

THE DISPUTE OVER INVOKING ABUSIVE CLAUSES INSERATED IN BANKING CONTRACTS IN THE TRIAL OF A CONTESTATION OF THE EXECUTION - ALIGNMENT TO EUROPEAN TRENDS IN THE MATTER*

Adriana Ioana PÎRVU**

Abstract: *The number of cases concerning the abusive clauses inserted in banking contracts, trialed in front of the national courts, is a considerable one. It seems like the compliance of the national regulations with the provisions of Directive 93/13 / EEC on 5 April 1993 on unfair terms in consumer contracts, is a difficult process. The purpose of the present study is to observe the current state of the alignment of the national legislation and jurisprudence to the European tendencies in the matter. In particular, we are interested in the admissibility of invoking abusive clauses in the process of a contestation of an execution, since the national case law is not unitary in this regard. Even in theory, opinions are divided. On June 26, 2019, the European Court of Justice expressed its opinion on this matter, in the cause C-407/18, the case of Aleš Kuhar, Jožef Kuhar v Addiko Bank d.d. At the end of the study, we aim to point out the main directions set at European level that must be followed by the national legislation and case law of a Member State.*

Key words: *Private law, Banking law, abusive clauses, banking contracts.*

Introduction

Although it does not define abuse in law or of law, the Civil Code¹ stipulates in article 15, entitled *Abuse of law*: “No right can be exercised in order to harm or damage others in an excessive or unreasonable way, contrary to good faith”.

The abusive clause is not defined by the Civil code, either. However, it is regulated by Law no. 193/2000 regarding the abusive clauses in the contracts concluded between professionals and consumers. According to art. 4 paragraph (1) of the law, “A contractual clause that has not been negotiated directly with the

* The article was prepared for the International Law Conference, "Current Issues within EU and EU Member States: Converging and Diverging Legal Trends", 3rd edition, organized by the Faculty of Law - Transilvania University of Braşov on the 29th-30th of November 2019. All links were last accessed on 1 November 2019.

** Senior Lecturer, PhD - Faculty of Economic Sciences and Law, University of Pitesti (adrianapatoiu@yahoo.com).

¹ Law no. 287 from 17 July 2009 regarding the Civil Code, republished in the Official Journal of Romania, Part I, no. 505 from 15th of July 2011.

consumer will be considered abusive if, by itself or in conjunction with other provisions of the contract, it creates, to the detriment of the consumer and contrary to the requirements of good faith, a significant imbalance between the rights and obligations of the parties". Further, paragraph (2) provides that "a contractual clause will be considered as not being negotiated directly with the consumer if it has been established without giving the consumer the possibility to influence its nature, such as the pre-formulated standard contracts or the general conditions of sale practiced by traders on the market of the respective product or service". In the annex that forms an integral part of the law, a series of clauses considered by the legislator to be abusive are listed, as an example.

The law faithfully reproduces the provisions of art. 3 paragraph (1) and paragraph (2) of the Council Directive 93/13 / EEC of April 5, 1993 regarding the abusive clauses in the contracts concluded with the consumers. The protection system created by the directive envisages the consumer who is inferior to a seller or a supplier in terms of bargaining power and the level of information, a situation that ends with the former's adherence to the conditions imposed.

The Directive mentions in Article 6 paragraph (1) that it is the responsibility of the Member States to ensure that the use of abusive clauses inserted in a contract between a seller or supplier and a buyer, concluded in accordance with national law, will not create obligations for the consumer, and the contract will continue to engage the parties only insofar as it can continue to exist without abusive clauses. Moreover, art. 7 paragraph (1) provides that "States shall ensure that, in the interests of consumers and competitors, there are adequate and effective means to prevent the continued use of abusive clauses in contracts concluded with consumers by sellers or suppliers."

In many cases, the Court held that the inequality between the consumer and the seller or supplier could only be compensated by a positive intervention, outside the contracting parties (Judgment of June 27, 2000, *Océano Grupo Editorial*, C 240/98, EU:C:2000:346, paragraph 27, as well as the Judgment of 26 October 2006, *Mostaza Claro*, C 168/05, EU:C:2006:675, paragraph 26). Thus, the Court considers that in such cases the intervention of the national courts is needed and they are obliged to assess the abusive nature of a contractual clause ex officio. The aim of such an intervention is to create a substitution of the formal balance established through the contract, with a real one (Judgement of 6 October 2009², *Asturcom Telecommunicationes*, C-40/08, EU:C:2009:615, paragraph 30).

In this sense, we interpret the provision inserted in art. 1 letter q of the annex to Directive 93/13 / EEC, which includes among the abusive clauses those clauses that have as their object or effect "the exclusion or obstruction of the consumer's

² Judgement of 6 October 2009, *Asturcom Telecommunicationes*, C-40/08, EU:C:2009:615, available on <http://curia.europa.eu/juris/document/document.jsf?text=&docid=77861&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=586083>.

right to bring legal proceedings or to exercise any other appeal, in particular by requesting the consumer to refer exclusively to an arbitration court that is not regulated by the legal provisions, unjustifiably restricting the evidence at his disposal or imposing the burden of proof which, in accordance with the law applicable, it must intervene to another part of the contract ”.

With regard to the present study, its purpose is to identify in what extent it is permissible to invoke the abusive clauses in a forced appeal and whether or not the prohibition of such an action is an infringement of the consumer's right to action.

1. The character of the rules regarding the abusive clauses

Directive 93/13, as a whole, is regarded as absolutely necessary for the fulfilment of the measures taken by the European Union, by increasing the level and quality of life at Union's level.

As regards Article 6 of the Directive, it is considered to contain an imperative rule. Based on the nature and importance of the public interest protected by the directive, the Court of Justice of the European Union emphasized that Article 6 "must be considered a norm equivalent to the national norms that occupy, within the internal legal order, the rank of norms of order public " (Judgement of 6 October 2009, *Asturcom Telecommunicationes*, C-40/08, EU:C:2009:615, paragraph 52)³.

2. Aspects of comparative law. Divergences and convergences in the practice of national courts at European Union's level

2.1. Hungary

Regarding the abusive clauses, they were initially regulated by art. 209 of the Civil Code of 1997. It offered a party the opportunity to challenge any general contractual condition considered abusive. As a result of such an appeal, the contract was losing the legal force, retroactively, from the date of its conclusion.

Subsequently, Government Decree no. 18/1999 regarding the clauses to be considered abusive in the contracts concluded with a consumer, classified the contractual clauses into two categories: clauses whose stipulation in the contracts was prohibited, their insertion in the contract being sanctioned with the nullity, and clauses considered abusive until the contrary was proven, such a presumption could have been overturned by the author of the clause.

Without expressly ruling on the invocation of abusive clauses directly in the procedure for contesting forced execution, the Court of Justice of the European Union ruled in a case brought by a national court of Hungary in the sense that an abusive contractual clause does not create obligations for the consumer, even if he

³ *Idem.*

has not made an express request in this regard. A contrary interpretation would exclude the right of the national court to ex officio analyze the abusive character of the clause, when analyzing the admissibility of the request with which it was referred (Judgement of 4 June 2009, *Pannon GSM zrt.*, C-243/08, EU:C:2009:350, paragraph 24)⁴.

The Court underlined that the national court to whom the cause was brought to notice has the obligation to compensate for the imbalance between the seller or the supplier and the buyer. The role of the national courts is not only to decide on the possible abusive nature of a contractual clause, but also the duty to examine this aspect ex officio, as soon as it has the necessary legal and factual elements in this regard.

2.2. Spain

As was natural, Spain has aligned its internal regulations on consumer protection with the requirements of Directive 93/13/EEC. Thus, the provisions of Law no. 26/1984 on the protection of consumers and users were modified by Law no. 7/1998 regarding the general conditions of the contracts, which transposed the provisions of the directive.

The amended Law no. 26/1984 contains a new article, introduced by the law no. 7/1998, respectively art. 10 bis, which stipulates, in paragraph (1): “any provisions that have not been the subject of individual negotiations are considered abusive clauses, which, despite the requirements of good faith, create to the detriment of the consumer a significant imbalance between the rights and obligations of the parties arising from the contract”.

Starting from this provision, from a procedural point of view, the question has been asked whether, Directive 93/13 should be interpreted as meaning that a national court seized with a request for enforcement of an arbitral decision that has acquired judicial authority is obliged to establish ex officio the abusive character of an arbitration clause contained in a contract between a seller or supplier and a consumer, as well as to annul the respective decision (Judgement of 6 October 2009, *Asturcom Telecommunicationes*, C-40/08, EU:C:2009:615, paragraph 59)⁵.

The imperative of the norm contained in art. 6 of the directive imposes on the national court notified the ex officio assessment regarding the compliance of the arbitration clause with the national norms of public order and, at the same time, imposes the obligation to assess the abusive character of the clause ex officio

⁴ Judgement of 4 June 2009, *Pannon GSM zrt.*, C-243/08, EU:C:2009:350, available on <http://curia.europa.eu/juris/document/document.jsf?text=&docid=74812&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=1186162>.

⁵ Judgement of 6 October 2009, *Asturcom Telecommunicationes*, C-40/08, EU:C:2009:615.

(Judgment of 26 October 2006, *Mostaza Claro*, C 168/05, EU:C:2006:675, paragraph 39)⁶.

To bring us closer to the proposed topic, we recall a relatively recent Judgement of 18 february 2016, *Finanmadrid EFC SA*, C-49/14 EU:C:2016:98, paragraph 2 of the summary)⁷. As a result of the questions referred to, the Court stated that the correct interpretation of the provisions of Directive 93/13 indicates that it "opposes a regulation of a Member State that does not allow the court that was notified with the execution of a payment order to ex officio assess the abusive character of a clause contained in a contract concluded between a professional and a consumer, if the authority notified with the request for payment order is not competent to proceed with such an assessment".

As long as the payment order procedure, as regulated by Spanish law, is, apart from the circumstances that attract the intervention of the judge, a closed one, without being able to control the existence of abusive clauses in a contract concluded between a professional and a consumer, the effectiveness of the protection of the rights deriving from Directive 93/13 is affected. The same is the result in the situation in which the court notified with the execution of the payment order is not competent to assess ex officio the existence of such clauses. The procedural system of a Member State must allow, in the case of a payment order procedure or a procedure for the execution of a payment order, an ex officio control of the clauses with a potential abusive content.

2.3. Slovakia

Focusing on the topic chosen for analysis, we conclude the comparative view on the procedural aspects pertaining to the jurisdiction of the courts to rule on the abusive nature of clauses inserted in contracts concluded between professionals and consumers, in various procedural stages, with a kind of the banking field, which concerns the possibility of invoking abusive clauses through an enforcement appeal.

Council Directive 87/102/EEC of 22 December 1986 on the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, as amended by Directive 98/7/EC of the European Parliament and of the Council, of 16 February 1998 (currently repealed by Directive 2008/48 / EC of the European Parliament and of the Council of 23 April

⁶ Judgment of 26 October 2006, *Mostaza Claro*, C 168/05, EU:C:2006:675, available on <http://curia.europa.eu/juris/document/document.jsf?text=&docid=63926&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1014913>.

⁷ Judgement of 18 february 2016, *Finanmadrid EFC SA*, C-49/14, EU:C:2016:98, available on <http://curia.europa.eu/juris/document/document.jsf?text=&docid=185933&pageIndex=0&doclang=RO&mode=req&dir=&occ=first&part=1&cid=1253779>.

2008), supported the involvement of the Member States in maintaining or applying stricter consumer protection measures.

A national court in Slovakia has referred the Court of Justice of the European Union with a preliminary question regarding the competence of a national court empowered to solve a request of a forced execution of a final arbitration ruling, to assess, even *ex officio*, the disproportionate character of the penalty provided in the credit contract, concluded between a financial service provider and a consumer, if, according to the national procedural rules, this court may proceed to such an assessment in some similar procedures, based on national law (Judgement of 16 November 2010, *Pohotovost` s.r.o.*, C-76/10. EU:C:2010:685, paragraph 29)⁸.

The judgment of the Court was similar to the judgment in *Asturcom Telecommunicationes*, mentioned above.

Thus, the Court has decided that the provisions of Directive 93/13 impose on the national courts the obligation to assess, even *ex officio*, the abusive nature of the penalties provided for in the credit agreement concluded between a financial service provider and a consumer, a penalty that has been applied through an arbitration decision, which has acquired judicial authority and which was rendered in the absence of the consumer. The national court will rule in so far as it has the elements regarding the legal and factual situation necessary for this purpose, and, according to the national procedural rules, the court can proceed to such an assessment in similar procedures based on national law.

3. Current trends, at European level, in establishing the competence to appreciate the character of the abusive clauses included in the banking contracts

Recently, the Court of Justice of the European Union was referred again with a request for a preliminary ruling on the interpretation and application of Directive 93/13, by a national court in Slovenia, in *Ales Kuhar, Jozef Kuhar v. Adikko Bank dd*, C-407/18.

In Slovenian law, Article 24 of the Law on consumer protection no. 98/2004 provides that those contractual clauses which either cause, to the detriment of the consumer, a significant imbalance between the contractual rights and obligations of the parties, or cause the execution of the contract to be considered abusive either harmful to the consumer, without a fault thereof, or leading to a significantly different performance of the contract, against the reasonable expectations of the consumer or contrary to the principles of good faith and loyalty.

In the case brought before the Slovenian court, the applicant requested for the forced execution of a mortgage loan contract, concluded between a professional and a consumer in the form of a direct executory notarial act. According to the

⁸ Judgement of 16 november 2010, *Pohotovost` s.r.o.*, C-76/10. EU:C:2010:685, available on <http://curia.europa.eu/juris/document/document.jsf?text=&docid=79737&pageIndex=0&dclang=en&mode=lst&dir=&occ=first&part=1&cid=2873234>.

Slovenian law, "the notarial act which provides for an obligation to give, to do, not to do or to allow something, which may be the subject of a transaction, constitutes an enforceable title, if the obliging party expresses itself, in the same act or in a separate notarial act, the consent regarding its directly enforceable character and if the respective claim is due" (Judgement of 26 June 2019, Ales Kuhar, C-407/2018, EU:C:2019:537, paragraph 16 regarding art. 4 of the Law on the notarial activity no. 2/07)⁹.

The Court considered, as we were accustomed, that in the light of Directive 93/13, the principle of effectiveness must be respected, which is not the case in the such a national regulation, under which the national court cannot, at the consumer's request or ex officio, examine whether or not certain clauses inserted in a contract are abusive, within the meaning of the directive.

4. National regulation and case law

According to art. 713 paragraph (2) of the Civil Procedure Code: "If the forced execution is done under a title other than a court decision, the appeal can be invoked in the execution and for reasons of fact or of law regarding the substance of the contained law in the enforceable title, only if the law does not provide in connection with that enforceable title a procedural route for its termination, including an action of common law".

Regarding the admissibility of the invocation of the abusive clauses in the contest to the execution, we find that the practice of the courts is *not* unitary.

The majority of the courts consider that "the invocation of the abusive clauses is subsumed to the situation in which defences regarding the extension of the belief are invoked, so that from a procedural point of view the qualification is the one of challenge to the actual execution".

Another part of the jurisprudence considers that the invocation of the abusive clauses regarding the appeal must be qualified as an enforcement challenge regarding the clarification of the meaning, scope and application of the enforceable title.

There is also a part of the jurisprudence that requires an analysis of the abusive clauses through the prism of the European jurisprudence in this matter, provided that the national procedural law is respected.

Finally, in line with the European jurisprudence in this matter, there are also courts that have understood to exonerate the nullity of the abusive clauses, in the files in which a challenge to the execution is solved.

We remind that the High Court of Cassation and Justice has relatively recently ruled that "although Law no. 193/2000 on the abusive clauses in the contracts

⁹ Judgement of 26 June 2019, Ales Kuhar, C-407/2018, EU:C:2019:537, available on <http://curia.europa.eu/juris/document/document.jsf?text&docid=215509&pageIndex=0&doclang=EN&mode=lst&dir&occ=first&part=1&cid=1121608>.

concluded between professionals and consumers does not provide as a sanction the cancellation of the clauses of an abusive character, but the in-opposability (or ineffectiveness) of them in relation to with the consumer the legal regime of this sanction being identical to that of absolute nullity". In accordance with the jurisprudence of the Court of Justice of the European Union, the JCCJ emphasized that the rules of Law 193/2000 are aimed at the protection of a general interest, and not of an individual interest, the law pursuing the protection of a generic category, that of consumers. Therefore, the sanction that intervenes in case of violation of these norms will be the absolute nullity, which can be invoked at any time by any interested person, even by the court *ex officio*.

Conclusions

We find that at national level, we have varied case law in the field. However, the issue under discussion has not yet been appealed in the interest of the law. It notes, however, that it tends to align with European trends in the field. Thus, the analysis of the clauses considered to be abusive is to be done on the basis of the law and the jurisprudence in this matter, in compliance with the national procedural law, regarding the legality of the investing of the court and of the term in which the appeal must be formulated.