

# RECENT CLARIFICATIONS BY THE EUROPEAN COURT OF JUSTICE ON THE MEANING OF THE NOTION OF CONSUMER

Mihaela Georgiana ILIESCU\*

## ABSTRACT

*Despite the fact that the doctrine of the concept of consumer has been given priority, and the Court of Justice of the European Union has had the opportunity to rule on numerous occasions on the interpretations given to this concept, this topic has not been exhausted yet, as practice shows that new explanations or additions are still needed. This study aims to complement the portrait of the European consumer, in the light of recent case law of the Court of Justice of the European Union.*

**KEYWORDS:** *consumer, average consumer, CJEU, unfair terms, contractual balance;*

## Introductory considerations

Knowing that the premise from which the legal relationship starts from the right of consumption is that the parties to the legal relationship - the consumer and the professional - are in a position of inequality which has as main consequence the alteration of the contractual balance, the norms of consumer law come to counterbalance this inequality and to restore the possibility for the consumer to express a free, unaltered and informed will, thus to remedy the contractual imbalance.

The main reason for the need to clarify the notion of consumer is that in the European Union the multiple directives in the field of consumer protection do not lead to a unified conception of this notion. If the notion of consumer is a notion with a variable content, it is largely the result of the fragmentation of legal rules in Union law in general and in consumer

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\* Assistant professor Ph.D., Law Faculty, "Titu Maiorescu" University, Bucharest, Romania.

law in particular<sup>1</sup>. It is an operational and dynamic notion, which is defined by reference to the content of each normative act in question.<sup>2</sup>

In this context, a significant role in the process of standardizing the application of the legal norms incident to the notion of consumer and implicitly in clarifying this notion belonged to the Court of Justice of the European Union<sup>3</sup>. Thus, the Luxembourg Court, by virtue of its interpretive role, had the opportunity to rule on a number of issues relating to consumer status<sup>4</sup>.

Recently, the CJEU added new clarifications on the interpretation of the concept of consumer in European Union law. These were occasioned by requests for preliminary Judgments in the field of unfair terms addressed to the Court by a court in Romania and one in Poland. The references for a preliminary Judgment concern, inter alia, the interpretation of Article 2 (b) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, that is to say, the interpretation of the concept of consumer in that directive.<sup>5</sup>

In the following we will present the context and the issues that were analyzed by the Court in relation to the meaning of the notion of consumer, as they emerge from the two judgments.<sup>6</sup>

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<sup>1</sup> H.-W. Micklitz, «La main visible du droit privé réglementaire européen», *Revue Internationale de Droit Economique*, 2014/1, p. 5.

<sup>2</sup> See K. Mortelmans and S. Watson, „The Notion of Consumer in Community Law: A Lottery?“, in J. Lonbay (ed.), *Enhancing the Legal Position of the European Consumer*, BIICL, 1996, p. 36-57; M. Ebers, «The notion of “consumer”», in *Consumer Law Compendium*, [www.eu-consumer-law.org](http://www.eu-consumer-law.org).

<sup>3</sup> For a comprehensive study of the CJEU's interpretations of consumer law, see, C. Toader, F. Lecomte, *Les derniers développements dans la jurisprudence de la Cour de Justice en matière de droit de la consommation*, *Revue des Affaires européennes*, 2014/4, p. 751-767.

<sup>4</sup> M. Iliescu, *Reperă jurisprudențială europeană privind conceptul de consumator*, in the „Curierul Judiciar” Journal no. 3/2018, p. 140, C.H. Beck Publishing House, Bucharest, 2018.

<sup>5</sup> JO 1993, L 95, p. 29, Special edition, 15/vol. 2, p. 273.

<sup>6</sup> Judgment of the Court (Fourth Chamber) of 9 July 2020, ECLI:EU:C:2020:537 and the Order of the Court (Seventh Chamber) of 10 June 2021, ECLI:EU:C:2021:481.

## **1. Judgments of the Court of 9 July 2020 in joined cases C-698/18 and C-699/18<sup>7</sup>**

The first case has as a starting point the credit agreement having as object the granting of a personal needs loan which matured during 2015, the date on which the loan was fully repaid by the person concerned. Subsequently, considering that certain clauses of this contract were abusive, the borrower JB notified, in December 2016, the Court of Târgu Mureş with an action aimed at establishing the abusive nature of these clauses. Raiffeisen Bank relied on the exception of JB's lack of active procedural capacity, since, at the time the action was brought, the person concerned was no longer a consumer, given that, at that time, relations between the parties to the credit agreement in question had ceased, and that contract had been terminated in the previous year by its full performance.

In the second related case, KC and another party, as co-borrower, entered into a credit agreement with BRD Groupe Société Générale SA in May 2003. In March 2005, as a result of an early repayment, the loan was considered liquidated and the credit agreement was terminated. After more than ten years, in July 2016, the applicant applied to the Târgu Mureş District Court for an action for a declaration that the terms of that contract were abusive. In addition, the applicant requested the cancellation of these clauses and the refund of any amount paid under them, as well as the payment of a legal interest calculated on the amounts subject to refund. BRD Groupe Société Générale claimed that the applicant was no longer a consumer, given that, at the time the action was brought, relations between the parties had ceased and that the contract had been terminated for 11 years by early repayment.

It should be noted that the referring court does not expressly ask any questions concerning the interpretation of the concept of consumer, however, it finds that it must be determined whether Directive 93/13/EEC continues to apply after the full performance of a contract concluded by a person who has undoubtedly benefited from consumer status, at the time of the conclusion of the contract containing unfair terms.

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<sup>7</sup> ECLI:EU:C:2020:537.

Thus, *the issue that arises in the context presented is to establish, from a temporal point of view, the quality of "consumer"; specifically, if the natural person who has concluded a (loan) contract for extra-professional purposes, after the moment of execution of that contract, must be considered a consumer.*

In arguing its judgment, referring to the interpretation to be given to the concept of consumer, the Luxembourg Court points out that the system of protection established by Directive 93/13 is based on the idea that a consumer is inferior to a professional in terms of both bargaining power and the level of information, a situation that leads him to adhere to the conditions previously drafted by the professional, without being able to exert an influence on their content.<sup>8</sup> The Court considers it necessary to specify that uniform rules of law as regards the unfair terms provided for in the Directive must apply to "all contracts" between 'professionals' and 'consumers' as defined in Article 2 (b) and (c) thereof,<sup>9</sup> and according to Article 2 (b), "consumer" means any natural person who, under contracts covered by this Directive, is acting for purposes which are outside his trade. Following its reasoning, the Court points out that the definition of 'consumer' in Article 2 (b) of Directive 93/13 *does not contain any element enabling the determination of when a contractor ceases to be a consumer within its meaning* and it is therefore no longer possible to rely on the protection afforded to it by this Directive.

In accordance with the Opinion of the Advocate General<sup>10</sup>, The Court will state that the performance of the contract in question does not

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<sup>8</sup> Judgment of 19 December 2019, *Bondora*, C-453/18 and C-494/18, EU:C:2019:1118, section 40 and the case law cited.

<sup>9</sup> Judgment of 21 March 2019, *Pouvin and Dijoux*, C-590/17, EU:C:2019:232, section 19.

<sup>10</sup> In a detailed and well-argued statement, the Advocate General states in his Opinion that „performance of the contract does not retroactively alter the fact that, at the time of its conclusion, the consumer was in such a situation of inferiority. In such a context, unfair terms, which create a significant imbalance to which the consumer adheres, are included in the contract and continue to be the basis for transfers made by the parties to the contract during its performance.” This solution is based on the fact that in most private law systems, a contract terminates as soon as all obligations under this contract are performed, but it must be borne in mind that the contract is the basis for transfers that took place during its execution. Thus, the fully executed contract remains mandatory, in the sense that it continues to be the basis for previous transfers. On the other hand, the full performance of the contract does not change the fact that, in the

retroactively alter the fact that, at the time of the conclusion of that contract, the consumer was in this inferior situation. In those circumstances, the limitation of the protection afforded to the consumer by Directive 93/13 only during the performance of the contract in question, in the sense that the full performance of this contract precludes any possibility for the consumer to avail himself of this protection, it cannot be reconciled with the system of protection established by this Directive. Such a limitation would be inadmissible, in particular in the case of contracts which are performed immediately after or at the time of their conclusion, since that would not allow consumers a reasonable period to challenge the unfair terms which may be used in such contracts. An additional argument put forward by the Advocate General is that Directive 93/13 requires Member States, as is clear from Article 7 (1) in conjunction with recital 24 in the preamble thereto, *to provide for appropriate and effective means "to prevent the continued use of unfair terms in consumer contracts"*. Such means must have a deterrent effect on professionals<sup>11</sup>, and the interpretation that that directive ceases to apply after the performance of a contract is likely to be detrimental to the achievement of its long-term objective.

In the light of all the foregoing considerations, the Court concludes that the concept of 'consumer' in Article 2 (b) of Directive 93/13 must be interpreted as meaning that, ***the fact that a contract is performed in full does not preclude a party to that contract from being classified as a 'consumer' within the meaning of that provision.***

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performance of his contractual obligations, the person who concluded that contract undoubtedly had the status of 'party to the contract'. In those circumstances, to consider that the performance of the contract precludes any possibility of declaring those terms abusive would lead to the situation in which any transfer on the basis of them would remain indisputable and final. In this context, certain contracts are executed immediately after or at the time of their conclusion. This is especially the case with the sales contract. To interpret that Directive 93/13 ceases to apply after the full performance of such a contract, would result in a party to this contract not even having the theoretical ability to bring an effective legal action before it ceases. However, nothing in that directive involves the exclusion of those contracts from its scope.

<sup>11</sup> See in this sense Judgment of 27 June 2000, *Océano Grupo Editorial and Salvat Editores* (C-240/98-C-244/98, EU:C:2000:346, section 28).

## 2. Order of the Court of 10 June 2021 in Case C-198/20<sup>12</sup>

New clarifications on consumer quality also affect Directive 93/13/EEC on unfair terms in contracts concluded between professionals and consumers will bring the CJEU by **order** of Case C-198/20. The particular hypothesis brought to the fore by this case is occasioned by the conclusion of a loan agreement between a bank and several natural persons MN, DN, JN and ZN, a contract concluded in order to purchase a home. Under that contract, the bank granted them a loan of 150,000 Polish zlotys, which was indexed to the Swiss franc (CHF). The loan was repaid in monthly instalments, the value of which was expressed in Swiss francs, but the payment was made in the national currency, at the selling price of the currencies shown in the exchange rate table, in force at the bank on the day of repayment. The loan was granted for a period of 30 years. The loan agreement was signed by MN, in his own name and on behalf of the other three borrowers. The key element in the factual situation is the fact that MN could not read the documents related to this contract before signing it, due to lack of time, DN read that contract only after signing it without understanding its content, and JN and ZN never read it. Following an increase in the amount of monthly loan repayment rates, as a result of increases in the exchange rate of the Swiss francs, the borrowers have entered into an addendum to the loan agreement, which modifies the method of repaying the loan, which can be done directly in Swiss francs, which came into force in December 2012. In 2018, the borrowers brought an action before the referring court requesting, in essence, the declaration of the nullity of the loan agreement in question, an action based on the abusive nature of the conversion clauses, as they did not have complete, explicitly provided information on the conditions of application of these clauses. In that context, one of the questions referred to the Court of Luxembourg by the Court of Warsaw is, in essence, whether the protection afforded to consumers by Directive 93/13 benefits all consumers or only the average consumer, who is normally informed and reasonably observant?

The Court will consider that the answer to the questions referred for a preliminary Judgment can be clearly inferred from the case-law, therefore, at a proposal from the Judge-Rapporteur and after hearing the

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<sup>12</sup> ECLI:EU:C:2021:481.

Advocate General, it will rule on a reasoned order. In the preamble to the order, the CJEU first points out that, according to its settled case-law, Directive 93/13 defines the contracts to which they apply in relation to the quality of the contractors, depending on whether or not they act in the context of their professional activity<sup>13</sup> and that, as regards the concept of 'consumer' within the meaning of Article 2 (b) of Directive 93/13, it is of an objective nature and is independent of the actual knowledge that the data subject may have or of the information that that person actually has.<sup>14</sup> According to a formula frequently encountered in its judgments in the field of unfair terms, the Court reiterates: the consumer is in a position of inferiority to the professional, both in terms of bargaining power, as well as the level of information, a situation that determines him to adhere to the conditions established in advance by the professional, without being able to exert an influence on their content<sup>15</sup>.

In the light of the arguments set out in Part One of the order, the Court will conclude that the classification of a person as a 'consumer' within the meaning of Article 2 (b) of Directive 93/13 does not depend on his behavior, even negligent, in concluding the loan agreement.

The Luxembourg Court will further reinforce this conclusion by stating that, on the other hand, according to its previous case-law, the situation of inequality between the consumer and the professional can only be offset by a positive intervention<sup>16</sup>, more specifically, the national

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<sup>13</sup> Judgment of 21 March 2019, *Pouvin et Dijoux*, C-590/17, EU: C: 2019: 232, section 23 and the case law cited.

<sup>14</sup> Judgment of 21 March 2019, *Pouvin et Dijoux*, C-590/17, EU: C: 2019: 232, section 24, and the case law cited.

<sup>15</sup> See, in this sense, Judgment of 21 March 2019, *Pouvin et Dijoux*, C-590/17, EU: C: 2019: 232, section 25 as well as *The Asbeek Brusse and de Man Garabito* Judgment, C-488/11, ECLI:EU:C:2013:341, section 31, *The Šiba* Judgment, C-537/13, ECLI:EU:C:2015:14, section 22, *The Vapenik* Judgment C-508/12, ECLI:EU:C:2013:790, *The Banco Español de Crédito* Judgment, C-618/10, ECLI:EU:C:2012:349, section 39; *The Pannon GSM* Judgment, C-243/08, ECLI:EU:C:2009:350, Section 22; *The Océano Grupo Editorial and Salvat Editores* Judgment, C-240/98-C-244/98, ECLI:EU:C:2000:346, section 25; *The Mostaza Claro* Judgment, C-168/05, ECLI:EU:C:2006:675, section 25, as well as the *Asturcom Telecomunicaciones* Judgment, C-40/08, ECLI:EU:C:2009:615, section 29; the *Aziz* Judgment, C-415/11, ECLI:EU:C:2013:164, section 44.

<sup>16</sup> Judgment of 17 May 2018, *Karel de Grote - Hogeschool Katholieke Hogeschool Antwerpen*, C-147/16, EU: C: 2018: 320, section 28 and the case law cited.

court is required to assess *ex officio* the unfairness of a contractual term in order to make up for the imbalance between the consumer and the professional. That obligation of the national court does not depend on the negligent conduct of the consumer concerned. The Court did not limit, in its judgment of 30 April 2014, *Kásler and Káslerné Rábai*<sup>17</sup>, the scope of the consumer protection regime provided for in Directive 93/13 only to average consumers, who are normally informed and reasonably observant and circumspect, but in this judgment, in particular, the Court has established the scope of the requirement that a contractual clause must be drawn up in a clear and intelligible manner.<sup>18</sup> In that judgment, the Court held that the referring court must take the average consumer, who is normally informed and reasonably observant and circumspect, as the criterion for assessment, only to determine whether a contractual clause has been drafted in a clear and intelligible manner.

Therefore, the Court will conclude that only in the context of the referring court's assessment of the transparency of a contractual clause should the average consumer be considered, normally informed and sufficiently attentive and informed. In the light of all the arguments put forward, the CJEU will rule that the protection provided for in Directive 93/13 benefits all consumers, not just those who can be considered an average consumer, normally informed and sufficiently attentive and informed.

## Conclusions

Despite the fact that the doctrine of the concept of consumer has been given priority, and the Court of Justice of the European Union has had the opportunity to rule on numerous occasions on the interpretations

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<sup>17</sup> C - 26/13, EU: C: 2014: 282, section 74.

<sup>18</sup> It held, therefore, that, as regards the particularities of the conversion into foreign currency, as specified in the contractual clause in question, it is for the national court to determine whether, having regard to all the relevant facts, including the publicity and information provided by the lender in the negotiation of a loan agreement, an average consumer, normally informed and sufficiently attentive and knowledgeable, could not only know the difference between the exchange rate for sale and the exchange rate for the purchase of a foreign currency, but to assess the potentially significant economic consequences for him of applying the exchange rate to the sale to calculate the rates at which he will ultimately be required to pay and, consequently, the total cost of his loan.



given to this concept, this topic has not been exhausted yet, as practice shows that new explanations or additions are still needed.

The latest clarifications from the CJEU complement the portrait of the consumer, adding two issues of principle, which national courts must take into account in Judgment:

1. *The party who had the status of consumer in a contract that was fully executed will be considered a consumer even after the execution of that contract and, consequently, will be able to benefit from the protection regime conferred by special legislation in the field.*
2. *The protection provided for in Directive 93/13 benefits all consumers, not just those who fall into the category of the average consumer, who is normally informed and sufficiently attentive and informed.*

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