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THE PROTECTION OFFERED BY EUROPEAN UNION CONSUMER LAW AS AN AREA OF DIALOGUE BETWEEN THE COURT OF JUSTICE OF THE EUROPEAN UNION AND NATIONAL COURTS

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Abstract

Consumer protection is not the only area of EU law in which significant progress has been made both through the adoption of formal legal instruments and through the interpretation of existing rules by the Court of Justice of the European Union, mostly on the initiative of national courts through the preliminary reference procedure provided for in Article 267 of the Treaty on the Functioning of the European Union. However, EU consumer law is unique in that the Court of Justice, with the assistance of national judges, has developed what can be described as a surprising interpretation of the secondary legislation in this area, going beyond the substantive aspects which it seeks to regulate and touching on important procedural aspects relating to the procedural position of consumers seeking to enforce their rights under European law and the remedies which can be used within the national legal systems of the Member States to promote more effective enforcement of consumer protection law..

The article begins by highlighting the approach taken by the Court of Justice in this decision and the implications of this approach, and then goes on to highlight two of the main mechanisms used in this approach - the progressive development of a broad concept of consumer in its procedural dimension and the principle of ex officio action by the national judge in consumer cases. The case-law relating to these mechanisms is presented in terms of its dynamics, including the most recent developments and a reading grid is proposed for each of them, which goes beyond the issue of consumer protection in order to identify the implications from an institutional perspective of the relationship between the

European Union and the Member States. The final part of the paper brings the two sets of jurisprudence together in order to draw some conclusions on the growing role of European jurisprudence.

Key words: *consumer, consumer protection, judicial dialogue, vulnerability, ex officio control*

INTRODUCTION

The development of a broad substantive consumer right at the level of the European Union (EU) is an obvious trend, stemming from its connection with the internal market, to the good functioning of which it contributes (as a counterweight to free competition, since the consumer is the final recipient of the products or services circulating in this market), but also in the developments that have led to the affirmation of consumer protection as a distinct area of law (*Weatherill, 2021, pp. 874-901*) and as a common standard of protection for the definition and implementation of the "other policies and actions of the Union", an idea that is reflected in Article 12 of the Treaty on the Functioning of the European Union (TFEU)[1].

Enshrined in Art. 169 of the TFEU as intended by which the Union contributes to protecting, inter alia, the economic interests of consumers, as well as to promoting their right to information, education and to organise themselves to protect their interests, promoting the interests of consumers and ensuring a high level of their protection was reflected in the adoption, on the basis of Art. 4(2) lit. f. TFEU, which establishes the shared competence of the Union and the Member States in this field, an impressive number of instruments of secondary law, mostly directives for the approximation of legislative or administrative acts of the Member States, which directly affect the establishment or functioning of the internal market, in accordance with Art. 114 of the TFEU[2].

A second dimension in which the objective of consumer protection is reflected in the Union's primary law can be found in the Charter of Fundamental Rights of the European Union (CFREU), which dedicates a special provision to it in Art. 38, where "a high level of consumer protection" appears as an objective that must be "ensured" by the policies of the Union (therefore, it is not registered as a subjective right that calls for the adoption of concrete measures). However, as noted in a collective study (*European University Institute, 2016, p.7*), other

[1] Consolidated version of the Treaty on the Functioning of the European Union, published in the Official Journal of the European Union (OJ) C 202 of June 7, 2016, pp. 47-388.

[2] Among the most relevant, can be included: Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, published in OJ L 95, 21.4.1993, p. 29, amended by Directive 2011/83/EU of the European Parliament and the Council, published in OJ L 304, 22.11.2011, p. 64; Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ L 149, 11.6.2005, p. 22-39; Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, OJ L 304, 22.11.2011, pp. 64-88.

provisions of the CFREU that enshrine subjective rights, such as, among others, Art. 1 regarding human dignity, Art. 3 regarding the right to the integrity of the person, Art. 8 on data protection or Art. 47 which refer to access to justice, may be relevant for the promotion of consumer interests.

In this dimension, in which the protection offered to consumers by EU law has developed in close connection with fundamental rights, consumer protection is presented as representing both a "quintessence" of fundamental rights and a practical circumstance of these fundamental rights "in every situation of daily (...) life" (*Buz, 2022, p.71*), arguments which, among others, could even support a constitutional consecration at national level of the principle of consumer protection (*Bercea, 2011, p.35*).

I. GENERAL FRAMEWORK FOR IMPLEMENTATION OF EU CONSUMER LAW. "JUDICIAL DIALOGUE" IN CONTEXT

The implementation of the consumer protection rules established at Union level is the responsibility of the Member States, which may determine a different level of realisation of the rights and obligations generated by the European rules, with consequences for the effectiveness of the protection of consumer rights and the uniform application of the Union's legal order, a requirement demanded by the uniqueness of the internal market. Moreover, this difference in the degree of concretisation may be due not only to the existence of substantive national rules on the matter, but also to the differences in the guarantees that the rules of national procedural law may offer to consumers, the states benefiting from this point of view of procedural autonomy (competence to determine the means of redress), with the limits arising from the Court of Justice's evolving case-law on the requirements that national procedural means should not be less favourable than those applicable to similar national procedures (principle of equivalence) and should not create excessive difficulties in the exercise of the rights conferred by the Union rules (principle of effectiveness)[3].

The area of consumer protection is in certain cases the subject of measures to harmonise national procedural rules, either contained in the substantive legislation itself or in the form of separate procedural measures[4], which, according to some authors, reflects a process of "proceduralisation" of EU consumer law (*Tulibacka, 2015, pp. 51-74*). This process is not limited to cross-border aspects, but also covers cases of application in national contexts, simultaneously covering not only access to courts and procedural rules before them, but also administrative

[3] For an illustration of these requirements, see the Judgment of 6 October 2015, Târsia, C-69/14, EU:C:2015:662, paragraph 27.

[4] As is the case, for example, of Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409, 4.12.2020, p. 1-27.

regulatory bodies, actions before public authorities, alternative dispute resolution mechanisms and collective action procedures. However, the development of harmonised procedural rules is still at an early stage and does not cover the whole field of consumer protection, as the application of European legislation in this area continues to be based on national institutional and procedural frameworks.

Taking into account the division of powers regarding the exercise of the judicial function in the EU, which I described in a previous work using the term "judicial subsidiarity" (*Mătușescu, 2018, pp. 57-67*), the protection of consumer rights derived from Union legislation is primarily the responsibility of national courts[5], but under the control of the Court of Justice of the European Union (CJEU), which remains the final interpreter of this legislation. Through the preliminary referral procedure provided for by art. 267 of the TFEU establishes a procedural mechanism that allows a constant and concrete interaction between the CJEU and national courts, a form of "judicial dialogue" between the courts of the member states called to ensure the application of Union law and the Luxembourg Court (*Mătușescu, 2020, pp. 38-40*), in which the national judge requests support from the European judge for the interpretation and assessment of the validity of a Union rule. In principle, national courts enjoy a wide discretion to address questions to the CJEU, and the answers that the Court offers are mandatory when it comes to the interpretation of European law, the application of this interpretation to the specific litigation situation in question remaining within the competence of the national judge.

Considering the dynamics and specificity of the consumer protection rules established at the EU level, but also the diversity of the existing implementation mechanisms at the level of the member states (as long as a good part of the European rules in the field are of minimum harmonisation), the national systems of consumer protection often appear as "a mixture between the transposition rules of European derivative law and existing national law (either general contractual law or specific rules aimed at consumer protection)" (*Twigg-Flesner, 2011, p.240*). In this context, and given that consumer rights require a particular focus on access to justice, it was inevitable that national courts would face problems related to the conflict between national and European rules, for which the available options are to interpret national law in conformity with EU law and to disapply any provision of national law that is contrary to EU law. As the latter option is generally approached by the courts with reservations due to its implications for the constitutional separation of legislative and judicial functions, and as the consistent interpretation of national law by reference to the incidental European norm is not always easily discernible (especially in the case of divergent

[5] CJEU Opinion of 8 March 2011, Avis 1/09 - Accord sur la création d'un système unifié de règlement des litiges en matière de brevets, EU:C:2011:123, paragraph 80.

national jurisprudence), access to the ECJ for guidance through the use of the preliminary reference mechanism has become an increasingly common option.

The considerable number of preliminary questions formulated by national courts in the particular field of consumer protection (among the most active being Romanian courts), a reflection of the many obstacles faced by judges in the member states when implementing consumer protection legislation, it gave the Union jurisdiction the possibility to interpret, in certain cases in a highly creative manner, the basic obligations imposed by Union law. With the competition of national judges, the CJEU achieved an, if not revolutionary, at least unusual interpretation of secondary law provisions, which goes beyond the material law aspects that they seek to regulate, to reach important procedural law aspects, related to the procedural position of the consumer trying to claim their rights under European law and the remedies that can be used within the national legal systems of the member states to promote a more effective application of consumer protection legislation.

In essence, the Court's approach starts from the consideration of specific consumer protection rules contained in secondary EU legislation, which takes, for example, the recognition of a non-binding nature of unfair clauses, the right to withdraw from a contract concluded at a distance or outside the commercial premises or the remedy of price reduction or termination of a sales contract in case of non-conformity of the delivered consumer goods, as imperative provisions that aim " to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them"[6]. Or, the effectiveness of this protection against abuse in contract law could only be ensured if the consumer has a real possibility from a procedural point of view to invoke the fact that a clause is abusive. From this point, it becomes apparent to the Court that it is necessary to assess the effectiveness of the remedies available to the consumer under domestic law. The requirement of the existence of fair contractual conditions thus entails the requirement of a fair procedure, which has been widely appreciated in the doctrine as a rather surprising effect of the Directive on unfair terms, since "one could hardly foresee that a European directive dealing with unfair contract terms suddenly might be used by the CJEU to reshape national procedural laws" (*Howells, Twigg-Flesne, Wilhelmsson, 2018, pp.156-157*). Without being isolated, the Court's approach has been used in a long line of cases to test the remedies available to the consumer to allege that a term is unfair, and these at all stages of the proceedings, including enforcement proceedings. The result of this incursion of the Court into national procedural law and its implications for the procedural

[6] For a recent affirmation, see the Judgment of 17 May 2022, Ibercaja Banco, C-600/19, EU:C:2022:394, paragraph 36.

autonomy of the Member States became evident when the Court established that a national law which does not allow the debtor in a loan agreement to invoke in mortgage enforcement proceedings the existence of an abusive clause in the contract, such a possibility existing only in separate (substantive) declaratory procedures, is incompatible with the Directive on abusive clauses, as long as it does not allow the court referred to the substantive procedure, competent to assess the abusive nature of such a clause, to adopt provisional measures, in particular the suspension of the enforcement procedure[7]. In fact, the Court requests the existence of a new remedy that allows the real assessment by the judge of the possible abusive nature of the clauses in the enforced execution phase, which, in a short time, was reflected in the modification by the national (Spanish) legislator in question of the incident domestic law (*Jerez Delgado, 2023, p. 80*).

The extensive dialogue between the Court of Justice of Luxembourg and the national courts on the application of the Unfair Contract Terms Directive has also made it possible to identify the main mechanisms by which the Union's case law can contribute to strengthening the procedural position of the consumer: the gradual development of a broad concept of the consumer in its procedural dimension and the principle of *ex officio* action by national judges in consumer cases. Both are based on a minimisation of national requirements for consumer procedural activism. Once accepted and applied by national judges, they became the basis of a high standard of consumer rights protection at EU level, outlining a uniform vision aimed at ensuring real and effective legal protection, but at the same time having a significant impact on most systems of national protection.

"Judicial dialogue", as a distinctive feature of the EU's legal system, is thus at the origin of a process of "Europeanization" of procedural law in the matter of consumer protection" (*Beka, 2018, p.9*). For example, referring to the influence of European law on national law in the matter, a legal practitioner from Romania asks rhetorically "how our law regarding the protection against abusive clauses of credit consumers could have been understood and applied correctly, without the interpretive support of the Luxembourg Court regarding the European directives in this matter?" (*Buz, 2022, p.67*). At the same time, a Spanish author sees in European law regarding abusive clauses "a real Trojan horse in Spanish formal (procedural) law, altering its classic principles, to the astonishment of the proceduralist doctrine" (*Jerez Delgado, 2023, p.76*).

In the following, the main milestones of the evolving jurisprudence of the European Court of Justice will be highlighted with regard to the definition of the concept of consumer in its procedural dimension, on the one hand, and with regard to the active role of the national court in consumer disputes, on the other hand, proposing for each of these lines of jurisprudence a reading grid that goes beyond the issue of consumer protection to identify meanings from an

[7] Judgment of 1 March 2013, Aziz, C-415/11, EU:C:2013:164,

institutional perspective of the relationship between the European Union and the Member States.

II. THE FUNCTIONAL APPROACH OF THE CONSUMER CONCEPT IN THE CASE LAW OF THE CJEU

The first line of case-law of the Court of Justice to which we shall refer concerns the determination of the persons who fall within the scope of the concept of 'consumer' or, more precisely, given that it relates to the procedural dimension, the determination of the conditions under which a party to a national civil dispute is or is not in fact a 'consumer' and thus entitled to the protection offered by EU law.

Although European Union substantive law generally defines the consumer as a natural person acting for purposes which are outside his or her professional activity[8] (an objective concept which sets the consumer in opposition to the professional), some of its provisions establish, without defining, a more nuanced dimension of the consumer, which takes into account certain characteristics that are his own and in relation to which the benefit of the protection offered by the regulation in question is granted - that of the "average consumer", which could be, as the Court of Justice held, the consumer "well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors"[9].

Beyond the difficulties inherent in establishing a uniform concept of the European consumer based on elements which, by their very nature, could be subjective, the introduction of such elements would make it possible to calibrate the level of protection according to the typology of the consumer protected, certain personal or situational characteristics of the person concerned (*Ungureanu, 2021, pp.16-17; Niță, 2023, pp.38-39*). However, the Court of Justice, which has often been asked by national courts to clarify the concept of consumer, has, particularly in recent years and with particular reference to consumer contracts, imposed a purely objective concept of consumer. Thus, from the point of view of the functioning of the consumer market, it refers in certain cases to the concept of the average consumer, who must be "a reasonably well-informed and reasonably observant and circumspect consumer"[10], which implies an objective concept that does not in fact measure the behaviour of the average consumer on the basis of these requirements, but rather prescribes a certain prior behaviour and allows for subsequent verification by the court on the basis of the requirements of

[8] See, for example, art. 2 (b) of Directive 93/13/EEC on unfair terms in consumer contracts.

[9] Judgment of 16 July 1998, Gut Springenheide and Tusky, C-210/96, EU:C:1998:369. See also Recital 18 of Directive 2005/29 on unfair commercial practices.

[10] See, for example, Judgment of 20 September 2017, Ruxandra Paula Andriciuc and others c. Băncii Românești SA, C-186/16, EU:C:2017:703, paragraph 47.

information and diligence. As noted in the doctrine (*Bercea, 2018, p.30*), this verification is, in fact, rarely present in the activity of national courts. In procedural matters, however, the consumer is protected regardless of the situation in which he finds himself, and "the idea of the average consumer from material law is not taken into account" (*Ungureanu, 2021, p.15*). The only condition for a natural person to be qualified as a consumer and to benefit from the level of protection provided by the European regulations is to conclude a contract with an economic operator for a purpose that is outside his professional field.

Most often, the general argument used by the Court is that the provisions (from case to case) of European secondary law aim to guarantee a high level of consumer protection and that they create a protection system based "on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge", and "[t]his leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms"[11]. As such, Member States are required to provide strong guarantees that the protection offered by European law cannot be circumvented and that it is guaranteed "to all natural persons finding themselves in the weaker position" to that of the professional[12]. Consequently, the notion of consumer has an objective character and is independent of the knowledge and information that the person in question actually has[13], his skills, the risks he assumes or the large sums he transfers. In addition, after establishing that only contracts concluded "outside and independently of any trade or professional activity or purpose, solely for the purpose of satisfying an individual's own needs in terms of private consumption" are subject to the special protection provided for in terms of consumer protection[14], recently the Court offered an even broader interpretation of the notion of consumer, showing that it also covers the situation when a person "has concluded a loan contract intended for a purpose in part within and in part outside his or her trade, business or profession, together with a joint-borrower who did not act within his or her trade, business or profession, where the trade, business or professional purpose is so limited as not to be predominant in the overall context of that contract"[15].

Although at the origin of this approach, arguments related to ensuring a high level of consumer protection could be identified, the broad interpretation of the concept of "consumer" offered by the CJEU has been criticised in the doctrine and considered unfair because, based on an "irrefutable" presumption of the vulnerability of the consumer and not taking into account the real situation of the

[11] Judgment of 3 September 2015, Costea, C-110/14, EU:C:2015:538, paragraph 18 and the jurisprudence quoted.
[12] Judgment of 21 March 2019, Pouvin and Dijoux, C-590/17, EU:C:2019:232, paragraph 28.
[13] Ibidem, paragraph 24.
[14] Judgment of 25 January 2018, Schrems, C-498/16, EU:C:2018:37, paragraph 30.
[15] Judgment of 08 June 2023, YYY., C-570/21, EU:C:2023:456.

person in question, it can lead to privileging the consumer who is not vulnerable (*Ungureanu, 2011, p.17-18*), to an "over-protection" of him (*Bercea, 2018, p.35*), with the consequence that, instead of the claimed objective, it rather brings a disservice to consumers who, feeling protected in any situation, become irresponsible, at the same time allowing the abuse of this quality by people who are not really vulnerable.

Another reading grid, in which this jurisprudence of the CJEU regarding the notion of consumer in its procedural dimension could be read, is an institutional one, related to the context in which it was pronounced in all these cases - preliminary referrals from national courts. The interpretation offered by the Court can be seen as a sign of goodwill and support given by the Court to national judges, an expression of its desire to secure its privileged relations with the national courts on whose activism it depends in the exercise of its own role, exempting them from the difficult obligation to check and decide, in each individual case, based on subjective criteria, who is a consumer and who is not. Thus, the phrase "in order to provide the national court with a useful answer", which appears in the text of many judgments to announce the instructions given to the national court in question, instructions which in most cases boil down to determining whether or not the person concerned is acting for purposes outside his professional activity, seems to convey such an idea.

On the other hand, the Court recently tried to impose a transversal concept of the consumer at the EU level, in order "to ensure compliance with the objectives pursued by the EU legislature (...), and the consistency of EU law", in this sense being necessary to take into account "in particular, of the definition of 'consumer' in other rules of EU law"[16]. An equally recent development[17], stemming from a preliminary reference made by a Romanian court (Tribunalul Olt), shows that this transversal concept of the consumer also extends beyond the borders of the Union, in order to protect the consumer who has his habitual residence in a Member State, even when he becomes active and goes to a third country to purchase products and services there. Thus, despite the existence of a clause designating the law of a third country as the law applicable to the contract concluded by the consumer for this purpose, such a contract falls within the material scope of application of the Unfair Contract Terms Directive (Directive 93/13) and the national court "must" apply the provisions transposing this Directive into the legal order of the Member State concerned and "has the task" of determining whether the trader is acting for purposes outside his professional activity. This interpretation, which we see as an excessive of the existing

[16] Ibidem, paragraph 40.

[17] Judgment of 8 June 2023, Lyoness Europe, C-455/21, EU:C:2023:455, in particular paragraphs 45-47.

provisions of the Directive in question (mainly, of the condition provided for in art. 6(2) of the Directive to exist "a close connection with the territory of the member states"), seems to conveys that the CJEU is willing even to neglect the legal coherence, the predictability of the applicable law and to sacrifice the uniformity of the level of protection provided to consumers at the EU level (as long as, in a case like the one under discussion, their judicial protection depends on the way in which the Directive is transposed at national level), in the name of the desired to maintain the European consumer, in whatever situation he may find himself, within the scope of EU law and within the scope of competence of the national courts, a component part of the Union judicial system, the only ones that can address with a preliminary reference to the Luxembourg Court, allowing it to rule in the last instance on the application or interpretation of EU law.

The concept of consumer in its procedural dimension, as an autonomous, functional notion, based on the role of the parties with regard to the contract in question, is therefore put at the service of ensuring the coherence of EU law and the functioning of the Union judicial system. However, it is questionable to what extent it also serves the objective of strengthening the protection of the rights of the European consumer, which should imply a special protection granted to those who are truly vulnerable. In fact, the Court's approach is insufficiently articulated, leading to situations that can hardly be justified from this perspective. Thus, the doctrine notes that in certain cases where the consumer is "neither ill-informed, nor inexperienced, nor in a state of economic inferiority", it is difficult to justify the distinction between consumer contracts concluded for professional purposes and those concluded for private purposes, as long as both situations are adhesion contracts, the conclusion of which places the adherent in the same position of inferiority, regardless of the professional or private purpose for which it is concluded (*Ungureanu, 2021, p.19*). In this context, the example of a lawyer is given (with reference to the Case Costea, C-110/14, in which the Court of Justice held that he fell within the definition of consumer because the contract he concluded was not related to the activity of his office) who, for professional purposes, took out a loan to equip his law office, a situation in which "he would no longer have been considered a consumer but a professional and would no longer have benefited from the protection rules. Or, even in this case, he would have been in the same inferior position, since he would also have concluded a contract of adhesion" (*Ungureanu, 2021, p.19*).

III. THE ACTIVE ROLE OF NATIONAL COURTS IN CONSUMER CASES: THE OBLIGATION TO ASSESS UNFAIR CONTRACT TERMS OF THEIR OWN MOTION (EX OFFICIO)

A second line of jurisprudence of the CJEU in the matter of consumer protection resulting from its interaction with national courts concerns the effectiveness of the special protection conferred on consumers by secondary EU

legislation. With arguments also related to the consumer's vulnerability (the need to protect the "weaker party"), which, according to one author, is becoming a principle of EU civil law (*Reich, 2013, p.37*), the CJEU has established that the consumer is in a weak position not only in contractual relations, but also as a party to the proceedings, and that this must be compensated by the courts. Consequently, national courts are obliged to analyse of their own motion the potentially unfair nature of contractual terms contained in contracts concluded with consumers, and are therefore bound by this obligation even if the unfair nature of the contractual terms is not invoked by the consumer.

Thus, although a provision to this effect is not included in any legal instrument of the Union, the Court first established that the European system of consumer protection (in this case, that provided for by Directive 93/13 on unfair terms[18]) "entails the national court being able to determine of its own motion whether a term of a contract before it is unfair"[19], in order to later clearly provide that the national court has "the obligation to examine that issue of its own motion, where it has available to it the legal and factual elements necessary for that task"[20]. The obligation to ensure ex officio control is also imposed in the situation where the domestic law does not provide for the ex officio examination of abusive contractual clauses or even prevents it, the courts of the member states being called upon to interpret the national rules in accordance with EU law (as it has been interpreted of the Court) or, if this is not possible, remove from application the contradictory national rules and rely directly on Union law[21]. Finally, the Court also specified the concrete implications for the courts of the failure to fulfill this obligation, which reflect "the role assigned by EU law to national courts"[22], namely the possibility that, if it acts as the ultimate jurisdiction, "that court committed a sufficiently serious breach of EU law by manifestly disregarding the provisions of Directive 93/13 or the Court's case-law relating thereto"[23], thereby making the Member State liable for the damages caused to consumers.

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[18] In particular, art. 7 para. (1) of the Directive, according to which "Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers".

[19] Judgment of 27 June 2000, Océano Grupo Editorial and Salvat Editores, C-240/98-C-244/98, EU:C:2000:346, paragraphs 26, 28 și 29.

[20] Judgment of 4 June 2009, Pannon GSM, C-243/08, EU:C:2009:350, paragraph 32.

[21] See the Judgments of the Court in cases C-168/15, Milena Tomášová or C-176/17, Profi Credit Polska. See also Commission Communication - Guidelines on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts, 2019/C 323/04, published in OJ C 323/4 of 27.09.2019.

[22] Judgment of 28 July 2016, Tomášová, C-168/15, EU:C:2016:602, paragraph 30.

[23] Ibidem, paragraph 27.

The foundations of this jurisprudence can be found in the Court's broader conception of the principles of effectiveness and equivalence as limits to the procedural autonomy of the Member States, determined by the need to ensure the useful effect and uniform application of EU law[24], in order to subsequently bring to the arsenal of arguments legal provisions from which this procedural requirement specific to consumer law is derived, effective jurisdictional protection[25], recognized as a general principle of EU law (*Mătușescu, Ionescu, 2018, p.157*). More recently, the Charter of Fundamental Rights is also brought into play (in a non-specific manner), the obligation of ex officio examination appearing as a condition of the effectiveness of remedies, more precisely, of the fundamental right to an effective remedy, in accordance with Article 47 of the Charter, which "must apply both as regards the designation of courts having jurisdiction to hear and determine actions based on EU law and as regards the detailed procedural rules relating to such actions"[26]. Since not only procedural obstacles, but also the limited knowledge or information possessed by consumers present a significant risk that they will not benefit from effective protection, such protection "can be guaranteed only if the national procedural system allows the court (...) to check of its own motion whether terms of the contract concerned are unfair (...)"[27].”

Although the Court did not expressly state this, it could be inferred from here, in accordance with the obligation of the national judge, the existence of a special procedural right of the consumer to benefit from an ex officio examination by the court of the contractual clauses in the consumer contracts on which concludes them, with the consequence of the withdrawal of all the procedural guarantees that art. 47 of the Charter establish them. Thus, although consumer protection is inscribed in the Charter (Art. 38) not as a subjective right, but as a legal principle, as has also been noted, "[t]his does not exclude the possibility that principles may evolve into a subjective right through the development of jurisprudence" (*European University Institute, 2016, p.8*). The increasingly frequent use, in this context, of Art. 47 of the Charter, which enshrines a subjective right, may suggest such a possible evolution.

The concrete implications of this case law have been extensively analysed in the doctrine, being summarised as representing "perhaps the strongest instance of the 'Jack-in-the-box' effect of EU consumer law – few anticipated the emergence of strong procedural requirements out of a basic duty to ensure the

[24] Judgment of 16 December 1976, Rewe, C-33/76, EU:C:1976:188.
[25] Judgment of 18 March 2010, Alassini, C-317/08, C-318/08, C-319/08 and C-320/08, EU:C:2010:146, paragraph 49.
[26] Judgment of 13 September 2018, Profi Credit Polska, C-176/17, EU:C:2018:711, paragraph 59. See also Judgment of 10 June 2021, BNP Paribas Personal Finance, C-776/19-C-782/19, EU:C:2021:470, paragraph 29.
[27] Paragraph 44 of Judgment Profi Credit Polska, C-176/17.

enforcement of the Directive. Indeed, this doctrine has developed beyond the area of unfair contract terms to apply to most areas of consumer law now" (*Howells, Twigg-Flesne, Wilhelmsson, 2018, p.333*). Since a detailed evaluation of these cases is beyond the scope of this approach, we shall confine ourselves to noting that, although they have been highlighted in subsequent case law (both in the countries of origin of the preliminary reference and in general), particularly in the sense of changing the assessment of the possible remedies in national law to ensure the protection of consumer rights in accordance with the requirements laid down by the CJEU, the case law of the Court of Justice has in some cases provided the argument for drafting legislative proposals (*Jerez Delgado, 2023, pp.76-91*)[28].

At least in certain legal systems, such as the case of Romania, the jurisprudence of the CJEU has determined a major reconceptualisation of individual consumer disputes (*Buz, 2022, pp.68-69*) by accepting the principle of ex officio examination even in the context of a passivity of the claimant, which previously seemed to be unthinkable and having the potential to demolish the foundations of the civil procedure and its guiding principle of the availability of the parties (*Ionescu, 2010, pp.103-109 and pp. 140 et seq.*). If we add to this the Court's more recent interpretations of important procedural principles, such as the authority of *res judicata* or the prohibition of *reformatio in pejus*, which cannot, under certain conditions (mainly related to the availability of effective remedies), prevent ex officio review of contractual clauses[29], the picture of the impact of the European Court's jurisprudence on national legal systems seems to be quite complete.

Thus, in addition to contributing to the objective of ensuring a high level of consumer protection, including through a possible deterrent effect on the use of unfair contractual terms in general, the principle of *ex officio* control, as established and refined over time by the ECJ, based on the presumed vulnerability of the consumer, had to be translated into the national legal systems (*Grochowski, Taborowski, 2022, p.235-256*), becoming a standard against which the adequacy of national standards of effective judicial protection is measured, a source of judicial innovations. As this translation overlaps with the long-settled principles of the national civil procedure, with which it sometimes contradicts, it was inevitable that more and more judges, from various member states, would request clarifications from the Court, thus giving it the opportunity to expand the theory in as many aspects of the consumer union law as possible. If this has considerably

[28] See, for example, in the case of Romania, the statement of reasons for the Draft Law on the protection of consumers against abusive or untimely foreclosures, PL-X 663/16-12.2019, adopted by the Senate and under debate, at the time of drafting this article, at the Chamber of Deputies.

[29] Judgment of 13 September 2018, Profi Credit Polska, C-176/17, Judgment of 17 May 2022, Unicaja Banco, C-869/19, EU:C:2022:397.

strengthened the authority of the ECJ, it is no less true that the Court's interpretation of European rules in particular national contexts has generated a body of case-law through which national judges find it difficult to navigate. In the face of the Court's dynamism in interpreting the provisions of EU law as giving rise to an obligation to review *ex officio,* when such an obligation could hardly be implied from the provisions in question, it is quite difficult for a national judge to assume that he does not have such an obligation, especially in a situation not fully covered by the Court's interpretation. A new preliminary question is therefore almost inevitable. This situation is fully illustrated by the successive preliminary references formulated by the Romanian courts regarding the possibility of invoking, by way of objection to the enforcement, the abusive nature of some clauses included in the contract concluded between a consumer and a professional[30], in the context of the particularities Romanian enforcement law, in which the objection to the enforcement procedure and the common law annulment action coexist (*Briciu, 2021*). Asked about the attitude to be adopted by the national court in the event that "it is not possible to interpret the rules of national law relating to enforcement in a manner consistent with EU law", the CJEU answered rather bluntly that the national court which is responsible for the enforcement proceedings and which hears an objection to the enforcement of a contract that is concluded between a consumer and a seller or supplier and constitutes an enforceable instrument "is obliged to examine of its own motion whether the terms of that contract are unfair, and, where necessary, is to disapply any national provisions which preclude such an examination"[31].

CONCLUSIONS

The mechanism that ensures the functioning of the Union's judicial system (the preliminary reference procedure, described as a form of judicial dialogue) has allowed the ECJ not only to define a broad scope of European consumer protection rules, but also to establish an autonomous concept of the effectiveness that must be given to the rights granted to consumers by EU law. Thus, "the procedural protection of consumers in their individual capacity in domestic disputes has been Europeanized and considerably strengthened" (Beka, 2018, p.7), making it clearer that this also implies an exception from the classical principles of procedural law, a result that can be explained "by alluding to the generation of a specific branch - "European consumer procedural law" - which is

[30] Order of 6 November 2019, BNP Paribas Personal Finance SA Paris Sucursala București and Secapital, C-75/19, EU:C:2019:950; Judgment of 17 May 2022, Impuls Leasing România (C-725/19, EU:C:2022:396); Judgment of 4 May 2023, BRD Groupe Société Générale SA and Next Capital Solutions Ltd, C-200/21, EU:C:2023:380.

[31] Paragraph 42 of Judgment in case BRD Groupe Société Générale SA and Next Capital Solutions Ltd.

detached from general procedural law (as consumer law also abandons the "general part or theory" in matters of contracts)" (Jerez Delgado, 2023, p.86).

From the perspective of this result, the activism of the Court manifested through this jurisprudence can be seen as an attempt to compensate for an imbalance between the requirements of the single market (Vâlcu, 2023, pp. 90-98) and consumer protection, which the substantive rules perpetuate. By anchoring fundamental rights in the field of European consumer law, the Court could respond to the requirement that the main objective of Union legislation in this field be consumer protection rather than reasons related to the functioning of the market (Howells, Twigg-Flesne, Wilhelmsson, 2018, p. 343). However, the rather timid inclusion (at least so far) of the fundamental rights enshrined in the Charter in the set of arguments that would justify such increased consumer protection at the EU level entitles us to express doubts as to whether such an objective is pursued as a matter of priority by the Court.

If we bring together the two lines of case-law highlighted throughout the paper, we can see that consumer protection, which is primarily the responsibility of the Member States and to which the European Union merely "contributes" according to the Treaties, rather becomes an important instrument of the Court of Justice's "judicial policy", related to the preservation of the autonomy of EU law and the system of judicial remedies through which this objective is achieved (at the head of which the Court itself is, alongside the national courts) (Arnull, 2019, pp 439-454). The Court's broad interpretation, both of the concept of consumer and of the national judge's obligation to invoke ex officio EU law, can thus be seen as a two-step reasoning: first, it strengthens the private application of EU law by bringing before national courts ("common law" courts of EU law) a wide category of individuals who can now rely on EU law to protect their rights and economic interests, in order to later compel national judges to fully manifest themselves in their capacity of component part of the EU jurisdictional system and to apply ex officio the provisions of this law regarding them. Moreover, the obligation to examine ex officio also requires a proactive attitude of the court, which must itself qualify a person as a consumer, in the absence of a claim of this quality by the party in question, in the situation in which it is referred to a dispute having as its object a contract that "seems to fall within the scope" of EU law[32]*. If we also take into account the jurisprudence related to the obligation of the courts acting at the last level of jurisdiction to refer preliminary questions to the Court of Justice whenever they have the slightest doubt regarding the interpretation of European norms (Mătușescu, 2020, pp.41-46), the place of national judges in the European judicial pyramid is secured. As one author notes (Beka, 2018, p.8), given the willingness shown by the courts of the Member States to engage in*

[32] Judgment of 4 June 2015, Faber, C-497/13, EU:C:2015:357, paragraph 46.

dialogue with the Luxembourg Court and to implement its guidelines, "[in] the field of consumer contract law, national courts fully assume their competence as Union law judges".

If, as I have emphasised throughout the paper, the jurisprudence analysed raises questions as to the extent to which it really protects consumers in need of protection[33], such questions can also be expressed in terms of the relationship between the jurisdiction of the Union and the national courts thus constructed, and the idea of cooperation and dialogue that should characterise this relationship (Mătușescu, 2020, pp. 38-40), but also, more broadly, of the implications for the relationship between EU law and the internal law of the Member States. In essence, by empowering national judges to autonomously examine the application of EU law as it has been interpreted by itself, giving them increasingly precise and authoritative instructions to do so, the Luxembourg Court in fact gives them a rather weak in the interpretation of European consumer protection law. Without accepting national variations, in consideration of the different legal traditions that may exist, the interpretation of the CJEU is clearly imposed on them, but it is quite unclear to what extent this interpretation is the result of a real dialogue between the courts. On the other hand, from the perspective of national law, the implications are far from negligible. National judges are empowered by the CJEU to overturn national normative and judicial hierarchies, leaving unapplied provisions of national law or the jurisprudence of higher courts that contradict their interpretation. European jurisprudence is becoming, at least in the area of unfair terms, a genuine source of EU law (Jerez Delgado, 2023, p.87), reflecting the fact that legislative intervention is not always necessary for the progress of European integration, sometimes a reorientation of jurisprudence is sufficient.

Although the doctrine expresses some doubts related to the absence of any resistance on the part of the national courts to accept the Court's theory without reservation (Howells, Twigg-Flesne, Wilhelmsson, 2018, p.334), we could say that the way in which the CJEU decided (with the competition of national judges) the issue of protecting the rights that EU legislation confers on consumers, described as "a paradigm of the institutional game between the Member States and the European Union" (Jerez Delgado, 2023, p.76), set the stage for even more ambitious interpretations, related, for example, to the issue of the rule of law and the independence of the judiciary, as an indispensable condition for it (Mătușescu, 2022). Looking only at the Romanian courts, the number of preliminary references they have made to the Luxembourg Court in the matter of consumer protection can be compared, until now, only with the activism shown in

[33] The European Commission itself suggests that, although the Court has not provided much guidance in this regard, in assessing the effectiveness of remedies it "should take into account the perspective of more vulnerable consumers" - paragraph 5.4.2. of its 2019 Guidelines on the interpretation and application of Directive 93/13, 2019/C 323/04.

recent years in matters relating to the rule of law and the independence of the judiciary, which has allowed the CJEU to analyse various components of the organisation and functioning of the judicial system in Romania[34]*. This joining could also suggest another question: would it be possible to fully incorporate the "triad" of Art. 2 TEU, which establishes the rule of law as a value of the Union - Art. 19(1) TEU on the obligation of the Member States to establish the means of redress necessary for the protection of rights deriving from EU law - Art. 47 of the Charter on the right to an effective remedy - in the field of consumer protection? Although it is difficult to foresee such a development, it cannot be completely excluded.*

However, we can observe that what links these two unprecedented jurisprudential developments (the protection of consumer rights and the rule of law) is the fact that the more authoritative tone of the Court of Justice seems to be related not only to the general context in which the respective judgments were pronounced (the financial crisis or the crisis of the rule of law, generating problems for European citizens), but also to the specificities or perceived weaknesses of certain legal systems. If this is the case, and if Romania continues to be perceived as being in a "grey zone" in terms of available remedies and the general functioning of the judicial system, it can be expected that, depending on the opportunities offered by the Romanian courts, this authoritarian tone will continue and further adjustments at the national level will be deemed necessary. From such a perspective, the "harmonising" effect of the CJEU jurisprudence is questionable as long as it is not certain that all national legal systems will be equally affected

A statement by the European Commission in the document that aims to "guide" the application of the directive on unfair terms suggests a solution to this problem: "(...) the principles of ex officio control and effectiveness may require the Member States to make certain adaptations or corrections in their legislation insofar as national rules of procedure and substance are in conflict with these principles (...).The Member States are, therefore, invited to examine all national provisions that may be in conflict with the guarantees required by the UCTD as interpreted by the Court"[35]*. However, such a voluntary examination of the compatibility of national provisions with the case law of the CEJU is rather illusory.*

[34] Starting with Judgment of 18 May 2021, *Asociația „Forumul Judecătorilor din România”,* Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19, C-397/19, EU:C:2021:393.

[35] Paragraph 5.6. from the 2019 Commission Guidelines on the interpretation and application of Directive 93/13, 2019/C 323/04.

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