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BRIEF CONSIDERATIONS REGARDING THE SPECIFIC CONCEPT OF „CONSUMER” - CONTRACTING PARTY INVOLVED IN A COMMERCIAL LEGAL RELATIONSHIP

E.N. VÂLCU

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Elise Nicoleta VÂLCU

Associate Professor PhD., Faculty of Economic Sciences and Law,
National University of Sciences and Technology, POLITEHNICA BUCUREȘTI,
Pitesti University Center

E-mail: elisevalcu@yahoo.com

ORCID ID: <https://orcid.org/0000-0001-6255-164X>

Abstract

At the level of the European Union, consumer protection has been integrated into all relevant policy areas of the Union legislation, so consumer interests have been a central theme in several legislative initiatives of the European Commission. At the same time, the need to modernize or strengthen some of the existing provisions in the matter of consumer protection was also noted.

Therefore, at the level of 2023, we can appreciate, without making a mistake, that the citizens of the Union Member States benefit from adequate Union legislation as well as application or transposition, as the case may be, regarding consumer protection in major areas such as passenger rights, purchase of goods and services, including in the digital system, the acquisition of the right of use for a certain period of some accommodation lodgings, or some holiday packages, and also the unfair commercial practices or abusive contractual clauses.

Keywords: *consumer, commercial professional, pre-determined clauses, abuse of economic power, limitation of freedom of contract.*

INTRODUCTION

In the light of art.169 of the Treaty on the Functioning of the European Union (TFEU), the policy in the field of consumer protection has as its main purpose the promotion of the health and safety of consumers, but also their right to information, and to organize themselves in such a way as to protect their

interests. To the same extent, art. 12 of the TFEU provides that the consumer protection policy must represent for the union co-legislator, a fundamental pillar in the definition of other union policies.

The legal systems of the member states as a whole as well as the legislation of the European Union protect EU citizens as well as non-EU citizens in their capacity as consumers, ensuring the necessary framework for access to goods and services, including digital ones.

The policy regarding the protection of consumers involved in contractual relations with commercial professionals is a broad one that includes the most diverse fields, from regulations regarding the rights they benefit from in the pre-contractual stage as well as in the contractual stage with the concrete identification of the relevant obligations professionals, to regulations aimed at protecting consumers from unfair commercial practices of traders to provisions on ensuring the defense of the collective interests of consumers on the economic market (actions in representation).

At the level of the Romanian legal system, the legislation on consumer protection is made up of a set of framework provisions formed by Law no. 296/2004¹ (called the Consumer Code) and O.G. no. 21/1992² on consumer protection, which after the entry into force of the consumer code became an annex of the first, remaining applicable even today. To this legislative "core package" one added sectoral or special normative acts whose object is regulation, areas of interest for the topic deduced from the analysis. Thus, we recall in this sense, as an example, Law no. 363 /2007³ on combating unfair practices of traders in the relationship with consumers and harmonizing regulations with European legislation on consumer protection; Law no. 193/2000⁴ republished on abusive clauses in contracts concluded between merchants and consumers.

I. ABOUT CONSUMERS AND THEIR RIGHTS UNDER CONTRACTS WITH TRADING PROFESSIONALS

I.1. Special look at the concept of "consumer"

The beneficiary of the framework legislation but also of the special legislation stated above is the "consumer".

¹ Republished in O.G. no. 224 of March 24, 2008

² Published in O.G. no. 208 of March 28, 2007

³ Published in O.G. no. 899/2007, amended by GEO no. 58 of April 28, 2022 published in the O.G. no. 456 of May 6, 2022

⁴ Republished in O.G. no. 543 of August 3, 2012; Law no. 193/2000 transposes Directive (EEC) 93/13 on abusive clauses in contracts concluded with consumers (OJ L 95, 21.4.1993, p. 29-34, special edition in Romanian; chapter 15 volume 002, p. 273-278, current consolidated version on 28/05/2022) as amended by Directive (EU) 2019/2161 amending Council Directive (EEC)/93/13 and Directives (EC) 98/6, 2005/29 and (EU) 2011/83 of the Parliament and the Council with regard to better ensuring compliance with Union consumer protection rules and the modernization of these rules (OJ L328, 18.12.2019, p.7-28

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The term "consumer" is defined by the framework legislation, in an objective sense, within art. 2 paragraph (1) letter (2) OG no. 21/1992 as being a natural person or an association of natural persons acting for purposes outside of his professional activity. A similar definition can be found in art. 2 paragraph (1) from Law no. 193/2000 republished on abusive clauses in contracts concluded between traders and consumers.

We find that the legislator, through the two provisions stated above, by way of example, creates the profile of the consumer in the sense that:

(a) *This is always a natural person* who completes a contract with the trading professional for the purpose of personal or family consumption, i.e. never for the purpose of making a profit. Also, his actions are not repetitive, in the sense that they are not done as a profession, there being no intention of the consumer to make a profit.

However, it is necessary to clarify the fact that it falls within the scope of the concept of "consumer" and "associations for the protection of consumers", at least from the perspective of the right to take legal action against the professional trader. (*Niță, 2023, p.38-39*)

Regulations with reference to "consumer associations" can be found in OG no. 21/92 on consumer protection, in Chapter VI, where in article 30 it is ordered that associations that protect consumers represent non-governmental organizations, which have non-profit purposes, their only concern consisting in defending the rights and legitimate interests of consumers, facilitating administrative or judicial actions for them. For example, as regulated in art. 36 letter h) of OG no. 21/92, "consumer associations" are recognized the right to file legal actions with the object of protecting their rights⁵.

At the level of the European Union, (EU) Directive 2020/1828⁶ of the European Parliament and of the Council of 25 November 2020 was adopted regarding actions in representation for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, through which the Union legislator creates an effective and efficient procedural mechanism that allows qualified entities that represent the collective interests of consumers to introduce actions in representation both to obtain injunctions and to obtain reparative measures against traders who violate the provisions of European Union law.

⁵ Through (EU) Directive 2020/1828 of the Parliament and of the Council of November 25, 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, consumer associations, qualified as "qualified entities, the power to bring legal actions, thus facilitating broad access to justice for consumers in order to protect their interests, requesting either measures to stop illegal practices or remedial measures (such as reimbursement, replacement, repair) or both types of measures.

⁶ OJ L 409, 4.12.2020, p. 1-27, Current version consolidated on 02.05.2023

(b) The phrase "outside of his professional activity" is used by the legislator with the aim of bringing into the scope of the concept of "consumer", a natural person who can simultaneously or successively be both "consumer" and "professional". How do we explain such conceptual "coexistence"?

It means that a natural person maintains the quality of consumer whenever he buys products or services, which are not part of his profession, i.e. these goods or services are used for personal or family consumption, which means for example that one will qualify as consumer the lawyer who concludes a credit contract with a banking company, whenever the credit contract is not related to the professional activity of the lawyer. However, it will not be considered relevant to qualify the lawyer otherwise than a consumer even in the hypothesis where the mortgage loan contract concerns the real estate intended for the exercise of his professional activity.

Per a contrario, the natural person becomes a professional when he acts (sells or provides) the products or services for purposes related to his professional, private or public activity.⁷

In the *Costea*⁸ case, the CJEU held at points 16-18, that the notion of "consumer" means any natural person, simple individual who, within the contracts regulated by the unfair terms' directive (Directive 93/13/CEE), acts for purposes who is outside his professional activity, while "seller or supplier" means any natural or legal person who, within the contracts regulated by the same directive, acts for purposes related to his professional, public or private activity.

1.2 Rights of consumers

Whenever we approach the topic of the rights of consumers involved in commercial legal relations (*Boghirnea, 2023, p.220-235*) with commercial professionals, it is necessary to mention the principle of contractual solidarity in which the two contracting parties have the obligation to be involved both during the pre-contractual period and throughout the duration of the contract execution, with the sole purpose of concretizing their contractual approach. In this context, part of the specialized doctrine (*Piperea, 2018, p.8*) appreciates, as far as the consumer is concerned, that he is the exclusive beneficiary of the rights arising from the exercise of the contractual obligations assumed by the professional trader, while the latter has almost exclusively obligations.

With reference to the rights available to consumers, art. 27 of Law no. 296/2004 (called the Consumer Code) specifically regulates them. Moreover, each of these is reiterated within the special legislation related to different types of commercial contracts in which the consumer is a contracting party. Specifically, we remind you in this sense:

(a) the right to have access to quality products or services;

⁷ See in this sense, case C-110/14, H.O. Costea c, SC Volksbank Romania SA, points 16-18.

⁸ Case C-110/14, H.O. Costea v. SC Volksbank Romania SA EU:C:2015:538

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(b) the right to be fully, correctly and accurately informed about the essential features of the goods or services to be purchased. This is done with the help of identification elements written in plain sight, legible and easy to understand, as the case may be, on the product, on the label, on the packaging or in the technical book of the product, etc.

(c) the right to be informed about the final price of the product or service. This must be indicated visibly and in an unequivocal, easily readable form by marking, labeling and/or display⁹. Also, the price of the product or service must be a fair one, in the case of a contract, respectively, whenever we are in the presence of an unfair price, i.e. an excessively higher price compared to the production price, it will represent the expression of a manifestation of abuse of the dominant position of the professional trader in relation to the consumer. (*Piperea, 2018, p.8*)

(d) the right to refuse to complete contracts containing abusive clauses. Therefore, any contract concluded by the consumer with a professional trader must contain clear, unambiguous contractual terms¹⁰ that do not require specialist knowledge for the consumer.

(e) the right to safe products, and implicitly the right to return a non-compliant product, the right to its replacement or repair during the warranty period.

(f) the right to be properly and properly compensated for damages caused as a result of non-compliant quality of products and services;

(g) the right to unilaterally terminate the contract accompanied by the right to fair compensation.

(h) the right to organize themselves in consumer associations, in order to defend their rights. (*Ulariu, Cliza, 2023, p.82*)

II. TYPES OF COMMERCIAL CONTRACTS CONCLUDED BY CONSUMERS WITH TRADING PROFESSIONALS

The term consumer is strictly related to concepts such as commercial professional, respectively to the commercial legal relationship, in other words "about commercial contracts". The autonomy of will is the cornerstone of the contractual matter that individualizes the right of option of each person to engage or not, as the case may be, in a contractual relationship." (*Ulariu, Cliza, 2023, p.82*) Therefore, it is imperative to present the types of commercial contracts practiced by consumers, as they are currently regulated by the civil code.

A first example in this sense is the adhesion contract¹¹ (*Bercea, R.R.D.P. no. 4/2020, p. 367-427*) characterized by the fact that its essential clauses are

⁹ See in this sense, art. 65 of Law no. 296/2004

¹⁰ See in this sense, art. 75 of Law no. 296/2004

¹¹ regulated by the Civil Code at art. 1175

predetermined by one of the contracting parties, respectively by the professional trader, the other party, in turn, the consumer, having only the option to purchase from them. This category includes most contracts concluded by consumers, such as credit contracts, insurance contracts, service contracts, etc.

A distinct category of contracts regulated by the civil code is the category of framework contracts¹², being defined as the agreement reached between the parties in order to negotiate, conclude or, as the case may be, maintain the contractual relationship whose essential elements are previously established by it. Therefore, the manner in which the framework contract is to be executed, i.e. references regarding the terms of execution of the obligations assumed by the parties, the volume of services and their price are to be established by subsequent agreements.

In specialized literature, subsequent contracts concluded on the basis of framework contracts are called "application contracts", characterized by the fact that the contracting parties establish the terms of the contract in accordance with the conditions set forth in the framework contract. Thus, it is appreciated that the existence of the framework contract considerably simplifies the negotiation procedure prior to perfecting the application contract. (*Angheni, 2022, p.429*)

It must be stated that although a significant part of the contracts qualified as part of this category are concluded between professional traders, the possibility of a consumer being a "contracting party to an application contract" is not excluded".

A last category of contracts mentioned by the civil code¹³ that refers to the special commercial legislation, is the *contracts concluded with consumers*. Among the special regulations applicable to legal relationships established between consumers and professionals, we mention: the Consumer Code (Law no. 296/2004), Law no. 193/2000 republished applicable to credit contracts concluded between merchants and consumers, Law no. 363/2007 on combating incorrect practices but also OG no. 21/92 on consumer protection.

III. ON THE PRINCIPLE OF FREEDOM TO CONTRACT. LIMITATION OF APPLICATION TO CONSUMERS

Pursuant to art. 1169 and 1170 of the Civil Code, the conclusion, execution but also the termination of a (commercial) contract is based on the principle of freedom of will doubled by that of good faith, thus the contracting parties, in the analyzed situation, the professional and the consumer "are free to conclude any contracts and determine their content, within the limits imposed by law, public order and good morals, being also obliged to show good faith throughout the negotiation, at the time of perfecting the contract, but also during its execution. *Per a contrario*, in the light of art. 11 of the Civil Code, a contract

¹² stipulated in art. 1176 C.civ.

¹³ See in this sense, art. 1177

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that contains provisions derogating from laws that concern public order or good morals will be considered invalid¹⁴.

The legal public order is built, mainly from all the legal norms that make up the branches of public law, we mention in this sense, constitutional law, administrative law, fiscal law, criminal law, etc. and is based on the need to guarantee general interests, therefore the rights of individuals at the level of society.

In the matter of contracts and especially with regard to consumer rights, the legal public order is also determined by the economic order, with multiple valences in the Union law system specific to the matter deduced from the analysis, in which a Union public order is configured. (*Angheni, 2022, p.424*)

What particularity presents the applicability of the principle of contractual freedom of will in the distinct case of the consumer, as a contracting party of a commercial contract?

We make it clear that the freedom to contract is manifested both at the time of the conclusion of the contract representing, in fact, the unequivocal decision to complete the contract as well as the subsequent manifestation, through the possibility of the contracting party to determine the essential clauses of the contract.

Prin urmare, este important să identificăm în ce măsură cele două dimensiuni ale principiului libertății de voință contractuală sunt întru-totul aplicabile consumatorului, ca parte contractantă implicată într-un raport obligațional comercial.

We are of the opinion that the freedom to contract, as a basic principle regulated by the civil code, is analyzed in close connection with the legal equality of the contracting parties, respectively consumer and professional trader.

In the case analyzed in this research, regardless of whether we are considering contracts for the sale of goods and services, including digital ones, credit contracts, etc. we believe that their particularity is given by the fact that there are no legal equality relationships between consumers and professionals, in the sense that the consumer is in a situation of legal inferiority, given by his impossibility to negotiate with the merchant because the analyzed contracts are

¹⁴ The principle of contractual freedom must be correlated with the principle of the binding force of the contract, "pacta sunt servanda" principle expressed by the legislator in art. 1270 paragraph (1) Civil Code, according to which "The validly concluded contract has the force of law between the contracting parties ", which means that, on the one hand, in order to be validly concluded, it must not harm public order and good morals, and, on the other hand, at the time of conclusion, the validity conditions provided for by art. 1179 C.civ. (the capacity to contract, the consent of the parties, a determined and lawful object, a lawful and moral cause) and, in certain cases, the form prescribed by law. If the contracting parties respect, mainly, the content of art. 1169 and art. 1179 C.civ., the contract has "force of law", it is binding between the parties.

characterized by the presence of predetermined, non-negotiable clauses, against which the consumer can only purchase or refuse to complete it, as the case may be.

Therefore, the applicability of the principle of freedom of will is limited only to the possibility of the consumer to enter into a binding relationship with the merchant, i.e. to conclude or not a commercial contract, however, the consumer's freedom in terms of negotiating contractual clauses cannot be appreciated, considering the above comment.

IV. METHODS OF PROTECTING CONSUMERS DETERMINED BY THE NEED TO PREVENT AND COMBAT THE ABUSE OF ECONOMIC POWER OF THE MERCHANT PROFESSIONAL

Some authors (*Piperea, 2018, p.4*) of specialized literature mention the consumer as the vulnerable part of the commercial contract, which is characterized by the fact that it needs special legal protection precisely in order not to become a victim of the trader's abuse of power.

In concrete terms, the appropriate consumer protection legislation takes into account the legal relations between the consumer and the professional, carried out both in the pre-contractual stage, at the time of concluding the contract, but also throughout its execution.

What are the concrete ways to protect the consumer?

a) A first aspect in this regard is the trader's obligation to inform the consumer about his rights. We exemplify in this sense, the obligation of the air transport operator to inform passengers about their rights. Specifically, based on art. 14 para. (1) in conjunction with the provisions of art. 5 para. (1) and (3) of Regulation (EC) no. 261/2004 regarding the rights enjoyed by passengers, in the event of the cancellation of a scheduled flight, they are offered, by the air transport operator: a readable announcement, in the passenger registration area, consisting of a written announcement in clear and legible characters in which they are informed that in the event of a flight being canceled or delayed for at least two hours, passengers have the option to request a form stating their rights at the check-in desk or at the boarding gate regarding compensation and assistance. Also, art. 11 of Directive (EU) 2011/38 on consumer rights, regulates aspects related to the way in which consumers can express their right of withdrawal from a contract concluded at a distance or from a contract completed beyond the commercial location. (*Vâlcu, 2022, p.171-179*)

b) Also, consumer protection is presumed to be ensured by regulating the legal regime of abusive clauses as well as by the presence of the coercive system applicable to incorrect, aggressive or deceptive practices of traders. Thus, we recall here, the presence of courts that can limit the effects that these contracts generate by finding the abusive nature of some contractual clauses and consequently following the judicial re-adaptation, a re-balancing of these contracts takes place.

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c) Combating the abuse of power by the professional trader is also achieved through the presence of special regulations regarding the rights of consumers to withdraw from a contract concluded with professional traders under the conditions of art. 9 of Directive (EU) 2011/38, the guarantee obligation, of quality and durability of the goods, but also the liability (*Beka, 2018*) of the professional trader for damages caused to consumers by the products or services sold.

CONCLUSIONS

As I clarified in the content of this research, the protection granted to consumers, natural persons considered in particular, is intended to correct the legal inequality created in the obligatory relations between consumers and commercial professionals. At the same time, this legislative protection determines essential derogations from the common law of contracts and tortious civil liability.

Also, we believe that the legal framework appropriate to the matter deduced from the analysis is broad, complex but, to the same extent, unanimously outlined when we discuss the meaning of the concept of "consumer", a meaning dedicated eminently to the natural person in actions that exceed his professional field, in other words or how many times the contracted product or service serves personal or family consumption.

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