the loan agreement and its legal and factual context"⁴⁹

Furthermore, the Court notes that the examination of the unfairness of the term at issue cannot be avoided on the ground that that term relates to adequacy of the price and the remuneration on one hand as against the services or goods supplied on the other. That term merely determines the conversion rate between Hungarian forints and Swiss francs for the purpose of calculating the repayments, without the lender providing any foreign exchange service. In the absence of such a service, the financial costs resulting from the difference between the buying and selling rates of exchange, which must be borne by the borrower, cannot be regarded as remuneration due as consideration for a service⁵⁰. Consequently, a contractual term such as Clause III/2 of the contract entered into by the Kásler spouses establishes a monetary charge which must be borne by the borrower and which cannot be regarded as remuneration due as consideration for a service provided by the lender can be analyzed in terms of its unfairness.

16. When is a contractual term considered to be written in plain and intelligible language? Premises for the national case law. In answer to the second preliminary question ii), the Court states that a term defining the main subject-matter of the contract is not excepted from the assessment of its unfairness unless it has been written in plain and intelligible language. The Court emphasizes that the requirement for the transparency of contractual terms stipulated by Directive 93/13 is not limited to an intelligible language in formal and grammatical terms; for the purpose of complying with the requirement of transparency it is also important to determine whether the contract sets out transparently the reason for and the particularities of the mechanism for converting the foreign currency and the relationship between that mechanism and the mechanism laid down by other terms relating to the advance of the loan, so that the consumer can foresee the economic consequences for him which derive from it⁵¹. In assessing the intelligibility of the terms, the national court is to determine if "the average consumer, who is reasonably well informed and reasonably observant and circumspect"⁵² would be

⁴⁶ See paragraph 42 of *Kasler*.

⁴⁷ *Idem*, paragraph 49.

⁴⁸ *Idem*, paragraph 45.

⁴⁹ *Idem*, paragraph 51.

⁵⁰ See Press Release no. 66/14 of CJEU on the Kásler decision, Luxembourg, 30 April 2014, available at curia.europa.eu.

⁵¹ See paragraph 73 of *Kasler*.

⁵² *Idem*, paragraph 74.

able to assess the potentially significant economic consequences of the contractual terms and, therefore, the contract price (the total cost of the sum borrowed).

17. For a proper understanding of the solution delivered in the *Kasler case* and in order not to expand the effects of such decision beyond its real significance, some experts insist on the fact that **the CJEU decision does not refer to the difference between the exchange rate applicable on the day the loan was advanced and the current or future exchange rate, so it does not focus on the risk and aspects related to the exchange rate**⁵³. In an interpretation that seems rather to argue a minimum or at best indirect relevance of the *Kasler decision*, it is considered that, although the loan contract denominated in foreign currency includes an element of exchange rate risk, this circumstance does not automatically entail that it is an unfair contract⁵⁴. It is thus considered that class actions aimed at eliminating the exchange rate risks by freezing the exchange rate of the currency in which the loan is denominated on the date the contract is concluded would practically mean a violation of the nominalistic principle (consecrated by Article 2164 NCC and, previously, by Article 1578 of the old Civil Code), this discussion being wrongly associated with unfair terms⁵⁵.

18. Without minimizing the importance of these arguments, the substance of the debate can be analyzed in further, subtler details. A first consideration that needs to be made is that, indeed, in the *Kasler case*, using the exchange rate applicable on the credit advance date is out of the question. In what sense does the Court acknowledge that using the selling exchange rate instead of the buying exchange rate can be considered unfair? In a more pragmatic approach of the meaning of this decision, we propose the following practical example: "Let's suppose that on the credit advance date, the CHF buying rate of exchange was 2.1 and the selling rate of exchange was 2.2. Today the buying rate of exchange is 3.6 and the selling exchange rate is 3.7. According to the CJEU decision, if upon the credit advance date the bank used the 2.1 exchange rate for conversion, today, it should use the 3.6 and not the 3.7 exchange rate. It should definitely not use the 2.1 exchange rate!"⁵⁶.

19. If we refer in particular to the credits advanced in CHF in Romania, it is not less true that, unlike in the case of Hungary, in our country, the loan, as well as its repayment was made directly in the respective currency; the contracts did not include a similar clause to that contested by the *Kásler*, namely stipulating that the installments should be paid in the national currency at the exchange rate of the bank, the clients being able to acquire the necessary amount in CHF most often from the exchange offices. From this perspective, the influence of the *Kásler* decision seems, at least apparently, not to be so rich for the Romanian cases. However, we believe that maintaining a reserved interpretation of the effects of the *Kásler* decision is the sign of a unilateral approach. The answer to the second preliminary question addressed to CJEU (regarding the professional's obligation to write the terms in a clear and intelligible language, not only in terms of grammar, but also in economic terms) could support the arguments invoked by the Romanian credit consumers in the disputes in which the conversion in RON at the historic exchange rate of the credits denominated in CHF is requested.

20. The fact that over 600 such claims are currently pending before Bucharest law courts (filed against Volksbank, Raiffeisen, Banca Transilvania, Alpha Bank, BCR, Credit Europe Bank and Unicredit) is a fact that cannot be ignored. Due to the increase of the CHF exchange rate, the installments of the clients that contracted loans denominated in this currency increased by over 85% in the last 7 years. Since during the periods of economic crisis, the Swiss franc becomes the refuge currency of fund owners and thus it presents a high risk of hypervalorization, this currency proves

⁵³ See Valentin Moroceanu, senior associate attorney Zamfirescu Racoți & Partners, quoted by Elena Voinea, *Decizii controversate a CJUE referitoare la clauzele abuzive. Avocații au interpretări diferite*, 8 May 2014, available at Avocatnet.ro, consulted on 21 November 2014.

⁵⁴ See Marieta Avram, *op. cit.*, available at www.juridice.ro.

⁵⁵ *Idem*. At the same time, the author claims, since derogations from the nominalistic principle cannot be created in case law, for the purpose of ensuring the consumer protection in loan contracts denominated in foreign currency, the solution would be not the actions consecrated by the provisions of Law no. 193/2000, but a special intervention of the legislator in the field. A good opportunity would be thus the transposition of the recent Directive 17/2014 which establishes the obligation of the Member States to adopt a proper regulatory framework "to limit the consumer exposure to exchange rate risk during the lifetime of the credit" by converting the credit in an alternative currency or by establishing another contract adjustment mechanism.

⁵⁶ See lawyer Gabriel Biriș, quoted by Elena Voinea, *op. cit.*, available at Avocatnet.ro.

to be an unfortunate, even toxic choice for the clients that were advanced a loan denominated in it. But what did the Romanian consumer know about this exotic currency (for him) in 2006-2007 when the loans in Swiss francs were promoted on the Romanian banking market and not only here? To what extent was he informed by the lender about the hypervalorization risk of the currency in which he was encouraged to contract the credit? Indeed, the professional's omission to inform the consumer about this hypervalorization risk of the Swiss franc represents a violation of the obligation to provide council. In the claims filed against banks, the clients' lawyers constantly denounce as deceitful commercial practice this omission, as well as **the action by which the loan denominated in Swiss francs was presented not only as a better alternative to the loan contracts in RON or in EUR, but also as a safe product, which was worth buying even beyond the normal borrowing limits.** Moreover, they also point out how, by a gross manipulation of statistics and of NBR regulations, the loans denominated in Swiss francs were sold even to consumers who, according to normal ratings, did not even qualify for credits in RON or EUR and that using such subprime loans, the banks and their representatives earned not only credit volume and market quotas, but also enormous profits and bonuses⁵⁷. As a result, as it is not sufficient that the terms should be formally written in an intelligible language, but they have to be intelligible in economic terms (namely the borrower should understand the consequences faced by signing the contract), to the extent the national court establishes that this latter requirement was not complied with (this is closely associated to the professional's violation of his obligation to provide council), the invalidity of such unfair term needs to be declared.

21. Synthesizing the aspects covered by the first two preliminary questions, we can conclude that although *a priori* the terms related to the exchange rate applicable to the repayment of the installments of a loan contracted in a foreign currency can be considered to fall under the main subject-matter of a loan contract denominated in a foreign currency, they are not necessarily excluded from the assessment of their unfairness. The terms that stipulate for the disbursement of a loan in foreign currency the use of an exchange rate different from that applicable for the repayment of such loan are excepted from the assessment of their unfairness only if they are written in a clear and intelligible language. On a more general note, the Court of Justice points out in *Kásler* that a contractual term referring to the main subject-matter of the contract and which is written in a clear and intelligible language cannot be subjected to the assessment of its unfairness on the substance of the case, based on the three conditions established in Article 3, paragraph (1) of the Directive.

22. What do we use to fill in the gap in the contract when the elimination of an unfair term would compromise the contract existence? The answer given in the *Kásler* case and its correlation with Article 1255 NCC. Finally, the last aspect concerns iii) the solution to be considered by the national court in order to fill in the gap in the contract when the elimination of an unfair term would compromise the contract existence. According to the arguments brought by the Court in the *Kásler*, case, if the contract cannot continue in existence after eliminating the unfair term, the national court is entitled to replace the respective unfair term with a national supplementary provision. Such a conduct complies with the level of protection guaranteed by the directive by reestablishing the balance between the rights and the obligations of the parties. Moreover, if such a replacement was not permissible, requiring the court to annul the contract in its entirety, the consumer might be exposed to particularly unfavorable consequences, as the consequence of an annulment is that the outstanding balance of the loan becomes due forthwith, which is likely to be in excess of the consumer's financial capacities and, as a result, tends to penalize the consumer rather than the lender (paragraph 83 and 84 of *Kásler*).

23. In this context, it is also important to remind the reader that the interpretations given in the *Kásler* case in order to maintain the contract when the invalidity of an unfair term is established (whose elimination would render the contract void), more exactly, Article 6, paragraph (1) of the Directive does not generate a conflict with the relevant provisions of the Romanian regulations.

⁵⁷ See lawyer Marius Coltuc, *Realitatea și șansele dosarelor pe denominare – clauze abuzive bănci în România – 2014*, 15 October 2014, available at procescolectivbanci.wordpress.com, consulted on 22 October 2014.

Thus, in its new form, Law 193/2000 explicitly stipulates under Article 12, paragraph (4) that the sanction applicable for unfair terms is the invalidity of the same, while, according to the provisions of Article 1255 of the New Civil Code (NCC) entitled Partial Invalidity, in case the contract is partially maintained, the null terms are automatically replaced with the applicable legal provisions. Consequently, the national court will not supplement the contract by amending the content of the term by rewriting such term (as, in fact, the Court of Justice indicated in the *Banco Español de Crédito* case), but it will "fill in" the gap occurred as a result of the elimination of such unfair term with the relevant legal provisions in case. As a result, the provisions of Article 6, paragraph (1) of Directive 93/13 do not contravene the provisions of Article 12, paragraph (4) of Law 193/2000, reported to Article 1255 of NCC.

§2. *Sánchez Morcillo* and *Abril García* – Enforcement Proceedings and Unfair Terms

24. The CJEU Approach. The *Sánchez Morcillo* and *Abril García*⁵⁸ decision delivered by CJEU on 17 July 2014 supplements the *Aziz* decision, being part of the same effort of Luxembourg Court to guarantee an effective protection of the mortgage credit consumers during the enforcement proceedings. After *Aziz*, the Spanish legislator amended the Civil Procedure Code (*Ley de enjuiciamiento civil*, hereinafter referred to as LEC) to introduce *the debtor's right to opposition to enforcement* when the presence of an unfair term in the loan credit representing the writ of execution is denounced. By the preliminary questions, the referring court is aimed at establishing whether the provisions of Article 7, paragraph (1) of Directive 93/13 *which lays down on the Member States the obligation to ensure, for the benefit of the consumers, the existence of adequate and efficient means to prevent the use of unfair terms in the contracts between consumers and sellers or suppliers* and of Article 47 of the Charter of Fundamental Rights of the European Union (FREU) related to *the right to a fair trial and equal instruments* must be interpreted to oppose a procedural rule such as that included in the Spanish regulation, more precisely in Article 695, paragraph (4) of LEC, regarding the procedure for objecting to enforcement. Concretely, this is a procedural rule which, when regulating the remedy at law against the decision settling the opposition to enforcement having as object mortgaged goods acknowledges the right of the creditor bringing mortgage enforcement proceedings (the professional) to file an appeal when the debtor's opposition is admitted, while the respective debtor subjected to the enforcement proceedings (the consumer) is not entitled to any remedy at law in case its contestation is rejected. Practically, **if the court of first instance admits the debtor's opposition to the enforcement proceeding, the creditor can attack it by filing an appeal, but if the opposition is rejected, the debtor has no available remedy at law.**

25. Arguing its solution, the Court considers that the regulations applying for the procedure for objection to enforcement stipulated by Article 695 of LEC places the consumer, as a debtor against whom mortgage enforcement proceedings are brought, in a weaker position compared with the seller or supplier, as a creditor bringing mortgage enforcement proceedings, as regards the judicial protection of the rights that he is entitled to rely on by virtue of Directive 93/13 against the use of unfair clauses⁵⁹. In those circumstances, it must be stated that the procedural system at issue in the main proceedings places at risk the attainment of the objective pursued by Directive 93/13. Thus, the imbalance between the procedural rights available to the consumer, on the one hand, and ***to the seller or supplier on the other hand***, simply accentuates the imbalance existing between the parties to the agreement⁶⁰ (in terms of bargaining power and level of knowledge), thus prejudicing the effective consumer protection guaranteed by Directive 93/13, corroborated with Article 47 of the Charter. In other words, this procedural situation consolidates the inequality of the means available to the sellers or suppliers, as creditors bringing mortgage enforcement proceedings, on the

⁵⁸ Case C-169/14, *Juan Carlos Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria SA*, available at curia.europa.eu.

⁵⁹ See paragraph 45 of *Sánchez Morcillo* and *Abril García*.

⁶⁰ *Idem*, paragraph 46.

one hand, and the consumers, as debtors representing the object of such proceedings, on the other hand, in exercising the legal actions based on the rights conferred upon them by Directive 93/13.

26. National Premises of the *Sánchez Morcillo* and *Abril García* decision: Generous vs. Strict Interpretations. Contrary to the Spanish procedural rules, the Romanian legislator acknowledges to the benefit of both parties the right to attack the decision settling the opposition to enforcement, according to the lawful provisions. However, as far as the *admission of the enforcement proceeding*, is concerned, according to Article 665, paragraph (6) NCPC the deed admitting the enforcement proceeding is not subjected to any remedy at law, while **the deed rejecting the proceeding can be appealed against, but only for the benefit of the creditor**, within 5 days from its notification. Consequently, since **the deed admitting the enforcement proceeding cannot be directly attacked by the consumer-debtor representing the object of such enforcement proceeding, the question arises whether this provision is compatible with the EU law in terms of the effective jurisdictional protection of the consumer-debtor**. In a more relaxed interpretation, the decision delivered in the *Sánchez Morcillo* and *Abril García* vs. Banco Bilbao case could generate a debate on its noncompliance with the EU law and could raise a preliminary question whether the provisions of Article 7 of the Directive, corroborated with Article 47 of the FREU Charter must be interpreted as opposing Article 665, paragraph (6) of NCPC. An affirmative answer would establish the right of the Romanian debtors that entered a loan contract to appeal against the deed admitting the enforcement proceeding when the contract based on which such enforcement is requested includes unfair terms⁶¹. On the other hand, in the case of the ambitious interpretations (which, in our opinion, are, however, vulnerable to a certain extent) promoted by CJEU in the *Asturcom Telecomunicaciones* case, at doctrinary level⁶², the opinion that the referred court can analyze of its own motion the unfairness of a term representing the ground of the writ of execution was upheld; the court would reject the claim for the admittance of the enforcement proceeding, the existence of such unfair terms representing the impediments stipulated by law under Article 665, paragraph (5), point (7) of NCPC.

27. However, when idealists get carried away, realists make themselves heard! According to a stricter interpretation of the meaning of the decision, which will certainly have as effect the reduction of its impact on the situation existing in the national environment, there are experts who consider that «although, it apparently deprives the debtor from using the same instruments as those available to the creditor, the above mentioned text does not contravene to the meaning of the directive, since it regulates a summary, non-contentious proceeding, which precedes the actual enforcement. As it is a non-contentious proceeding, the admittance of the enforcement is not concluded with the establishment of a right against the debtor and, as a result, the court authorizing the initiation of the enforcement proceeding is not entitled to check aspects related to the substance of the report resulting in the initiation of such proceeding, a conclusion which can also be drawn considering the limiting cases stipulated in paragraph (5) of the same article in which the admission can be rejected»⁶³. As our legislator stipulated the possibility of annulling the deed admitting the enforcement proceeding by means of an appeal against enforcement [Article 711, paragraph (3) NCPC], we are inclined to consider, beyond the above mentioned arguments regarding the non-contentious nature of the claim for the admittance of the enforcement proceeding, that the latter interpretation seems more pertinent and more balanced. Moreover, even if we consider that the court can analyze the unfair terms as part of the summary admittance procedure, this ruling would be subjected to censure in the larger context of the appeal against enforcement⁶⁴, which thus proves to function as an adequate procedural remedy, likely to allow the control of unfair terms when the enforcement is carried out on the grounds of a contract that includes such terms.

⁶¹ See Ciprian Sandu, Senior Associate Lawyer Dănilă, Petre & Asociații, in Elena Voinea, *O decizie recentă a CJUE clarifică drepturile debitorilor executați silit de bănci. Care sunt efectele concrete în România ?*, 26 August 2014, available at Avocatnet.ro, consulted on 18 November 2014.

⁶² See Mihaela Mazilu-Babel, *Despre creditul ipotecar și executarea silită*, 20 March 2013, available at www.juridice.ro, consulted on 27 August 2014.

⁶³ See Elena Davidescu, Senior Associate at Predoiu Law Firm quoted by Elena Voinea, *op.cit.*, available at Avocatnet.ro

⁶⁴ *Idem*.

IV. Conclusions

28. In a text which is said to contain «the Janus ideology that can be found in most directives on consumer protection»⁶⁵, the test for the identification of the unfairness consecrated by Directive 93/13 represents an original tool used to suppress unfair terms. By the interpretations formulated in the answers to the preliminary questions addressed to the Luxembourg Court, the contribution of such court cannot be ignored. In time, by its interventions, the Court has built a real system for examining of its own motion whether the terms of contracts concluded with the consumer are unfair and the rules established by its case law interventions are gradually integrated in the internal law. Given that only the national court is to rule on the unfairness of a term, taking into account the circumstances of the concrete case submitted to trial, the potential of the CJEU decisions must not be exaggerated. The judge on the Kirchberg plateau establishes only a series of guiding criteria for the national courts. The meaning of the delivered decisions is not to be subjected to subjective and biased interpretations, but to those complying with the reading key proposed by the Court in its case law interventions.

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⁶⁵ See G. Howells, T. Wilhelmsson, *EC Consumer Law*, European Business Law Library, 1996, p.89.