

# The concept of abusive clauses/unfair terms in contracts concluded between the undertakings, on the one hand, and the consumers, on the other hand<sup>1</sup>

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## **Abstract**

Initially, the concept of unfair terms characterized only the contracts concluded between consumers and professionals. Currently, the concept is also incident in other types of contracts. This study only concerns the concept of unfair terms applicable to contracts concluded between consumers and professionals.

Main regulations applicable are represented by Law no. 193/2000 on unfair terms in contracts concluded between professionals and consumers and Directive 93/13 / EEC on unfair terms in consumer contracts (interpreted by the ECJ).

Scientific work is proposed to set up the concept of unfair terms. In order to do so, several steps are to be followed:

1. determining the scope (contracts on the sale of goods or services concluded between professionals and consumers)
2. analysis of unfair terms defining features: (a) the absence of negotiation between the contracting parties, (b) the presence of a significant imbalance between the rights and obligations of the parties, to the detriment of consumers and (c) the breach of good faith
3. the identification of the incident sanctions
4. the highlighting of some procedural features (especially in terms of the effects of court decisions finding the unfairness of a contractual term).

**Keywords:** unfair terms, undertakings, consumers, significant imbalance, good faith

**JEL Classification:** K12, K22

## **1. Preliminary clarifications. Delimitation of the object of the present essay**

According to the current legal rules, *the concept of abusive clauses/unfair terms does not govern anymore exclusively the contracts concluded between undertakings and consumers, but also the contracts concluded amongst undertakings.*

Thus, pursuant to Article 12 *et seq.* of Law No. 72 of 2013, “the practice or contractual clause that, in relation to the creditor, establishes the payment period, the interest rate for late payment or the additional damages in a manifestly inequitable manner is deemed as being abusive.” This regulatory act is applicable to contracts concluded “amongst undertakings or between undertakings and a contracting authority”<sup>3</sup>. It follows from here that, at the present time, under the provisions adopted at domestic level, the concept of abusive clauses/unfair terms is specific to two categories of contracts:

- a) contracts concluded between undertakings and consumers, and

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<sup>3</sup> Pursuant to Article 2 of Law No. 72 of 2013:

- an undertaking is any natural or legal person that is operating an enterprise for profit.
- a contracting authority is:
  - a) any public authority of the Romanian State which acts at central, regional or local level;
  - b) any body of public law, other than the ones mentioned at paragraph a), having legal personality, which was established in order to satisfy needs in the general interest, which is non-profit and is in at least one of the following situations:
    - i) is funded, in its majority, by a contracting authority, as defined at paragraph a), or by another body of public law;
    - ii) is subordinate to or subject to the control of a contracting authority, as defined at paragraph a), or another body of public law;
    - iii) more than half of the members of the management board or, as the case may be, of the supervisory or administrative board are appointed by a contracting authority, as defined at paragraph a), or by another body of public law.

Law no. 72 of 2013 *on the measures for combating delays in the performance of the payment obligations of certain amounts of money arising out of contracts concluded amongst undertakings and between undertakings and contracting authorities* was published in the Official Gazette, Part I, No. 182 of 2 April 2013.

b) contracts concluded amongst undertakings.

However, in this context, it should be mentioned the fact that Law No. 72 of 2013 opted for the wording “abusive clause” even though the directive which this law implements, namely Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions<sup>4</sup>, uses the wording “unfair contractual terms” (Article 7).

The present study relates exclusively to the concept of unfair terms specific to contracts concluded between undertakings (sellers of goods or suppliers of services) and consumers.

## 2. Relevant provisions

The features of the concept of unfair terms<sup>5</sup>, specific to the contracts concluded between undertakings and consumers, arise out of two regulatory acts<sup>6</sup>, one adopted at domestic level and the other one adopted at European Union<sup>7</sup> level.

At EU level, on this matter, it was adopted the **Council Directive 93/13/EEC** of 5 April 1993 *on unfair terms in consumer contracts*<sup>8</sup>, while at domestic level, **Law No. 193 of 2000 on the abusive clauses in contracts concluded between undertakings and consumers**<sup>9</sup>. As it follows from its Article 17<sup>1</sup>, Law No. 193 of 2000 implements Directive 93/13/EEC<sup>10</sup>. The relationship established between the two regulatory acts has legal relevance when it comes to the interpretation of Law No. 193 of 2000. Hence, *Law No. 193 of 2000 must be interpreted in such a manner as to ensure the compatibility with Directive 93/13/EEC*. The fact that Law No. 193 of 2000 is a regulatory act adopted prior to Romania’s accession to the EU and, consequently, before Directive 93/13/EEC was applicable in relation to the Romanian State is of no legal relevance. This follows from the ECJ case law according to which *the interpretation of national law provisions must be made, as far as possible, in conformity with the provisions adopted at EU level. This principle relates to regulatory acts that have entered into force after the Directive 93/13/EEC, but also to those predating it*<sup>11</sup>.

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<sup>4</sup> Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 *on combating late payment in commercial transactions*, published in the Official Journal of the European Union, L series, No. 48 of 23 February 2011

<sup>5</sup> With regards to the qualification of the prohibition to include unfair terms into contracts as a limitation of the freedom of contract, see also: Stanciu D. Cărpenu, *Tratat de drept comercial român*, fourth edition, updated, Ed. Universul Juridic, Bucharest, 2014, p. 408-409.

<sup>6</sup> For a doctrinal analysis of the concept of unfair terms, see: Stanciu D. Cărpenu, *op.cit.*, p. 408-409, Gh. Piperea, *Drept comercial*, Ed. C. H. Beck, Bucharest, 2008, p. 43-64, J. Goicovici, *Dreptul consumației*, Ed. Sfera Juridică, Bucharest, 2000, p. 74-80, Paul Vasilescu (coord.), *Consumerismul contractual: repere pentru o teorie generală a contractelor de consum*, Ed. Sfera Juridică, Cluj-Napoca, 2006, p. 117-152. For examples of Romanian jurisprudence in the matter of unfair terms, see, C. D. Enache, *Clauze abuzive în contractele încheiate între profesioniști și consumatori*, Ed. Hamangiu, Bucharest, 2012.

<sup>7</sup> Further abbreviated as EU.

<sup>8</sup> Council Directive 93/13/EEC of 5 April 1993 *on unfair terms in consumer contracts*, published in the Official Journal of the European Union (OJEU) No. L 95 of 21 April 1993.

<sup>9</sup> Law No. 193 of 2000 *on the abusive clauses in contracts concluded between undertakings and consumers* was published in the Official Gazette No. 560 of 10 November 2000 under the name of Law No. 193 of 2000 on the abusive clauses in contracts concluded between traders and consumers. This regulatory act was last republished in the Official Gazette No. 543 of 3 August 2012.

<sup>10</sup> The relationship between the two regulatory acts was established by Law No. 363 of 2007 on combating the wrongful practices of traders in relation to consumers and to harmonise the provisions on consumer protection to EU legislation, published in the Official Gazette, Part I, No. 899 of 28 December 2007. According to Article I paragraph 6, Law No. 193 of 2000 is supplemented by a new provision pursuant to which “the present ordinance transposes the provisions of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, published in the Official Journal of the European Union (OJEU) No. L 144 of 4 June 1997, as last amended.”

<sup>11</sup> Judgment of the Court of 27 June 2000 rendered in the joined cases: *Océano Grupo Editorial SA v Roció Murciano Quintero (C-240/98)* and *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)*, published in the European Court Reports 2000 I-04941. *The exact wording of the ECJ Judgment is as follows: “The national court is obliged, when it applies national law provisions predating or postdating the said Directive, to interpret those provisions, so far as possible, in the light of the wording and purpose of the Directive.”*

### 3. The scope of the concept of unfair terms

Pursuant to Article 1 of Law No. 193 of 2000, the concept of unfair terms is specific to contracts “concluded between undertakings and consumers for the sale of goods and the supply of services”. First and foremost, in order to configure its scope, we must provide definitions for the concepts of “undertaking” (A), “consumer” (B), “sale of goods” and “supply of services” (C). Law No. 193 of 2000 defines the notions of undertaking and consumer, but does not specify the meaning of the expressions “contract having as object the sale of goods” and “contract having as object the supply of services”.

**A) With respect to the meaning of the notion of “undertaking”** we must have regard to the provisions of Article 2(2) of Law No. 193 of 2003 according to which, «*“undertaking” means any authorised natural or legal person that, under a contract falling within the scope of the present law, pursues a commercial, industrial or manufacturing activity, craft or liberal profession, as well as any person acting for the same purpose in his name or on his behalf.*»

An analysis of the definition leads to the following **conclusions**:

- a) on the one hand, it must be noted the fact that **there are several differences between the definitions provided for the word “undertaking” provided by Law No. 193 of 2000 and the Civil Code**. Thus, the most important one pertains to the non-existence of the requirement to operate an enterprise in the situation of the *undertaking* governed by Law No. 193 of 2000. In accordance with this regulatory act, an undertaking is any person carrying out an activity falling within the category of the ones mentioned above, i.e. commercial, industrial or manufacturing activity, craft or liberal profession. Therefore, the main criterion for qualifying a person as being an undertaking consists in the carrying out of an activity.
- b) on the other hand, it must be noted the fact that Law No. 193 of 2000 operates with **two criteria for qualifying a person as being an undertaking**: an objective criterion and a subjective criterion. **The objective criterion** is represented by “*the pursue/carrying out of an activity*”. This criterion is the qualifying criterion applicable whenever the conclusion of the contracts falling within the scope of Law No. 193 of 2000 is made directly, meaning without the involvement of an intermediary. **The subjective criterion** is represented by the fact of “*acting in the name or on the behalf of an undertaking*”. Thus, the existence of the attribute of “undertaking” for the person in/on whose name or behalf one acts grants the same attribute to the principal or consignee. This qualifying criterion is applicable to the relationship between the principal or consignee and the third party with which he concludes contracts in the performance of the agreement of agency or commission. In the relationship between the principal/consignee and the agent/consignor applies the objective criterion of qualification. Thus, the agent/consignor shall conclude an agreement with a professional principal/consignee if the latter conducts an activity consisting in brokerage operations (meaning that the brokerage operation is not an isolated act).

**B) As regards the meaning of the word “consumer”**, according to Article 2(1) of Law No. 193 of 2003, «*“consumer” means any natural person or group of natural persons forming associations that, under a contract falling within the scope of the present law, acts within purposes falling outside his commercial, industrial or manufacturing activity, craft or liberal profession.*»

An analysis<sup>12</sup> of the definition leads to the following **conclusions**:

- a) a first category of consumers is the one of **natural persons**. According to the definition, natural persons are consumers when they act within purposes which are not related to any possible economic activity that they might carry out. Thus, to the extent that a natural person conducts an economic activity in an organised form without legal personality, as a result of this situation, the natural person does not lose its vocation of being qualified as consumer. He may or may not be a consumer, depending on the capacity in which he acts at the time of the conclusion of the legal

<sup>12</sup> Regarding the concept of consumer, see, J. Goicovici, *op. cit.*, p 15-28, P. Vasilescu (coord.), *Consumerismul contractual: repere pentru o teorie generală a contractelor de consum*, Ed. Sfera Juridică, Cluj-Napoca, 2006, p. 63-83.

act. When a person acts, upon the conclusion of a legal act, as a person who carries out economic activities, then that person may not be qualified as consumer. On the contrary, if he acts as ordinary person, then he may be qualified as consumer.

- b) a second category of consumers is the one of the “**group of natural persons forming associations**”. In connection with this category also, Law No. 193 of 2003 states the fact that the group has the attribute of consumer when acting within purposes falling outside the economic activities that are being conducted. The legal provision gives rise to a question regarding its scope of application.

*A first possible interpretation* would be that the text of law confers upon associations the capacity of consumer. Having this interpretation as hypothesis, we must determine if the text of law would confer the title of consumer only to certain associations or to any association. The text of law does not make any distinction in relation to the object of activity of the association or with regards to the legal basis under which the association was established. The only distinction that the regulatory act makes refers to the type of associates. Therefore, in the interpretation according to which associations may be deemed as being consumers, *within the category of consumers could be falling any association consisting of natural persons, but not the mixed associations (comprising both natural and legal persons)*. From this perspective, it is easy to note that even some *legal persons might be classified as consumers*<sup>13</sup> due to the fact that, according to Government Ordinance No. 26 of 2000, which is the most widely applicable regulatory act in the domain of association establishment, associations set up<sup>14</sup> in compliance to the provisions thereof have legal personality (Article 5).

*A second possible interpretation* would be that the text of law grants the attribute of consumer to the *group of natural persons that have established an association, and not to the association itself*. Hence, this legal norm would refer to a joint action of the natural persons forming the association, within purposes exceeding the activity of the association. In such a situation, it might be given rise to an issue similar to the one arising in the case of natural persons conducting economic activities in an independent manner, individually. As regards the natural persons, the problem created was caused by the fact that they were able to act both within and outside purposes connected to the conduct of their activity. When acting within purposes pertaining to the conduct of the activity, the natural persons acquired the attribute of *undertaking*. Consequently, this gave rise to the question if this attribute produced effects only in relation to the legal relationships connected to the performance of the activity or should have produced effects in relation to all the legal relationships that the natural person has entered into. The choice of the legislator was to tie the attribute of *undertaking* to the exercise of an economic activity, without producing any legal consequence in respect of other categories of legal relationships of the natural person. With regards to the natural persons forming an association, they are able to act together within purposes pertaining to the functioning of the association, but also within purposes exceeding this framework. The text of law under analysis relates to the latter hypothesis, aiming to underline the fact that participating in the

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<sup>13</sup> ECJ has analysed the concept of *consumer*, stating the fact that this notion must be interpreted as referring *exclusively to natural persons*: Judgment of the Court (Third Chamber) of 22 November 2001 rendered in the joined cases of *Cape Snc v Idealservice Srl (C-541/99)* and *Idealservice MN RE Sas v OMAI Srl (C-542/99)*, published in the European Court Reports 2001 I-09049. Pursuant to Articles 267 and 280 of the Treaty on the Functioning of the European Union (TFEU): the Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. The judgments of the Court of Justice of the European Union are enforceable. On the legal regime of the proceedings initiated for the interpretation of the acts of the EU institutions, see: *Klaus-Dieter Borchardt, The ABC of European Union Law*, pp. 107-110 ([http://europa.eu/documentation/legislation/pdf/oa8107147\\_en.pdf](http://europa.eu/documentation/legislation/pdf/oa8107147_en.pdf)); *I.N. Militaru, Dreptul Uniunii Europene (European Union Law)*, Universul Juridic, Bucharest, 2011, p. 274. On the legal regime of the proceedings initiated for the interpretation of the acts of the EU institutions, prior to the Treaty of Lisbon, see: *P. Craig, G. de Búrca, Dreptul Uniunii Europene: comentarii, jurisprudență și doctrină (EU Law: Text, Cases and Materials)*, Hamangiu, Bucharest, 2009, pp. 576-628. The Treaty on the Functioning of the European Union was published in consolidated version in the Official Journal of the European Union (OJ C 326 of 26 October 2012).

<sup>14</sup> According to Article 2(c) read in line with Articles 4 and 5(1) of G.E.O. No. 26 of 2000, associations are established by three or more persons who associate with the purpose of carrying out an activity of general, local (at community level) or group interest (in the personal and non-profit interest of those who form the association).

establishment of an undertaking (the association in question) does not affect the vocation of the associates to act together as a non-undertaking, within purposes that exceed the operation of the association. This is one more argument that the legal provision in question refers strictly to groups of natural persons forming associations, and not to groups of natural and legal persons established in associations. Therefore, even though from a legal perspective, legal persons too have the capacity to set up an association, their exclusion from the definition of consumer is justified by their inability to act within personal purposes, which would exceed the performance of the economic activity, in a manner similar to the natural persons. As a result, the acts of a legal person are always a manifestation of the exercise of the activity for which it was established, thus, the legal person always acts as an undertaking.

**C) In relation to the meaning of the concepts of “sale of goods” and “supply of services”, because Law No. 193 of 2000 lacks a definition in this regard, it is necessary to provide an interpretation thereof.**

Thus, we may outline two alternative interpretations, namely an interpretation in a narrow sense (*stricto sensu*), as well as one in a broad sense (*lato sensu*):

- a) The *stricto sensu* interpretation takes into consideration *the narrow sense of these concepts, as arising out of the provisions of the Civil Code*. As a result, Law No. 193 of 2000 would apply only in relation to two categories of contracts: the contracts of sale, regulated by Article 1650 *et seq.* of the Civil Code, and the works contracts, governed by Article 1851 *et seq.* of the Civil Code.
- b) The *lato sensu* interpretation takes into consideration *the broad sense of these concepts, resulting from the provisions of Directive 93/13/EEC which Law No. 193 of 2000 transposes*. Pursuant to the preamble of this directive, its purpose is to exclude from its scope of application only certain contracts, such as: contracts relating to employment, contracts relating to succession rights, contracts relating to rights under family law and contracts relating to the incorporation and organization of companies or partnership agreements. The examples excluded from the scope of application of this regulatory act are so far off the narrow sense of the concepts of sale of goods and supply of services that they may only lead to the interpretation according to which the concepts of sale of goods and supply of services have a very broad and comprehensive sense. In the default of such an interpretation, i.e. only in the narrow sense interpretation, the exclusions set forth in the preamble would be meaningless because they are not compatible to the significance provided by the Civil Code. This interpretation should prevail for two main reasons. On the one hand, the regulatory act adopted at national level must be interpreted as to ensure the observance of the obligation of the Member States of the European Union to transpose the directives. On the other hand, it follows from the text of Law No. 193 of 2000 that it is applicable also to other contracts, apart from the contracts of sale and the works contracts set forth by the Civil Code. According to the Annex to Law No. 193 of 2000, the provisions of the regulatory act are also applicable to the financial services contract, category which may comprise: credit agreements, leasing contracts, credit facility agreements, etc. Moreover, according to the ECJ case law, the lease agreement is deemed as being subject to the provisions of Directive 93/13/ECC<sup>15</sup>. All the aforementioned contracts exceed the scope of the works contract. In conclusion, Law No. 193 of 2000 applies, in principle, to any contract concluded between undertakings and consumers.

#### **4. The defining features of the concept of unfair terms**

Pursuant to Article 4 of Law No. 193 of 2000, a **contract clause** may be classified as an **unfair term** if it meets, **cumulatively**, the following **conditions**:

- a) it was not directly negotiated with the consumer;

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<sup>15</sup> Judgment of the Court (First Chamber) of 30 May 2013, rendered in the case of *Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v Jahani BV (C-488/11)*, to be published in the European Court Reports 2013, not yet published.

- b) a significant imbalance is being created between the rights and obligations of the parties, to the detriment of the consumer;
- c) it was inserted into the contract contrary to the requirement of good faith.

All 3 conditions **must be met cumulatively at the time of the insertion** into the contract of the potentially unfair term/abusive clause.

From the point of view of **how to prove the fulfilment of the said conditions**, having as starting point the provisions of Law No. 193 of 2000, contract clauses may be classified into two categories:

- 1) clauses whose unfair nature must be proved;
- 2) clauses whose unfair nature is presumed.

Clauses whose unfair nature **must be proved** represents **the rule**. The presumption of the unfair nature of a contract clause is the **exception**. The presumption is **relative**, and its reversal entails the demonstration, made by the undertaking, of the non-observance of any of the 3 conditions that establish the abusive nature of a contract clause. Law No. 193 of 2000 comprises in its Annex<sup>16</sup> an **indicative list** of clauses deemed as unfair. As an example, we may mention: clauses entitling the undertaking to unilaterally alter the contract clauses, without any good reason<sup>17</sup> specified in the contract (Annex – Article 1(a)); clauses that constrain the consumer to conform to certain contract terms which he had no real opportunity to get informed about at the date of the signing of the contract (Annex – Article 1(b)); clauses that grant the exclusive right of contractual interpretation to the undertaking (Annex – Article 1(g)); clauses binding the consumer to pay a disproportionately high amount of money in case of non-fulfillment of the contracted obligations, as compared to the damages borne by the undertaking (Annex – Article 1(i)).

**A) With respect to the negotiated character**, according to Article 4(2) of Law No. 193 of 2000, a contract clause is deemed as being negotiated with the consumer if it was **laid down in the conditions in which the consumer had the opportunity to influence its substance**. The negotiation of some of the contract clauses or of some aspects of a contract clause does not preclude the application of Law No. 193 of 2000 in relation to the other contract clauses or to the part of a clause that was not negotiated (Article 4(3) of Law No. 193 of 2000).

However, Law No. 193 of 2000 sets forth a **presumption** to the benefit of the consumer. Thus, according to Article 4(2) of Law No. 193 of 2000, a contract clause **is deemed as being non-negotiated directly with the consumer if it was included into a pre-formulated standard contract or into the general terms and conditions of sale used by traders**. However, this presumption is **relative** in nature as the undertaking is allowed to bring evidence to the contrary (Article 4(3) of Law No. 193 of 2000).

The negotiation of the contract clauses **should not be confused with the signing of the contract**. The signing of the contract expresses the agreement in respect of the terms of the contract, but is not equal to the negotiation thereof. An interpretation according to which the signing of the contract has the same value as the negotiation thereof would result in depriving Law no. 193/2000 of its legal effects, considering the fact that all contracts are signed.

**B) In relation to the requirement of being created a significant imbalance**, Law No. 193 of 2000 does not provide any details, stating only the fact that the imbalance may be caused by the clause deemed unfair on its own or in correlation with other contract terms (Article 4(1)). However, ECJ has ruled<sup>18</sup> upon the question of the interpretation of this notion, giving shape to the criterion of assessment of the existence of the significant imbalance. Thus, in order to be in the presence of

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<sup>16</sup> The nature of the list was analysed by the ECJ, which concluded that the list is *indicative and non-exhaustive*. Judgment of the Court (First Chamber) of 14 March 2013, rendered in the case of *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* (C-415/11), to be published in the European Court Reports 2013, not yet published.

<sup>17</sup> In practice, it was concluded that the expression “good reason”, which Law No. 193 of 2000 makes reference to, is the situation clearly described in the contract, in relation to objective elements, enabling the consumer to identify the situations in which the contract may be altered and enabling the court to assess if the situation has indeed taken place and if the alteration of the contract was proportional.

<sup>18</sup> Judgment of the Court (First Chamber) of 14 March 2013, rendered in the case of *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* (C-415/11), to be published in the European Court Reports 2013.

significant imbalance, *the consumer should find himself, as a consequence of the concluded contract, in a less favourable legal situation than that provided for by the national law in force applicable in the absence of the contract.*

*Giving rise to a significant imbalance* between the rights and obligations of the parties creates the vocation of *causing material injury* to the consumer. Thus, it should be noted that Law No. 193 of 2000 does not make the existence of the unfairness of a clause subject to the actual incurrance of material injury. For this very reason, a contract clause which creates a significant imbalance between the rights and obligations of the parties may be classified as abusive even though it has not yet managed to produce, in a concrete manner, a material injury.

C) As for the **non-observance of the requirement of good faith**, Law No. 193 of 2000 offers no details. However, ECJ has ruled upon this question too<sup>19</sup>, defining the criterion of assessment of the existence or absence of good faith at the time of the insertion into the contract of the potentially unfair term. Therefore, *good faith* is deemed to *exist if the contracting party of the consumer could reasonably assume that the latter would have agreed to the term suspected of unfairness if individual fair and equitable negotiations would have taken place.*

The necessity to demonstrate the existence or absence of good faith by reference to the moment of the conclusion of the contract should not lead to the result that the behaviour of the undertaking, subsequent to this moment, is totally irrelevant from a legal perspective. Thus, the subsequent behaviour of the undertaking, consisting in the manner in which he acts when relying on the potentially abusive clause, may constitute evidence of how he acted at the time when the term concerned was inserted into the contract.

## 5. Available sanctions in the case of contract unfair terms

**The insertion of unfair terms represents a breach of the undertaking's obligation to not stipulate abusive clauses into consumer contracts**, obligation instated by Law No. 193 of 2000, but also by other regulatory acts, such as: G.O. No. 21 of 1992 (Article 10) or Law No. 296 of 2004 (Article 78). This obligation is a customization of a wider obligation incumbent on undertakings, namely the one to fully, fairly and accurately inform the consumers on the essential characteristics of the products and services and to include into contracts clauses that are clear and unambiguous.

The breach of the obligation to not insert abusive clauses into contracts entails **sanctions in relation to the undertaking in default (A), but also with respect to the unfair term (B) and the concluded contract (C).**

**A) In relation to the sanctions applicable to the undertaking that breaches the obligation to not insert abusive clauses into contracts**, pursuant to Article 16 of Law No. 193 of 2000, the insertion of such clauses into contracts represents a **contravention**, unless it is committed in such a manner as to incur criminal liability. The applicable sanction is a **fine**.

**B) Concerning the sanctions applicable in relation to the unfair term**, according to Law No. 193 of 2000, the violation of the obligation to not insert unfair terms into contracts mainly affects the abusive clause, but, in some situations, it may affect the whole contract.

According to Article 6 of Law No. 193 of 2000, the clause classified as abusive **does not produce any effects against the consumer**. In doctrine, this legal rule has received many interpretations, such as: Article 6 imposes the sanction of considering the clause as unwritten; or, Article 6 imposes the sanction of relative nullity; or Article 6 imposes the sanction of absolute nullity.

ECJ has addressed the issue of the sanctions applicable in relation to clauses that are found as being abusive/unfair. However, no generally applicable sanctions have been identified, but rather principles that should be followed by the national courts. Thus, according to the rulings of the European court, *it is for the national court or tribunal to establish all the consequences arising,*

<sup>19</sup> Judgment of the Court (First Chamber) of 14 March 2013, rendered in the case of *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* (C-415/11), to be published in the European Court Reports 2013.

under national law, from qualifying a term as unfair, in order to ensure that the consumer is not bound by that clause<sup>20</sup> without amending the contract in question by altering the wording of that clause. Therefore, the only sanction that is suitable in this case, in order to ensure the conformity with the European regulatory act, is to eliminate the unfair term<sup>21</sup>.

Regarding the aspect of considering the **clause as unwritten**<sup>22</sup>, it actually has no relevance due to the fact that, at the present time, Law No. 193 of 2000 makes direct reference to the enforcement of the sanction of nullity. As for the nullity, currently, Law No. 193 of 2000 expressly refers to the application of this sanction, but **does not stipulate which type of nullity is involved. However, there cannot be accepted the sanction of relative nullity.** Relative nullity entails the violation of a legal rule protecting a particular interest (Article 1248 Civil Code). The rules and regulations on the prohibition of unfair terms into contracts **protect a general interest** since: their infringement was qualified as **contravention**, which demonstrates the fact that the social value protected by these norms is of public interest, and, as it follows from the ECJ case law rendered in connection to Directive 93/13/EEC, national courts **are bound to assess, ex officio**, the unfairness of the contract terms, situation which is specific only to legal provisions that protect a general interest<sup>23</sup>. Consequently, starting from the fact that the provisions that prohibit the insertion of unfair terms into contracts are protecting a general interest, **the nullity deriving from their violation** may not be other than the **absolute nullity**.

C) **In respect of the contract containing unfair terms**, Articles 6 and 7 of Law No. 193 of 2000 state that it may continue to produce effects or it may be nullified.

**The furthering of the contract** intervenes when, after the removal of the unfair terms, it *has the vocation to continue to be performed*. Law No. 193 of 2000 also makes reference to the *existence of the assent of the consumer* in this regard (Article 6 of Law No. 193 of 2000).

The voidance of the contract intervenes when, after the removal of the unfair terms, it *no longer has the vocation to continue to be performed* (*per a contrario* Article 6 of Law No. 193 of 2000). Moreover, the voidance of the contract may also occur when the contract may continue to be executed, but the *consumer does not give his assent* on this matter. Article 7 of Law No. 193 of 2000 refers to the voidance of the contract as a result of its termination. Concretely, the voidance of the contract is the result of the non-fulfilment of the obligation arising under the law and which is specific to the conclusion of the contract, and not the result of the non-performance of an obligation deriving out of the contract. Therefore, the reference to “termination” should be interpreted as

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<sup>20</sup> Judgment of the Court (First Chamber) of 6 October 2009, rendered in the case of *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* (Case C-40/08), published in the European Court Reports 2009 I-09579; Order of the Court (Eighth Chamber) of 16 November 2010, rendered in the case of *Pohotovost' s.r.o. v Iveta Korčkovská* (C-76/10), published in the European Court Reports 2010 I-11557

<sup>21</sup> Judgment of the Court (First Chamber) of 14 June 2012, rendered in the case of *Banco Español de Crédito SA v Joaquín Calderón Camino* (C-618/10), to be published in the European Court Reports 2012; Judgment of the Court (First Chamber) of 30 May 2013, rendered in the case of *Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v Jahani BV* (C-488/11), to be published in the European Court Reports 2013.

<sup>22</sup> Even before the institution of the sanction of nullity, the sanction of considering the clause as unwritten could have not been admitted for several reasons. Firstly, the sanction of considering the clause as unwritten **has not received a general legal institution prior to the New Civil Code**. Under these conditions, the qualification of Article 6 of Law No. 193 of 2000 in the light of a concept not found in the Romanian legislation would have raised questions of legality. Secondly, in the context of the New Civil Code, in order to be in the presence of an unwritten clause it is necessary **to expressly regulate this kind of nature** and not to assume this by way of interpretation (unlike nullity, there can be no assumption on the virtual unwritten nature of a clause). In these circumstances, it cannot be stated that Article 6 of Law No. 193 of 2000 qualifies the unfair terms as being unwritten.

<sup>23</sup> Judgment of the Court of 27 June 2000, rendered in the joined cases of *Océano Grupo Editorial SA v Roció Murciano Quintero* (C-240/98) and *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), published in the European Court Reports 2000 I-04941; Judgment of the Court (First Chamber) of 6 October 2009, rendered in the case of *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* (C-40/08), published in the European Court Reports 2009 I-09579; Judgment of the Court (Grand Chamber) of 9 November 2010, rendered in the case of *VB Pénzügyi Lízing Zrt. v Ferenc Schneider* (C-137/08), published in the European Court Reports 2010 I-10847; Judgment of the Court (Fourth Chamber) of 4 June 2009, rendered in the case of *Pannon GSM Zrt. v Erzsébet Sustikné Györfi* (C-243/08), published in the European Court Reports 2009 I-04713; Order of the Court (Eighth Chamber) of 16 November 2010, rendered in the case of *Pohotovost' s.r.o. v Iveta Korčkovská* (C-76/10), published in the European Court Reports 2010 I-11557; Judgment of the Court (First Chamber) of 14 June 2012, rendered in the case of *Banco Español de Crédito SA v Joaquín Calderón Camino* (C-618/10), to be published in the European Court Reports 2012.

establishing, to the benefit of the consumer, a **unilateral right of withdrawal**<sup>24</sup> (Article 1321 of the Civil Code).

## 6. Procedural issues regarding the enforcement of the sanctions arising from the insertion of unfair terms into contracts

In the enforcement of the sanctions for the breach of the obligation to not include unfair terms into contracts, Law No. 193 of 2000 sets 3 methods of action:

- a) the direct action of the consumer;
- b) the action of the National Authority for Consumer Protection (ANPC) and of the authorized specialists of other bodies of the public administration; and
- c) the action of the associations for consumer protection.

In relation to each one of the three actions, Law No. 193 of 2000 specifies the corresponding type of sanction and also who are the persons affected by the rendered decision.

**The direct action of the consumers** is characterized by the fact that it has the vocation to lead exclusively to the enforcement of civil sanctions, and not of contraventions. As to the effects of the rendered judgement, they pertain exclusively to the contract concluded between the consumer-plaintiff and the undertaking-defendant.

**The action of the National Authority for Consumer Protection (ANPC) and of the authorized specialists of other bodies of the public administration** is characterized by the fact that it has the vocation to lead to the enforcement of both civil sanctions and contraventions. As to the effects of the rendered judgement, they cover all the contracts in progress, concluded by the undertaking-defendant, as well as the pre-formulated standard contract intended to be used in his activity. Thus, according to Articles 12(1) and 13(1) of Law No. 193 of 2000, in the situation in which it is ascertained the use of pre-formulated standard contracts comprising unfair terms, the control bodies provided for in Article 8 (the authorised representatives of the National Authority for Consumer Protection, as well as the specialists of other bodies of the public administration) shall refer the matter to the court of the domicile or, where appropriate, of the main office of the undertaking, requesting to order the latter to alter all contracts in progress by removing the unfair terms. The court, in case it finds the existence of unfair terms in the contract, orders the undertaking to alter all the pre-formulated standard contracts in progress, as well as to remove the unfair terms<sup>25</sup> from the standard contracts intended to be used in his professional activity.

**The action of the associations for consumer protection** is characterized by the fact that it has the vocation to lead exclusively to the enforcement of civil sanctions, and not of contraventions. As to the effects of the rendered judgement, they cover all the contracts in progress, as well as the pre-formulated standard contracts (Article 12(3) in conjunction with Articles 14(1) and 14(4) of Law No. 193 of 2000).

## 7. Conclusions

The concept of unfair term has emerged from rules adopted both at national and European (EU) level. The most important are Law No. 193 of 2000 and Directive 93/13/EEC. However, it is essential to be acquainted with the ECJ case law as it provides landmarks for establishing the main features of the unfair terms: non-negotiation, significant imbalance and the lack of good faith. Moreover, the ECJ case law has offered also the guidelines on the sanctions applicable in case of the violation of the obligation to not insert unfair terms into contracts concluded between

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<sup>24</sup> There can be no discussion on the general voidance of the contract because the insertion of unfair terms is, as a principle, a cause of partial nullity reflected solely on the unfair term.

<sup>25</sup> Concerning the actions initiated by ANPC and other bodies of control, namely the associations of consumer protection, Law No. 193 of 2000 comprises no express provisions imposing the sanction of nullity. This is required for the same reasons. An additional argument is the fact that the effect of the court judgments, issued upon the request of ANPC and other bodies of control, was to eliminate the unfair term/terms from the contracts. This result is one of the effects of nullity, being thus an indirect establishment of the enforcement of this sanction, regardless of the petitioner.

undertakings and consumers. Sanction-wise, it should be afforded special attention to the legal regime of the rendered rulings. Thus, in certain situations, their effects are reflected also on persons that were not parties to the judicial proceedings, by ordering the undertaking to remove the unfair terms from all the contracts in progress, as well as from the pre-formulated standard contracts intended to be used in his economic activity.

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