

PRACTICAL ISSUES IN THE EX OFFICIO EXAMINATION OF UNFAIR CONTRACTUAL TERMS

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Abstract

In Romanian court practice, there are still situations where some courts examine the unfairness of contractual terms while others do not. Even within the same court, there are situations of inconsistent practice in this regard. Although there is, for example, a long-standing practice in which interest rates of 0.5% per day of delay have been declared unfair, there are still courts that do not examine the unfairness of such clauses imposing this type of penalty. As in any EU country, Romanian judges are independent and answer only to the law, so that, at least at first glance, they cannot be held responsible for not aligning their practice with that of the majority. The purpose of this article is to analyze other possible reasons for this practice, whether it is determined by other factors that could lead judges to choose the easier and faster way to resolve cases involving such clauses. This study will also analyze mechanisms that should have long since relieved the courts of repetitive cases in which unfair terms with identical content are invoked and annulled, and protected consumers. Ultimately, we will try to demonstrate the reality of the situation, the reasons why it has come to this, and the means by which consumers can be protected in the future.

Keywords: *unfair contractual clauses, ex officio invocation, national register of unfair contractual terms, alleviation of courts' workload, judges' disciplinary liability.*

1. Introduction

The subject of this paper is the analysis of inconsistent practices of Romanian courts regarding the investigation of the unfairness of contractual terms, when required, practices that lead to the deprivation of protection for Romanian consumers.

As we will show, although these practices could be prevented by current legislation, they continue to occur and affect the social and economic interests of consumers. In other words, current legislation does not provide sufficient guarantees to achieve the desired objective.

In the course of our research, we will demonstrate that the main blame for these results lies with the Romanian legislator, who should have intervened long ago and amended the legislation in this area, given that cases seeking protection of subjective rights arising from unfair terms are repetitive, which lays the foundations for inconsistent practice.

The issue at hand is particularly important for two reasons. The inconsistent practice analyzed leads to the impermissible infringement of consumer interests and the unnecessary congestion of the courts.

We will identify the causes in court case law where the same clause is or is not examined from the perspective of unfairness and will attempt to explain the reason for these practices.

Next, we will analyze the relevant domestic legislation and, in relation to judicial practice, we will attempt to identify and demonstrate the shortcomings of certain institutions regulated by current legislation, institutions that should otherwise be extremely effective in fulfilling their purpose. Also, through the case law of the Court of Justice of the European Union¹, we will identify a legal mechanism created by the Polish legislator, namely that of a national register of unfair terms, and, in the context of this paper, we will demonstrate the appropriateness of immediately regulating such an institution.

Internally, the work is intended to be original, as its subject matter has not been addressed in the specialized doctrine in our in-depth research.

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¹ Next up is the CJEU.

2. Legal framework. Ex officio examinations and accountability of magistrates

Directive 93/13² does not explicitly provide for an ex officio examination of the unfairness of contractual terms.

This obligation arose through case law and was ultimately expressly regulated by the Romanian legislature in Article 13¹(l) of Law No. 193/2000³, which expressly states that "The court has the obligation to examine ex officio the unfair nature of a contractual clause as soon as it has the necessary legal and factual elements to do so."

Violation of the aforementioned obligation should result in disciplinary action against the judge in accordance with the provisions of Article 271(s) of Law No. 303/2022⁴, which defines "performing one's duties in bad faith or with gross negligence" as a disciplinary offense.

Art. 272 art. (1) of Law No. 303/2022 defines bad faith as a situation in which "the judge or prosecutor knowingly violates substantive or procedural law, seeking or accepting harm to a person."

Art. 272 art. (2) of Law No. 303/2022 defines gross negligence as a situation in which "the judge or prosecutor seriously, undoubtedly, and inexcusably disregards the rules of substantive or procedural law."

According to art. 272(3) of Law No. 303/2022, "In order to determine cases in which substantive or procedural rules are seriously, undoubtedly, and inexcusably disregarded, the degree of clarity and precision of the violated rules, the novelty and difficulty of the legal issue in relation to the relevant case law and doctrine, the seriousness of the non-compliance, and other objective professional circumstances shall be taken into account, the novelty and difficulty of the legal issue in relation to the relevant case law and doctrine, the seriousness of the non-compliance, as well as other objective professional circumstances."

Therefore, the examination of unfair terms is mandatory in Romanian civil law. And the provisions on the liability of judges should constitute a serious guarantee, sufficient to achieve the intended purpose, namely consumer protection.

However, in order to invoke the unfairness of a clause, it must at least appear to be unfair. In other words, a clause must attract the judge's attention so that he has a reasonable standard of appearance regarding its unfairness and submits this unfairness to the parties for debate, following which, after judicial analysis, he decides, if appropriate, remove the effects of the clause from the legal relationship between the contracting parties by declaring it unfair in the final instance.

In his book *Noise*⁵, Daniel Kahneman distinguishes between rules and standards. While in the case of a rule such as a speed limit imposed on a certain section of road, violation attracts a unanimous verdict, the situation is not as simple in the case of a standard such as, say, bad faith in the performance of an obligation.

In such a situation, one judge may consider that a person who has failed to fulfill their obligation to compensate their creditor for the fact that they had a child in hospital, which required expenses, was acting in bad faith, while another may consider the opposite. Therefore, in the case of standards, the assessment is purely subjective, left to the sole discretion of the decision-maker who will evaluate the situation based on their level of theoretical and practical knowledge, life experience, education, and other such factors.

From this perspective, the unfairness of a contractual clause is a standard, not a rule, especially in the context where European legislation establishes as assessment criteria, inter alia, good faith, significant imbalance between rights and obligations, etc.

Under these circumstances, art. 272 (3) of Law No. 303/2022 establishes criteria that may lead to the judge being held liable if he or she has not raised for discussion and examination the unfair nature of a type of clause which, given the long-standing nature of the problem and its relatively low degree of difficulty, has been considered abusive by the majority of case law, the relatively low difficulty of the issue, and the majority of case law, has been deemed unfair.

Therefore, liability should be attributed not because the judge, in disagreement with the majority of courts or doctrine, considered a certain type of clause to be lawful, but for the simple fact that he did not bother to invoke the potentially unfair nature of the clause to be discussed and investigated.

² Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (Published in the Official Journal of the European Union, No. L 95 of 21.04.1993).

³ Law No. 303/2022 on the status of judges and prosecutors (Official Gazette of Romania No. 102 of November 16, 2022).

⁴ Law No. 193/2000 on unfair terms in contracts concluded between professionals and consumers, republished (Official Gazette of Romania No. 543/03.08.2012).

⁵ D. Kahnemann, O. Sibony, Cass R. Sustein, *Noise – A flaw in human judgment*, Ed. Vellant, 2021, pp. 391, 392.

Moreover, we believe that the CJEU should clarify, by means of a preliminary ruling, whether it is mandatory to invoke the unfairness of a contractual term, regardless of the judge's practice, but by reference to widespread judicial practice and doctrine in this area. This would constitute a matter of interpretation of the provisions of art. 13¹ of Law no. 193/2000 in accordance with European legislation, with reference to the classification of the described circumstance under the phrase "as soon as it has the legal and factual elements."

We therefore conclude on this issue that it is risky from a disciplinary perspective for Romanian judges to take such an approach, in which they do not invoke the unfair nature of clauses that are generally declared unfair at national level.

It should be noted that the liability of judges can be seen as a guarantee of compliance with and enforcement of the law and, ultimately, returning to the subject of this paper, a guarantee of consumer protection against unfair terms used by professionals.

We did not identify any disciplinary actions with such an objective on the judicial inspection⁶ website. Moreover, given the circumstances surrounding the adjudication of such cases, it is difficult to believe that such liability is effective, but it is potential.

More specifically, in small claims cases, most consumer debtors are people without specialized education and often completely misinformed, who are unable to even respond to the claims filed by professionals. However, since they do not strive to formulate defenses in these proceedings, the chances of informing the judicial inspectorate about the violation of the judge's positive obligation to invoke and investigate the unfairness of contractual terms are extremely low.

However, such a situation is not impossible. For example, there is a possibility that the consumer was not legally summoned and, at the time of enforcement based on the court decision obtained, complains to the judicial inspectorate about the lack of diligence of the trial judge who issued the decision that was enforced. The judicial inspectorate could also identify non-compliant practices in relation to unfair terms during the thematic checks it may carry out.

But before calling the judge to account for such an approach, which may be justified under the umbrella of his independence, if we allow the abusive nature of the practice not to be raised on the grounds of his own practice or a restricted judicial practice, the reasons leading to these practices should be identified and whether they are also due to legislative shortcomings.

3. Case law and the situation of the courts - administrative context

A significant proportion of cases in which contractual terms are analyzed from the perspective of unfairness are small claims procedures⁷.

Currently, Romania uses an application that can be accessed at www.rejust.ro by practitioners and citizens. The application allows for the analysis of Romanian court case law in any matter, covering all court decisions except those of the High Court of Cassation and Justice.

Therefore, with the help of this application, we identified claims involving small claims filed by the same claimants—professionals (mostly debt collectors initially arising from the assets of professionals, mobile phone operators, or internet service providers) against consumers.

Given the diversity of unfair terms used in consumer contracts, we focused our attention on one that is extremely popular, namely the penalty interest of 0.5% per day of delay, which accrues from the date the debt becomes due until its actual payment.

Thus, we have identified hundreds of thousands of cases, but we will limit ourselves to a small portion of them in order to demonstrate the premise underlying this study, namely the failure of some courts to examine the unfairness of clauses when required to do so, and the need to add new legislative mechanisms to prevent these clauses from taking effect.

⁶ <https://inspectiajudiciara.ro/page/Actiuni-dicivil-judgementiplinare/Jurisprudenta> accessed on 22.01.2026.

⁷ Small claims procedures are subject to a special procedure governed by art.1026-1033 of Law No. 134/2010 on the Code of civil procedure, republished in the Official Gazette No. 247/10.04.2015 (further referred to as the Code of civil procedure). This procedure is distinguished by the fact that it is, as a rule, paper-based, without the need for the parties to be present and for oral arguments before the court, which leads to a much shorter resolution time.

By civil judgment no. 1181/2013 of November 22, 2013⁸, handed down by the Vatra Dornei Court⁹, in which the court, on November 22, 2013, held the following:

"In this case, as shown, penalties of 0.5% per day of delay were stipulated, equivalent to a cumulative penalty that was disproportionately high compared to the interest rates applied on the banking market, a clause that contravenes the mandatory provisions of Law No. 193/2000 on unfair terms in contracts concluded between traders and consumers, as amended.

Thus, it can be seen that the penalty imposed is clearly disproportionate to any damage that could reasonably be assumed, including the fees paid to the creditor in the present case for the recovery of the debt.

This disproportion creates a significant imbalance between the rights and obligations of the parties, contrary to the requirements of good faith and to the detriment of the consumer.

(...)

For all these reasons, the court considers the creditor's claims to compel the debtor to pay late payment penalties (both invoiced and uninvoiced), calculated at 0.5% per day of delay, to be unjustified, and therefore rejects this part of the claim as unfounded."

The Slobozia Court of Law ruled similarly in Civil Judgment No. 1840/2014 of August 27, 2014¹⁰. In fact, for over 10 years, the overwhelming majority of Romanian courts have considered this type of clause to be unfair¹¹, noting that these default damages amount to an annual rate of 182.5%, which is clearly disproportionate to any damage that could reasonably be assumed¹².

On the other hand, there has been and continues to be a minority of courts that consider this type of clause not to be unfair, admitting claims based on them.

In this regard, in civil judgment no. 2228/2025 of October 24, 2025, handed down by the Găești Court¹³, the court held that "With regard to the requested late payment penalties, the court finds that the defendant owes late payment penalties in the amount of 0.5% per day of delay in accordance with the contract concluded between the parties. Given that the parties have expressed their agreement on this clause, the court finds that the claimant is entitled to the payment of late payment penalties by the defendant in the amount determined by agreement. The court also notes that this amount of penalties calculated by the assignor creditor was included in the invoices issued by the claimant."

By civil judgment no. 5137/2025 of 12.11.2025 handed down by the Giurgiu Court¹⁴, the court upheld the professional claimant's request and ordered the defendant "to pay the claimant the sum of 54.08 lei, representing late payment penalties calculated prior to the date of assignment, as well as to pay late payment penalties of 0.5% per day, calculated on the principal debt, from the date on which they were calculated by the assignor creditor, indicated in the last invoice issued, until the date of full payment of the debt."

It is also interesting to note that even within the same courts there are divergent practices. Thus, the Giurgiu Court of First Instance issued civil judgment no. 2189/2023 of 12.04.2023¹⁵, in which the clause containing the aforementioned penalties was considered unfair.

As far as we are concerned, there is no doubt that such clauses are unfair and that situations in which they are imposed on consumers by either the creditors or their assignees should have ceased to exist long ago.

However, each judge is and must be independent in the decisions they make, so that, in the absence of Supreme Court rulings ensuring uniform practice or of normative provisions, the matter may remain at the discretion of each individual judge.

⁸ To demonstrate the longstanding nature of the issue and the solutions adopted by the courts since that time, we have selected a case from 2013. We did not set out to examine the prevailing practice in this regard at the national level during that period, but we believe it is important to highlight this aspect.

⁹ Available at <https://www.rejust.ro/juris/2576e8gd2> – accessed on 16.01.2026.

¹⁰ Available at <https://www.rejust.ro/juris/52ge32432> - accessed on 16.01.2026.

¹¹ See also Civil judgment 361/2025 of 30.04.2025 issued by the Sfântu Gheorghe Court (available at <https://www.rejust.ro/juris/865gg985e>, accessed on 16.01.2026; civil judgement No. 20323/2024 of 26 November 2024 issued by the Bucharest Sector 4 Court, available at <https://www.rejust.ro/juris/ee6g47668>, accessed on 16 January 2026; civil judgement No. 10526/2025 of 23.09.2025 issued by the Bucharest Sector 3 Court, available at <https://www.rejust.ro/juris/d94d674d8>, accessed on 16.01.2026.

¹² Civil judgment No. 557/2024 of February 15 2024, handed down by the Târgoviște Court of First Instance, available at <https://www.rejust.ro/juris/g87ee3dd4>, accessed on January 16, 2026. We note on this occasion that in the Aziz case, para. 68 (CJEU, Judgment of 14 March 2013, C-415/11), the Court allowed the comparison of the situation that would have resulted under national law with that resulting from a contractual clause when deciding on significant imbalance.

¹³ Available at <https://www.rejust.ro/juris/9d38d42eg> – accessed on 16.01.2026.

¹⁴ Available at <https://www.rejust.ro/juris/8422d7gee> – accessed on 16.01.2026.

¹⁵ Available at <https://www.rejust.ro/juris/39d487387> – accessed on 16.01.2026.

Of course, although the situation is problematic, it could be accepted to the extent that the reason why such clauses are upheld by some courts is simply the interpretation given to the law. However, if the reasons for not investigating the unfairness of the clauses are different from the free evaluation, unconstrained by any type of influence, of the judge, of the situation brought to trial, then remedies must be found immediately to eliminate these practices.

Among the reasons for not investigating the unfairness of the terms could be the existence of a disproportionate workload, leading judges to try to lighten their load. Thus, it would be, hypothetically, much simpler to settle a small claim without complications regarding the invocation of unfairness, bringing it up for discussion between the parties, possibly by summoning the parties to court, even though the procedure would allow the case to be heard without a summons¹⁶.

Even from the perspective of the court's technical staff, things would be easier if there were no investigation of unfair terms. In this regard, for example, if this issue is raised, the clerk must seek new forms of communication so that the parties are informed about the broadening of the procedural framework regarding the examination of the unfairness of certain contractual terms. If such activity is extended to several thousand other cases per year, it is quite possible that the excessive volume of work will be a reason for some courts to adopt practices other than those in accordance with the legislation in force on unfair terms.

Furthermore, judicial statistics would be more favourable in terms of judges who settle cases without investigating the unfairness of contractual clauses between the parties. They will have a higher number of cases resolved in a shorter period of time, which will benefit them both in the promotion procedure to the position of execution and in the event of a disciplinary investigation based on delays in resolving cases registered on their panel.

We emphasize that, unlike the situation described above, where the disciplinary liability of the judge for failing to examine ex officio the unfairness of a contractual clause is at most possible, in the case of delay in performing the work, disciplinary liability is very real and actual.

In the absence of standardized work norms, judicial inspection evaluates the judge's activity by comparing it to the court's average on certain indicators, including the number of cases resolved within a certain time frame.

Therefore, it is easy to see that the number of cases resolved within a given period of time will always be lower in proceedings where the unfairness of contractual terms is invoked than in those where this issue is not examined, laying the foundations for the disciplinary liability of judges who are behind schedule in their work, especially in situations where his practice is isolated from that of the majority of members of the same court.

In this context, we emphasize something that is extremely obvious. Namely, in a situation such as the one described above, a practice that requires less effort on the part of one member of the court is likely to cause the other members to adopt it in disagreement with their own interpretation of the legislation in force, which is a matter of judicial independence as long as it can influence them to act in a manner that is not in accordance with their own convictions.

Another problem is that in the system for assessing the complexity of cases pending before Romanian courts, a small claims application is awarded 3 complexity points regardless of whether or not the contractual terms are examined from the perspective of unfairness.

The different weighting of causes could encourage the investigation of unfair terms when necessary.

Finally, in such cases, it is ultimately the consumer who suffers harm, and therefore the situation must be remedied.

Therefore, it is possible that some Romanian courts have approached such practices for reasons other than those relating to the interpretation and application of the law independently, free from any influence.

It is possible that this approach was triggered by fear of disciplinary action for delays in resolving cases, statistics that could affect career advancement, and other similar factors.

¹⁶ Under art. 1030 (1), (2), and (3) of the Code of civil procedure, it is possible to conduct proceedings without ordering the parties to appear, in writing and without summons. Some courts have ruled that in order to invoke the unfair nature of clauses, they must be cited and presented, which has made it difficult to conduct proceedings. Some courts have ruled that in order to invoke the unfair nature of the clauses, they must be summoned and appear in court, which has made it difficult to conduct judicial proceedings in this area, given the large number of requests made. Other courts have questioned the unfairness of contractual terms in writing, by means of a letter issued by the court. Moreover, art. 1030 (8) of the Code of civil procedure provides that "The court may request the parties to provide further information within the time limit it shall set for this purpose, which may not exceed 30 days from the receipt of the defendant's or, as the case may be, the claimant's response."

Under these circumstances, we considered it necessary to treat these divergent practices encountered in practice as being determined by causes other than the judge's own interpretation of the law based on his independence.

This perspective triggered the need to identify possible remedies that would lead to the elimination of such inconsistent practices in this area, so that Romanian consumers would be protected as well and as effectively as those in other European Union member states.

4. Legislative remedies

A simple search on rejust.ro for the terms "civil – small claims"; "disputes with professionals – small claims"; "unfair terms", "Admit", "Reject", "0.5%" returned a total of 235,244 results¹⁷. This number should represent the number of civil judgments handed down in which clauses regarding late payment penalties in the amount described above were challenged.

Clearly, long before such a large number of cases had been resolved, the Romanian state should have intervened through the competent legislative bodies to remove the possibility of such clauses having any effect. This is, in fact, a duty and a requirement regulated by art. 7(1) of Directive 93/13, which states that "Member States shall ensure that, in the interests of consumers and competitors, there are adequate and effective means of preventing such terms from having effect. Member States shall ensure that, in the interests of consumers and competitors, there are adequate and effective means to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers."

Instead, as we will show below, the Romanian state remained passive in the face of the enormous number of repetitive cases that it could have prevented, at the risk of issuing divergent rulings, thereby relieving the role of the Romanian courts, which are already extremely overburdened.

We would like to point out that, in the following, we will not focus our attention on addressing judicial practices that would streamline the work of the courts in resolving such cases. We will emphasize that the courts continue to suffer from a lack of involvement on the part of the legislative branch, with the result that the economic interests of European consumers - Romanian citizens - are affected.

De lege lata, art. 8 of Law No. 193/2000 stipulates that "Compliance with the provisions of this law shall be monitored by authorized representatives of the National Consumer Protection Authority, as well as by authorized specialists from other public administration bodies, according to their competences."

Art. 12 (1) of Law No. 193/2000 stipulates that "If the use of adhesion contracts containing unfair terms is found, the supervisory bodies referred to in art. 8 shall refer the matter to the court of the domicile or, as the case may be, the professional's place of business, to order the cessation of the use of unfair terms in the future and the amendment of contracts currently being performed, by removing the unfair terms."

The Romanian legislator grants active procedural capacity, within the meaning of the above, to consumer protection associations in accordance with art. 12 (3) of Law No. 193/2000.

The purpose of this approach is specified in the provisions of art. 12 (3) of Law No. 193/2000, according to which "Consumer protection associations that meet the conditions set out in Articles 30 and 32 of Government Ordinance No. 21/1992 on consumer protection, republished, with subsequent amendments and additions, may bring legal action against professionals who use adhesion contracts containing unfair terms before the court referred to in paragraph (1), in order for the court to order the cessation of their use and the amendment of contracts currently being performed by removing the unfair terms. The provisions of article 13 (1) and (4) shall apply." The provisions of Art. 13 (1) and (4) are applicable." and the provisions of art. 13 (1) of the Law, which stipulate that the court may oblige the professional "to amend all adhesion contracts currently in force and to remove unfair terms from pre-formulated contracts intended for use in professional activities, and to oblige them to publish final court decisions on their own website."

A particular problem with the legislation outlined above is that it applies to contracts that are currently being executed. However, the overwhelming majority of small claims brought by professionals are based on contracts whose term of performance has ended, the contracts having been terminated due to consumers' failure to perform their contractual obligations, and are within the time frame for the compulsory enforcement of the obligations arising therefrom.

¹⁷ The inquiry took place on January 16, 2026, at 7:40 p.m. It should also be noted that the period under inquiry is from January 1, 2011, to January 16, 2026.

In practice, in these situations, the above-mentioned bodies cannot ask the courts to compel professionals to cease requesting court rulings obliging consumers to pay debts arising from unfair terms in contracts that have expired and which, in most cases, have been ceded to debt collectors.

Therefore, *de lege ferenda*, it is absolutely necessary to enrich the existing mechanism with regard to the phase following the execution of the contract, namely that of the compulsory enforcement of obligations.

Such an amendment may be made by the legislator expressly, which would be the most desirable option; however, in our view, it can also be achieved indirectly, through a civil proceeding in which the authorities competent to request a preliminary ruling from the CJEU examine the conformity of the above-mentioned internal mechanism with art. 7 (1) of Directive 93/13, with the likely aim of extending the scope of the national legal provision.

Thus, once notified, Romanian courts should be able to compel professionals to refrain from seeking court rulings in the future that would oblige consumers to pay debts arising from clauses declared to be unfair.

Following such widespread practice, in which clauses regarding late payment penalties of 0.5% per day of delay established to the detriment of the consumer were found to be unfair, state control bodies, as provided for in art. 8 of Law No. 193/2000, or consumer protection associations should be able to request the court of the consumer's domicile or the professional's place of business to impose the above prohibition.

The fact that, from a period prior to 2009 until today, there are still calls for the protection of professionals' rights derived from such clauses is an extremely serious problem, which not only reveals the unimaginable indifference of the responsible authorities, but also legislation that protects consumer rights only in a theoretical and illusory way. One of the consequences is the excessive congestion of the courts with repetitive cases of this kind.

A particularly important case was settled by civil judgment no. 2429/20.10.2023 of the Bucharest Tribunal, 6th Civil Section, pronounced in case no. 239/3/2023, which became final through civil decision no. 1923/13.12.2024 of the Bucharest Court of Appeal. No. 239/3/2023, which became final by civil decision No. 1923/13.12.2024 of the Bucharest Court of Appeal, 5th Civil Section, whereby the appeal in the case was dismissed as unfounded.

The case was heard between the Regional Consumer Protection Commission for the North-East Region (Iași) and the defendant Vodafone Romania SA, according to the court portal¹⁸.

In its ruling, the court found that the clause in the contract concluded by Vodafone Romania SA with consumers MD and JG regarding the application of late payment penalties of 0.5%/day of delay on the outstanding amount due, as moratory damages, in the event of failure to comply with the payment deadline for invoices issued by the defendant, was abusive.

Furthermore, the court ordered the defendant to amend all current adhesion contracts concluded with consumer customers and to remove unfair terms from pre-formulated contracts intended for use in the course of professional activity, in accordance with this judgment.

Unfortunately, due to the legislation in force, the ruling only has future effect and only applies to the sellers or suppliers¹⁹ who was a party to the proceedings. In other words, other professionals (those who use identical clauses) are not affected by the ruling, as they were not parties to the proceedings and, moreover, even the purchasers of the debts, assigned prior to the ruling, are not bound by this ruling as they were not parties to the proceedings.²⁰

However, the considerations on which the court's decision was based should have inspired uniform practice with regard to the examination of unfair terms with identical or similar content. In this regard, the Bucharest Court of Appeal noted²¹, among other things, when analyzing the unfairness of the aforementioned clause, considerations that have long been established in the overwhelming practice of the courts, namely:

«(...) In this case, applying a penalty rate of 0.5% per day of delay through the clause in question, without any limitation by the parties, leads to a penalty of 182.5% per year, which highlights the imbalance caused by

¹⁸ Available at <https://portal.just.ro/SitePages/acasa.aspx>, accessed on 22.01.2016.

¹⁹ Further referred to as professionals.

²⁰ According to art. 435 (1) of the Code of civil procedure, "The court decision is binding and has effect only between the parties and their successors." The judgment can only be used as evidence, which means that interested consumers can submit it in cases where they are sued. Furthermore, contrary evidence could be presented against the judgment, at least in theory, in other cases in accordance with the provisions of art. 435 (2) of the Code of civil procedure.

²¹ It should be noted that the Bucharest Court of Appeal jurisdiction also includes the Slobozia and Giurgiu courts, which issued the divergent rulings mentioned above.

applying such a contractual clause. The court of appeal will uphold the correctness of the reasoning applied by the court of first instance and the unfair nature of the clause, determining the absolute nullity of the clause relating to penalties, based on letters b) and i) of the annex to Law No. 193/2000.

The analysis must start from the assessment made by the Romanian legislator in O.G. 13/2011 regarding the damage caused as a result of the late execution of the obligation to pay a sum of money.

The statutory penalty interest (the amount owed by the debtor of the monetary obligation for failure to pay a sum of money when due), in accordance with the supplementary provisions on the matter, pursuant to Article 3(2) of Government Ordinance 13/2011, is set at the reference interest rate plus 4 percentage points. In relation to the date of conclusion of the contracts analyzed - April 2022, according to the Circulars of the National Bank of Romania (No. 7/2022, No. 11/2022, No. 17/2022, No. 22/2022, No. 31/2022, No. 37/2022, No. 1/2023, No. 29/2024, No. 35/2024, etc.), the reference interest rate of the National Bank of Romania ranged between 3% per annum and 7% per annum, so that the statutory penalty interest rate also varied between 7% and 11% per annum.

Thus, contrary to the appellant's arguments, the Court considers that there is a clear disproportion between the 11% per annum statutory penalty interest rate and the 182.5% per annum rate established by the clause in question for the same purpose: failure to pay the same amount of money (regardless of its value) on the due date.

Therefore, if the parties had not established the penalty interest rate in the contract, it would have been a maximum of 11% per annum. By establishing this penalty interest rate, the legislator considered that the creditor would be compensated for the damage resulting from the lack of use of the amounts paid late.

By comparison, at a rate of 0.5% per day of delay, this would result in a penalty interest rate of 182.5% per annum. It can therefore be concluded that such a clause would lead to the consumer paying a disproportionately high amount compared to any possible damage suffered by the professional.

As such, following this comparative analysis, the Court finds that this contractual clause places the consumer in a less favorable legal situation than that provided for by the national law in force, the conditions for significant imbalance being met.

At the same time, the Court notes that this penalty applies to the outstanding amount due, which may include not only the value of the subscription (as the appellant claims, in order to suggest that the amount is insignificant, by calculating only the minimum value of some subscriptions), but also other costs (for example, provided for in Article 5 of the main contractual clauses: fair compensation in the event of termination – 18% of the subscription value multiplied by the number of months remaining until the expiry of the minimum contractual term; for equipment purchased with payment in installments, upon termination of the contract, the customer shall pay, in a single installment, the remaining unpaid installments, as well as the difference between the purchase price of the equipment and the price without connection, etc.).

The appellant's argument that "judicial practice has deemed the criterion of 2% per day of delay for default damages to be reasonable and compatible with the requirements of Directive No. 93/13 and Law No. 193/2000" is manifestly unfounded.

The debates during the meeting of the presidents of the specialized (formerly commercial) sections of the High Court of Cassation and Justice and the Courts of Appeal on June 27-28, 2019, focused on another factual hypothesis (setting a percentage of 2% above the interest rate established in loan agreements, in order to establish a default interest rate), and the case law developed and referred to was that of Spain.

The reasoning of the Court of Justice of the European Union in Joined Cases C 96/16 and C 94/17, which refer specifically to loan agreements (concluded with Banco Santander and Banco de Sabadell, respectively) examined by the national courts in Spain, is relevant. which ruled that non-negotiated terms in personal loan agreements concluded with consumers relating to default interest that meet the criterion whereby the rate of such interest exceeds by more than two percentage points the ordinary interest rate agreed between the contracting parties must be declared unfair.

The Court considers that the court of first instance adequately analyzed the requirements of art. 4 (5) of Law No. 193/2000, and the appellant's contrary opinion regarding the decision handed down by the court of first instance does not indicate a violation of the aforementioned provision.

Given the legal nature of late payment penalties and the subject of the analysis (in relation to the legal provisions), the Court considers that the affordable price of the services, the consumer's right to switch to

another operator (there being, moreover, a mandatory legal framework in this regard), the possibility of deferring payment, the appellant's offers regarding the purchase of equipment, etc. are not relevant. (...)

The arguments concerning "the generation of a huge number of civil cases before the courts" and "the impact on other mobile phone operators" are not relevant to the subject matter of the case (the finding that the contractual clause in question is unfair) but, in the Court's opinion, may suggest precisely the negative financial impact of the clause on consumers (payment difficulties also relating to these excessive penalties, the rules on the allocation of payment, etc.) and the general preventive role in adjusting the behavior of mobile phone operators to voluntarily comply with mandatory legal requirements. (...)

With regard to the requirement of good faith, the court considers that the professional did not act in good faith when concluding the contract, given that the consumer would not have accepted such a clause after being adequately informed. From the wording of the contract, which is in fact a standard form contract, it is not clear that the consumer had the actual opportunity to influence the nature of the clauses inserted, namely those relating to the manner and amount of penalties for late payment (...)

The above-mentioned decision became final on December 13, 2024. As we have shown, although it could not have any effect on third parties who were not involved in the proceedings, the court's reasoning and decision should have inspired uniform practice, at least within the jurisdiction of the Bucharest Court of Appeal.

However, we will continue to present only a few solutions pronounced by courts within the same Bucharest Court of Appeal, in cases involving the aforementioned professional, in which such clauses had an effect.

By civil judgment 1657/09.10.2025²² of the Bolintin-Vale Court, the court ordered, among other things, the defendant to pay the claimant the sum of 6, 147.44 lei representing the value of contracted services and equipment installments and to pay late penalties equal to 0.5% for each day of delay, in accordance with art. 4 of the basic contractual clauses, namely the amount of 283.52 lei, and thereafter, from the due date of the last invoice issued until the full payment of the outstanding debt.

Furthermore, by civil judgment 1929/11.11.2025²³ of the Bolintin-Vale Court, the defendant consumer was ordered to pay the claimant the sum of 10,820 lei representing the value of contracted services and equipment installments, as well as to pay the claimant late payment penalties equal to 0.5% for each day of delay, in accordance with art. 4 of the basic contractual clauses, namely the amount of 655.39 lei, and thereafter, from the due date of the last invoice issued until the full payment of the outstanding debt.

By civil judgment no. 1853/2025 of 05.11.2025 handed down by the Bolintin Vale Court²⁴, it was ordered, among other things, that the defendant pay the claimant the sum of 996.02 lei for services rendered and not paid for, the sum of 4284.79 lei representing the monthly instalments for the equipment purchased, late payment penalties of 0.5% for each day of delay, calculated from the due date of the last invoice (28.09.2022) until the date of payment of the outstanding debt.

We note that from September 28, 2022, to November 5, 2025, there were 1,134 days, which, multiplied by 0.5% per day of delay, results in a debt of 567% of the aforementioned debt of 5,280, 81 lei (996.02+4284.79), and a simple calculation shows that the consumer will owe the amount of 29,942.19 lei under the aforementioned clause.

By civil judgment no. 3093/04.06.2025 of the Giurgiu Court²⁵, the court also ordered the defendant consumer to pay the amount of 5202 lei as outstanding debt and late payment penalties in the amount of 169.15 lei, calculated by the creditor, as well as late payment penalties in the amount of 0.5% per day of delay, from the due date of the last invoice issued until the date of actual payment.

In conclusion, there is an immediate need to amend the provisions referred to in this section so as to allow courts to render unfair terms ineffective even where the performance of the contract has ended.

²² Decision No. 1657/2025 of October 9, 2025, issued by the Bolintin Vale Court, available at <https://www.rejust.ro/juris/ggd2d2223> – accessed on January 16, 2026, January 22, 2026.

²³ Decision No. 1929/2025 of 11.11.2025 issued by the Bolintin Vale Court, available at <https://www.rejust.ro/juris/e94g27549> – accessed on 22.01.2026.

²⁴ Decision No. 1853/2025 of November 5, 2025, issued by the Bolintin Vale Court, available at <https://www.rejust.ro/juris/46g758226>, accessed on January 16, 2026.

²⁵ Decision No. 3093/2025 of 04.06.2025 issued by the Giurgiu Court of Law, available at <https://www.rejust.ro/juris/2362e5767>, accessed on 16.01.2026.

Another mechanism that we found interesting and that could be introduced into Romanian law is a national register of unfair terms, which was discussed by the Court of Justice of the European Union for the first time in case C-119/15²⁶.

The Court's ruling states that the register is public so that all consumers and professionals have access to it, even those who are not responsible for the clauses being entered in it. According to the Court's reasoning²⁷, the register is intended to avoid the proliferation of legal proceedings concerning clauses with the same subject matter due to their use by other professionals.

The Court held that such a register is compatible with EU law, noting that Article 8 of Directive 93/13 provides that Member States may draw up lists of contractual terms considered unfair.

According to the Court, the register must be managed transparently in the interests of professionals and consumers, and must be clearly structured, regardless of the number of clauses it contains²⁸.

The clauses in the register must meet the criterion of timeliness, meaning that they must be rigorously updated and, in accordance with the principle of legal certainty, clauses that are no longer necessary must be removed²⁹.

According to Polish law, professionals may be fined for using clauses included in the register and may appeal to a court when, not being identical, the clauses used differ not only in form but also in effect from those entered in the register.

In another case³⁰, the CJEU held that finding unfairness based on such a register could quickly contribute to ending the effects of unfair terms used in contracts, appearing to be an appropriate remedy for the problem we highlight in this study.

This mechanism led to predictable problems, since the prohibition on its use applied not only to the professional who was a party to the dispute that led to its entry in the register, but also to any other professional. Thus, on November 20, 2015, the Supreme Court of Poland³¹ issued a ruling establishing that the registration of an unfair term in the register has no effect on professionals other than those covered by the registration procedure, in order to respect the right of these other professionals to be heard.

It must be noted that, even under such a scenario, tens of thousands of disputes would nevertheless have been prevented, in which, in Romania, the same professionals—assignees of claims for the purpose of their recovery (debt collection agencies)—apply to the courts, by way of small claims procedures, for the delivery of judicial decisions based on contracts containing unfair contractual clauses. In other words, even if such clauses had been registered sequentially, for each professional individually, these practices would, by now, long since have been discontinued.

Returning to the decision of the Polish Supreme Court, in Case C-531/22³², the CJEU, by contrast, held that EU law, in the context of Directive 93/13, does not preclude national case-law according to which the entry of a contractual clause into the national register of unlawful clauses has the effect that such a clause is to be regarded as unfair in any proceedings involving a consumer, including with respect to a professional other than the one who was a party to the proceedings that led to the registration, even where the clause does not have wording identical to that registered, provided that it has the same scope of application and produces the same effects for the consumer.

In the aforementioned case, the CJEU further held that the choice of the means used to attain the specific objectives of such a register, as well as the determination of the legal effects produced by such registration, fall within the competence of the Member States. However³³, it also laid down the condition that the professional must have the possibility to challenge, before a national court, any assessment deeming a contractual clause to be equivalent to one entered in the register.

Attention must be drawn to the fact that the CJEU has emphasised that, irrespective of the scope of the obligation to raise ex officio the unfair nature of a contractual clause, the national court is required to bring this

²⁶ CJEU, Judgment of December 21, 2016, delivered in the case of *Biuro podróży Partner*, C-119/15.

²⁷ Paragraph 35 of Case C-119/15.

²⁸ Paragraph 38 of Case C-119/15.

²⁹ Par. 39 din cauza C-119/15

³⁰ CJEU, Judgment of February 25, 2022, delivered in the case of *mBank (Polish Register of Unfair Terms)*, C-139/22, paragraph 41.

³¹ CJEU, Judgment of January 18, 2024, delivered in the case of *Getin Noble Bank S.A. et al. v. TL*, C-531/22, paragraph 25.

³² See answer No 2 to the questions referred to the Court in Case C-531/22.

³³ Paragraph 72 of Case C-531/22.

issue before the parties for adversarial debate³⁴. Accordingly, it appears that, should professionals choose to seek the delivery of a judicial decision based on an unfair contractual clause - hypothetically entered in the register - and subsequently proceed to its enforcement, the same factual situation would arise as that currently existing, in which the equivalence with the clause entered in the register would still need to be discussed.

Nevertheless, the existence of such a register would be useful even under these jurisdictional conditions, since, first and foremost, it would ensure unity of action among courts, which would assess the matter brought before them by reference to a clause expressly prohibited and entered in a public register accessible *erga omnes*.

Accordingly, it would no longer be left to the discretion of the court to determine, contrary to the prevailing view, that a penalty of 0.5% per day of delay is permissible, but merely to examine whether, although the wording of the clause differs from that entered in the register, it has the same scope of application and produces the same effects for the consumer concerned.

We note that, in such a situation, the possibility of directly fining the professional for the abusive exercise of its civil action by the court would be welcome, or, alternatively, of the court seised referring the matter to the competent administrative authority, which could maintain a computerized record of such types of cases initiated by professionals and could sanction the professional for repeated attempts to give effect to unfair contractual clauses entered in the register.

5. Conclusions

In conclusion, at present, the Romanian State does not have sufficient safeguards to ensure the objective of Directive 93/13, namely the protection of consumers against unfair contractual clauses used by professionals.

The existing legislation merely serves to overburden the courts with repetitive cases brought by professionals seeking to enforce civil actions aimed at protecting rights arising from unfair contractual clauses, which should not produce any legal effects.

The result is that, in certain situations, due to inconsistent practices by some courts -which may be based not on the free application of the law in cases brought before them, in accordance with the principle of judicial independence³⁵, but on other factors such as excessive workload, fear of disciplinary liability, or the impact on prospects for professional promotion -some consumers obtain outcomes that are completely different from those of others in identical cases.

The liability of judges is, at present, only potential, as there are no precedents in which judges have been sanctioned for failing to examine, *ex officio*, the unfair nature of contractual clauses. Consequently, not only does this not constitute a guarantee of consumer protection, but it may even serve as a premise for violating such protection to the extent that judges' liability is engaged for failing to resolve cases within an optimal and reasonable timeframe³⁶.

One of the remedies we propose lies in alleviating the burden on the courts through the establishment of effective and efficient mechanisms, as presented throughout this study, namely by amending the provisions of art. 12 (1) and art. 13 (1) and (4) of Law no. 193/2000 so as to allow courts to prohibit the issuance of judicial decisions, even in the case of contracts whose performance has been completed, on the basis of clauses declared to be unfair.

Another remedy is the adoption of an institution of a national register of unfair terms, similar to the legislation of the Republic of Poland.

Such measures should, first and foremost, lead to the strengthening of safeguards for the protection of Romanian consumers, to the alleviation of the overloaded Romanian courts, and, last but not least, to the reinforcement of judicial independence, since, as we have shown, judges may be induced to deviate from the proper adjudication of cases due to various fears, which may be more or less justified.

In the continuation of this research, mechanisms should be identified that would clearly and effectively enhance the protection provided by Directive 93/13 by eliminating the hundreds of thousands of repetitive cases in which inconsistent practices still exist. Moreover, at a general level, the mechanisms of collaboration between the judiciary and the legislature, as well as between the latter and legal research institutions, should be examined

³⁴ Paragraph 73 of Case C-531/22

³⁵ According to art. 124 (3) of the Constitution of Romania, judges are independent and are bound solely by the law.

³⁶ Art. 271 (g) of Law no. 303/2022 provides that the following constitutes a disciplinary offense: "repeated failure, for attributable reasons, to comply with the legal provisions regarding the swift resolution of cases, or repeated delays in carrying out work, for attributable reasons."

and redesigned, since it appears that, at present, the legislation in force does not clearly, efficiently, or concretely reflect the interests of those governed.

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