

Difficulties in Implementing European Contractual Institutions in National Common Law

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Abstract

Romania's accession to the European Union has produced profound legal changes, including in legislative, doctrinal and practical terms. In matters of contract, the provisions of the European directives on the regulation of legal relations between professionals and consumers have created and continue to produce disputes, especially in the field of the harmonisation of the new consumerist institutions to the common national law. At the present stage, the general theory of the contract is subject to pressure exerted by the new rules, full of vitality, of the law of consumption or competition law. The main consumerist institutions subject to the national implementation process are: pre-contractual obligations, unfair terms and the consumer's right of withdrawal. The study insists on the difficulty of harmonizing the above institutions, in the context of the new legislative changes in the field, especially of the Emergency Ordinance of the Government, no. 58/2022. The work is structured in four sections: "The common law contract and the consumption contract", "Pre-contractual obligations: conditions of validity special to consumption", "Unfair terms: manifestations of pre-contractual will" and "Consumer withdrawal: denunciation of progressive consent".

Keywords: contract in civil law, consumer contract, pre-contractual obligations, unfair terms, consumer's right of withdrawal.

JEL Classification: K15, K33

1. Introduction. Common law contract and consumer contract

According to Article 1166 of the Civil Code, a contract is an agreement of wills between two or more persons with the intention of creating, modifying or terminating a legal relationship.

From the above text we understand that, in its unfolded form, the contract involves four main stages: the formation phase, the conclusion of the contract, the performance and the termination of the contract (in which the moment of conclusion of the contract is essential).

The contract formation phase includes discussions and negotiations between persons interested in entering into legal relations. At this stage the question arises as to whether the essential conditions of validity laid down in Article 1179 of the Civil Code have been met: capacity, consent, subject matter, cause and form².

The contract is concluded when the offer meets the acceptance.

The phase of performance (effects) of the contract comprises the obligations of the parties (contract terms).

The contract usually ends when its effects have been produced. As an exception, the contract may also be terminated by unilateral termination by one of the parties (under certain conditions).

Note that Article 1166 et seq. of the Civil Code governs the general contractual rules applicable to all contracts. They constitute the common law of contract.

After 1990, national legislation transposed the provisions of several European directives, in particular in the field of consumer rights.

However, the European consumer regulations include new specific contractual institutions which differ from those enshrined in national contract law.

In this context, it should be noted that, according to Article 1177 of the Civil Code, contracts concluded between professionals and consumers (consumer contracts, n.d.) are subject to special rules (established by the relevant legislation, n.d.) and are supplemented by general rules (established by the Civil Code), which are common law in this area.

Thus, according to Article 1 of the Law no. 296/2004 on the Consumer Code³ (hereinafter

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² See Liviu Pop, *Tratat de drept civil. Obligatiile*, Volume II. *Contract*, Ed. Universul Juridic, Bucharest, 2009, p. 139.

³ Published in the Official Gazette no. 593/2004 (in force since 1 January 2007).

referred to as 'the law'), 'the legal relationships created between economic operators and consumers in relation to the purchase of products and services' are contractual in nature.

The consumer contract is concluded between the consumer and the trader in the course of business and concerns a good or service⁴.

The difficult process by which the specific institutions of consumer law are brought into line with the corresponding (already established) civil law institutions is known as harmonisation⁵.

Through the process of harmonisation, the general theory of contract is subject to the pressure of the new and vital rules of consumer law or competition law.

It is unanimously accepted in French doctrine that the general theory of contract is undergoing a period of reconsideration and reconstruction⁶.

The main difficulty in adapting the contract to the new conditions is that the legislator of the 21st century has created a legislative framework designed to meet current social and economic interests, without taking care to implement them in the existing legal system.

Although the influence of consumer law on ordinary contract law has been confirmed, the fundamental role of consumer protection is nevertheless ensured by ordinary law.

The task of harmonising the new rules with the existing legal system falls to doctrine and case law, by developing effective solutions.

The main consumer institutions requiring harmonisation with the common law are the so-called 'pre-contractual obligations', 'unfair terms' and 'consumer withdrawal'.

2. "Pre-contractual obligations": special conditions of validity of consumption

The contract formation phase is dominated by its final element: the parties' agreement of wills.

In the common law, for consent to be valid, the contracting parties must, among other things, be informed of all aspects of the contract.

According to Article 1166 et seq. of the Civil Code, the conclusion of a contract presupposes the expression of the free and un vitiated consent of the parties. To this end, each party must be aware of all the circumstances relating to the contract.

However, in relations specific to the consumer contract, the specific features of the so-called "pre-contractual obligations" take on new and important values⁷.

In the above context, the State must encourage the use of programmes designed to ensure that consumers are properly informed and educated in order to make the right choice based on adequate information about goods and services and are aware of their rights and responsibilities (Art. 38 of the Consumer Code).

The general aim pursued is to protect consumers when purchasing goods and services and to protect the general public interest against misleading advertising, the negative consequences of advertising and establishes the conditions under which comparative advertising is permitted (Art. 39 of the Consumer Code).

The so-called "pre-contractual obligations" are: the obligation to inform, the obligation to advise and the obligation to provide security, which are briefly described as follows.

a) The obligation to inform consumers. The obligation to inform the consumer implies the communication of all the knowledge relating to the product and necessary for the expression of a valid consent to the conclusion of the contract.

The information obligation is specific to the contract formation stage but continues after the

⁴ See Nicole L'Heureux, *Droit de la consommation*, Yvon Blais Inc, Quebec, 2000, p. 27.

⁵ Harmonisation concerns two aspects: the transposition of European legislation into national law and the adaptation of the new institutions to the general rules already established; see Liviu Stănculescu, *Necesitatea armonizării instituțiilor speciale ale contractului de consumație cu regulile generale*, Ed. C.K.S., Bucharest, 2010, p. 361 ff.

⁶ See Yves Picod, Hélène Davo, *Droit de la consommation*, Armand Colin, 2005, p. 92.

⁷ In the national doctrine, it has been considered that "pre-contractual obligations" are: "obligation of good faith", "obligation of confidentiality" and "obligation of information"; Liviu Pop, Ionu-Florin Popa, Stelian Ioan Vidu, *Tratat elementar de drept civil. Obligațiile*, Ed. Universul Juridic, Bucharest, 2012, p. 92-93.

conclusion of the legal act. Thus, it also extends to the performance of the contract⁸.

The natural person consumer must be informed of: information concerning the identity of the trader, the contractual terms, the characteristics of the product and services, the risks or possible shortcomings of the product or service, the manner of use⁹.

The consumer must be fully, accurately and precisely informed of the essential characteristics of the goods and services supplied.

The obligation to provide information is incumbent on "economic operators" so that consumers are able to make a rational choice, in accordance with their interests, between the products and services on offer and are able to use them safely for their intended purpose (Article 18 of the Emergency Ordinance of the Government No. 21/1992¹⁰, hereinafter referred to as the "Ordinance").

Consumers must also be informed of the risks to which they are exposed through the normal or foreseeable use of the goods (Article 48 of the Consumer Code).

Consumers must be informed by means of identification and characterisation of the consumer, in a visible, legible and comprehensible form, in a form which cannot be erased, etc. (Article 19 of the Ordinance).

Information concerning the protection of the life, health and safety of consumers must also be communicated to them, as far as possible, by means of easily understandable international graphic symbols (Article 46 of the Consumer Code).

Failure to comply with the information obligation is punishable under ordinary law. For example, a consumer contract may be declared null and void on the grounds of a defect in consent (error or fraud¹¹).

The professional's obligation to inform the consumer "may not be waived by invoking commercial or professional secrecy" (Article 23 of the Ordinance).

b) Duty to advise consumers. Sometimes, in addition to information about the product or service, the consumer also needs advice, guidance or a specialist opinion.

In this case, the professional must also provide consumers with other elements so that their decision to purchase a product "best meets their needs" (Article 5 of the Consumer Code).

In terms of its scope, the obligation to provide advice is a complement to the obligation to provide information (and not merely ancillary to it).

By his conduct, the professional must guide the consumer correctly in his choice.

However, the consumer's duty to provide advice is not unlimited.

According to the doctrine¹², the relationship between the professional and the consumer in this area must comply with four rules:

- the consumer must collaborate with the trader in providing advice,
- the obligation to provide advice ceases when the consumer deliberately remains silent about the purpose of the good.
- the advice is intended to express a valid consent of the consumer.
- the consumer may be assisted by a professional adviser (business agent, lawyer, expert, etc.).

c) Product safety obligation. In addition to consumer protection of consent (pre-contractual obligations, s.n.), the relevant legislation also protects consumer safety.

In this context, the import, manufacture, distribution and marketing of counterfeit or falsified, dangerous products or products with non-conforming safety parameters that may affect the life, health or safety of consumers are prohibited.

It is also forbidden to market unsafe products and products that are not accompanied by the

⁸ See Gabriel Vasii, *Contractul civil versus contractul de consumatie*, Ed. Rosetti, Bucharest, 2022 p. 84; Anca Nicoleta Gheorghe, Camelia Spasici, Dana Simona Arjoca, *Dreptul consumatiei*, Ed. Hamangiu, Bucharest, 2012, p. 64.

⁹ See Liviu Pop, *Obligatia de informare-mijloc de protectie a consimtamentului la incheierea contractelor*, in „Dreptul” no. 6/2017, p. 61.

¹⁰ Published in the Official Gazette no. 212/1992 (in force since 28 August 1992).

¹¹ See Ionuț-Florin Popa, *Dolul si obligatia de informare in contractele sinalagmatice*, in „Dreptul” no. 7/2002, p. 70.

¹² See Juanita Goicovici, *Dreptul consumatiei*, Ed. Sfera Juridica, Cluj-Napoca, 2006, p. 44 ff.

mandatory documentation required by law (Article 37 of the Consumer Code).

Professionals are obliged to place on the market only products that are safe for the life, health and safety of consumers (Article 36(1) of the Consumer Code).

A safe product may be any good which, under normal or reasonable conditions of use, including duration and, where appropriate, commissioning, installation and maintenance requirements, presents no risk or only minimal risks (compatible with the use of the product).

Manufacturers must provide consumers with useful information enabling them to assess the inherent risks of a product when these are not immediately perceptible to the consumer without an appropriate warning (Article 4(1) of the Act).

The obligation to ensure product safety operates from the moment the products are placed on the market, but continues after the contract is concluded (Article 4(1) of the Law).

Accordingly, the professional's product safety obligation begins before the sale of the product and continues throughout the term of the contract¹³.

It follows that the obligation of the product safety professional is continuous.

d) Legal nature of "pre-contractual obligations": special conditions of validity.

According to the doctrine, a civil obligation has the meaning of a civil law relationship in which one party, called the creditor, has the legal possibility to require the other party, called the debtor, to perform one or more positive or negative performances, usually under the sanction of state compulsion¹⁴.

Strictly speaking, in contractual matters, the term "obligation" has the meaning of the debt assumed by the contracting debtor.

In the common law sense, the term 'contractual obligation' refers to the effects phase of the contract and not to the formation phase (where one can only speak of negotiations, offers, acceptances, conditions of validity, etc.).

According to Article 18 of the Ordinance, consumers have the right to be fully, correctly and accurately informed of the essential characteristics of the products and services offered by economic operators, so that they are able to make a rational choice, in accordance with their interests, between the products and services on offer and are able to use them safely for their intended purpose.

In the spirit of the special laws, but also of the Civil Code, we understand that the main obligation of information is complemented by two other correlative obligations of the professional, namely the obligations of advice and security.

From the text of Article 1177 of the Civil Code, according to which, the contract concluded with consumers is subject to the special laws and, in addition to the general contractual rules, we note that the three so-called "pre-contractual obligations" are special conditions of validity imposed on the consumer contract (and not contractual obligations)¹⁵.

Accordingly, in the consumer contract, the so-called 'obligations' of information, advice and security have the legal nature of special conditions of validity. They co-exist with the general ones provided for in Article 1179(2) of the EC Treaty. 1 and 2 of the Civil Code (common law, in the matter)¹⁶.

¹³ The French doctrine analyses both the general preventive safety rules for products and services and those applicable only to certain categories of products and services; see Jean Calais-Auloy, Henri Temple, Malo Depince, *Droit de la consommation*, Dalloz, 2020, p. 289 et seq.

¹⁴ See Liviu Pop, Ionu-Florin Popa, Stelian Ioan Vidu, *op. cit.*, p. 13.

¹⁵ The practice has also taken the same position: Jud. Sect. 1 Bucharest, civil sentence, no. 12488/24.06.2011; C.A. Bucharest, commercial section, dec. no. 192/18.03. 2010; I.C.C.J., commercial section, dec. no. 422/2004 in Anca Nicoleta Gheorghe, Camelia Spasici, Dana Simona Arjoca, *op. cit.*, p. 80 et seq.

¹⁶ Part of the French doctrine considers pre-contractual obligations to be "integrated into the contract" because they constitute "the expression of public policy of direction and public policy of protection" in order to ensure a certain "contractual policing"; see Gabriel Vasii, *op. cit.* (2022), p. 85 and the French authors cited: François Terré, Philippe Simler, Yves Lequette, *Droit civil. Les obligations*, Dalloz, 2009, p. 396-401; Philippe Delebecque et Frédéric-Jérôme Pansier, *Droits des obligations*, Lexis Nexis, 2013, p. 234.

3. "Unfair terms": pre-contractual manifestations of will?

As a bilateral expression of will, the contract presumes a balance between the parties' performances. For example, in a sale, the price paid by the buyer is in principle equivalent to the value of the goods sold.

As an exception, contractual obligations may be unbalanced (in favour of one of the parties).

Although the scope of unfair terms is also known in common law, they are specific to consumer contracts (due to the permanent imbalance between professional and consumer).

An unfair term is one which has not been directly negotiated with the consumer if, by itself or together with other provisions of the contract, it creates, to the detriment of the consumer and contrary to the requirements of good faith, a significant imbalance between the rights and obligations of the parties (Article 4(1) of the Law).

The subject-matter is Law No. 193/2000 *on unfair terms in contracts concluded between professionals and consumers* (hereinafter referred to as "the Law")¹⁷.

Three conditions characterise the unfair term.

a) The clause was not negotiated directly with the consumer. A contract term is "deemed not to have been directly negotiated with the consumer if it has been agreed without giving the consumer the possibility to influence its nature, such as pre-formulated standard contracts or general conditions of sale practised by professionals in the market for the product or service in question" (Article 4(2) of the Law)¹⁸.

On the contrary, the term is not negotiated if it has been drafted in advance by the trader unilaterally and without the possibility for the consumer to intervene on it.

The existence of negotiation implies that the consumer must be able to prove that he has the possibility of changing the nature or content of the contract.

This requires genuine negotiation, as a result of which the clause can be amended or even removed from the contract (and not formal negotiations)¹⁹.

It is therefore not negotiation to be able to choose between the offers of several banks, nor to be able to choose between several contract variants offered by the same bank.

For example, where contracts concluded between professionals and consumers have the same format and the same content, and where the differences between them are due solely to the specific features of the client, the lack of negotiation is obvious.

In the case of pre-formulated standard contracts and general terms and conditions, the lack of negotiation is presumed to be relative, without this implying that other types of contract cannot contain unfair terms.

Where one of the parties, i.e. the consumer, has negotiated the pre-contract to his advantage and has accepted its terms (which in the future have proved to limit his power to negotiate the terms of the contract), the terms are not unfair, but merely a contract better negotiated by the trader.

The negotiation must include all the contractual clauses.

According to Art. 4 para. 3 of the Law, "The fact that certain aspects of the contract terms or only one of the terms have been negotiated directly with the consumer does not exclude the application of the provisions of this Law to the rest of the contract, if an overall assessment of the contract shows that it has been unilaterally pre-determined by the trader".

Therefore, if a professional claims that a pre-formulated standard term was negotiated directly with the consumer, it is his duty to provide evidence to this effect (Art. 4(3), second sentence of the Law).

By way of exception, the relative presumption in favour of the consumer that there has been

¹⁷ Law 193/2000 on unfair terms in consumer contracts transposed into national law Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. Law no. 193/2000 was republished in the Official Gazette no. 543 of 3 August 2012 and amended by the Emergency Ordinance of the Government no. 58/2022).

¹⁸ See F. Prip, *Aprecierea caracterului abuziv al clauzelor contractelor de consum*, Ed. Sfera Juridică, Cluj-Napoca, 2006, p. 129.

¹⁹ Similarly, a distinction must be made between prior information of consumers and negotiation, information being merely the implementation of the obligation of transparency laid down in Article 5 of Directive 93/13/EEC, on the basis of which consumers can decide whether they wish to be bound by the terms drawn up in advance by the trader.

no negotiation may be rebutted by the trader by adducing evidence to the contrary only where the preformulated term has been altered²⁰.

b) Breach of the requirement of good faith in the conclusion of legal acts. According to Article 14 of the Civil Code, any natural or legal person must exercise his rights and perform his civil obligations "in good faith" and in accordance with public policy and morality.

Good faith presupposes a standard, objective conduct, expected of a professional, reflected in honest activity and inspiring mutual trust in the conclusion and performance of contracts.

The requirement is general and therefore applicable to all contracts²¹.

The requirement of good faith is the abstract basis for the regulation of unfair terms (Article 4(2) of the Law).

Contractually, the requirement of unconscionability presupposes the absence of any act or omission which could be detrimental to the "weaker party".

The assessment of the unfairness of a term in a given contract, already concluded, will be made in concreto, taking into account the person of the consumer and the conditions of the conclusion of that contract.

By way of exception, where general terms are concerned, without reference to a particular contract, the assessment of unfairness will be made in abstracto, taking into account an average consumer and the usual conditions.

c) Significant imbalance between benefits. The principle of contractual equilibrium is intended to ensure that the consumer (weaker party) has equal contractual conditions with the professional (stronger party).

Significant imbalance is contrary to the normal relationship that should exist between the parties.

The contractual imbalance must be concrete, depending on the specific circumstances of each contract.

Thus, the imbalance must also be qualified as "significant" in terms of the legal situation that the consumer would have had by applying the legal rules of national law.

The imbalance must be significant.

Not every inequality is relevant, but only "a significant imbalance between the rights and obligations of the parties" (Article 4(1) of the law).

The imbalance must be to the detriment of the consumer, who is the only one concerned by the consumer law protection rules.

Otherwise, if a term would create a significant imbalance to the detriment of the trader and obviously to the advantage of the consumer, it cannot be qualified as unfair.

The imbalance must also be analysed in terms of the legal situation which the consumer would have had by applying the legal rules of national law, and the economic effect on the consumer need not be significant (in relation to the value of the transaction which is the subject of the contract).

It should be noted that, in French doctrine, the unfair nature of a contractual term is assessed on several levels, depending on: the nature of the goods or services covered by the contract; the factors determining the conclusion of the contract; the other contractual terms²².

The conditions of good faith and significant imbalance are closely linked.

In the above context, the insertion of a term which creates a significant imbalance to the detriment of the consumer is 'per se' contrary to good faith.

d) List of terms considered unfair. Penalties. The Annex to Law no. 193/2000 contains a list of terms considered unfair.

The list, which is annexed to the law, is not exhaustive but lists some contractual provisions

²⁰ According to Article 1 para. 1 of the Law, the possibility of negotiation is also determined by the clarity of the contractual terms, both in the sense that no specialist knowledge is required to understand them [Art. 1(1) of the Law] and by the content, which must be complete.

²¹ See Camelia Spasici, *Introducere in dreptul civil*, Ed. Hamangiu, Bucharest, 2013, p. 5.

²² See Yves Picod, Hélène Davo, *op. cit.* (2005), p. 140.

which the law recognises as representative unfair terms.

Because of its restrictive character, doctrine and practice may add other unfair terms to the list.

In keeping with its spirit, the 'list' establishes a presumption of unfairness of the contractual terms in question.

However, the presumption of unfairness is not absolute but relative.

Thus, the trader can prove the contrary (by proving that the conditions of the unfair term are not fulfilled).

According to the list, terms are considered unfair (among others, s.n.), clauses which: give the trader the right to unilaterally alter the terms of the contract without good reason to be stated in the contract; oblige the consumer to comply with contractual conditions of which he was not aware (at the time of the conclusion of the contract); oblige the consumer to fulfil his obligations even when the trader has not fulfilled his own; entitle the trader to unilaterally ascertain the conformity of the goods and services supplied; entitle the trader to interpret contract terms exclusively; oblige the consumer to pay disproportionately high amounts (in case of non-performance of contractual obligations).

Exceptions to the rules set out in the list are the provisions relating to the trader's unilateral right to amend the contract, to increase the price of the products and to terminate the contract without notice in two cases: securities transactions and sales of foreign currency.

According to the majority doctrine²³, since the unfair term affects the substance of the consumer's will (and not the obligation - the effect of the contract), the applicable sanction is the nullity of the consumer contract (in whole or in part)²⁴.

It should be noted that the sanction of nullity is based on the trader's bad faith in concluding the contract, but also on the failure to fulfil the essential condition of validity of the cause (Article 1179 of the Civil Code)²⁵.

4. "Consumer withdrawal". Withdrawal of progressive consent

a) Termination of the contract. General rule. Exceptions. As a rule, the contract terminates when it takes effect.

By way of exception, under Art. 270 para. 2 of the Civil Code, after its (valid, s.n.) conclusion, the contract may be modified or even terminated "only by agreement of the parties or for reasons authorised by law".

According to Art. 1276 para. 1 and 2 of the Civil Code, the parties may unilaterally terminate the contract, before or after its commencement, subject to certain conditions²⁶.

Since the consumer contract is subject to special laws and, in addition to general law, even the consumer's withdrawal must be in accordance with the general rules (art. 1177 Civil Code).

b) Legal nature of the consumer's withdrawal from the contract: question of consent formation or unilateral termination of the contract. The consumer's right of withdrawal is subject to several European and national regulations.

According to Article 1122 of the French Civil Code, "The law or the contract may provide for a reflection period, which is the period up to the expiry of which the recipient of the offer may not express his acceptance, or a withdrawal period, which is the period up to the expiry of which the recipient may withdraw his consent".

In applying the text of the law, French doctrine uses the phrase "repentir; reflexion;

²³ See C. Dascălu, *Consideratii privind protectia intereselor economice ale consumatorilor in contractele de adeziune cu clauze abuzive*, in „Revista de Drept Comercial” no. 1/1999, p. 59.

²⁴ See also practice: ICCJ, sec. II civ., dec. no. 978/2019; I.C.C.J., sec. II civ., dec. no. 115/2012; Jud. Galați, civ. sent., no. 3557/2016, in Gabriel Vasii, *op. cit.*, p. 175 et seq.

²⁵ See Anca Nicoleta Gheorghe, Camelia Spasici, Dana Simona Arjoca, *op. cit.*, p. 101.

²⁶ See Liviu Pop, *op. cit.* (2009), p. 280 et seq.

retractation" to mean the period of time²⁷ during which the consumer's consent "does not become irrevocable".

Correspondingly, in Anglo-Saxon law, the cooling-off period has the meaning of the period of time allowing the consumer to buy without regret²⁸.

According to French doctrine²⁹, the signing of the contract represents only a progressive stage in the formation of the consumer's will (and not a conclusion of the legal act in the sense of the common law).

The consumer's right "de repentir" (of regret, s.n.) is a mechanism of successive contract formation which only becomes perfect at the end of the withdrawal period³⁰.

In another view, "Le droit de repentir" only suspends the effectiveness of the contract, prohibiting the performance of the consumer's obligations, but it is not recognised as "perfect" because only one of the parties is allowed to withdraw from it.

According to the above, the contract does not take effect (when it is perfected) but only when it is fully formed.

At national level, the positions between the legislature and the doctrine are totally different.

According to Article 82 of Law no. 296/2004 (Consumer Code), the contract for the purchase of goods and services must contain an express clause on the consumer's "right of unilateral termination of the contract".

Thus Article 84 of the Consumer Code: "the consumer's right of withdrawal... contract" cannot be annulled or restricted by any contractual clause or agreement between the parties.

Materialising the consent of the trader and the consumer must contain an express clause on the "right of unilateral termination" of the contract (Art. 82 Consumer Code).

The right of "unilateral termination" instigated by the legislator (in the post-1989 period) gave the consumer additional protection by allowing him to reflect on the decision taken and to check how the trader fulfilled his obligations.

In this context, the theory of "phased" contract formation has also been formulated, according to which, although the trader's consent initially met the consumer's consent, the contract was not fully concluded, and during the withdrawal period his consent matured and the contract was consolidated until the final conclusion of the contract.

According to the above, the contract does not take effect (at the moment of its conclusion) but only when it is fully formed.

The doctrine has consistently held that the consumer's right "to withdraw from the contract" is legally translated into the possibility for him to withdraw his consent given at the time of conclusion of the contract.

Consequently, the consumer's 'withdrawal' from the contract is not a way of terminating the contract but a way of 'withdrawing consent'. Thus, the consumer's right to 'unilaterally withdraw' from the contract is a matter of will (consent³¹) and not of revocation (termination) of the contract³².

The effect of the consumer's withdrawal is that the contract is not concluded (on the grounds of non-consent)³³.

Otherwise, by not exercising the right of withdrawal within the time limit laid down by law, the consumer confirms that his consent is maintained.

c) Particular features of consumer withdrawal from distance or off-premises contracts.

The seat of the matter is to be found in the provisions of Articles 9-16 of the Emergency Ordinance

²⁷ Period of time during which the consumer gains lucidity (spontaneously or through counselling by another person); see Jean Calais-Auloy, Henri Temple, *Droit de la consommation*, Dalloz, 2015, p. 156.

²⁸ See Laurent Aynes, Philippe Malaurie, Philippe Stoffel-Munck, *Les obligations*, Defrenois, Paris, 2011, p. 263.

²⁹ See Jean Calais-Auloy, Henri Temple, Malo Depince, *op. cit.*, p. 173.

³⁰ See François Terré, Philippe Simler, Yves Lequette, *op. cit.*, p. 298.

³¹ See Juanita Goicovici, *Dreptul relatiilor dintre profesionisti si consumatori*, Ed. Hamangiu, Bucharest, 2022 p. 69.

³² See also practice: I.C.C.J., Jud. Sect. 1 Bucharest, sentence no. 2205/2017, in portal.just.ro no. 2 of 28 March 2017; T. Braşov, civ. sentence no. 139/C/2015, in portal.just.ro of 28 January 2015; Bucharest Tribunal, 6th civil section, sentence no. 2626 of 02.04 2013, in portal.just.ro of 13 October 2013.

³³ See Gabriel Boroî, *Drept civil. Partea generala. Persoanele*, Ed. Hamangiu, Bucharest, 2008, p. 208.

of the Government No. 34/2014 *on consumer rights in contracts concluded with professionals*, as amended (hereinafter referred to as the "Ordinance"), as amended³⁴.

According to Art. 9 para. 1 of the Ordinance, the consumer has a period of 14 days to withdraw from a contract "without having to justify the decision to withdraw and without incurring any costs" (other than those provided for by law).

In order to protect the legitimate interests of consumers with regard to aggressive or misleading commercial or sales practices, the withdrawal period is extended to 30 days for contracts concluded in two cases: in the context of unsolicited visits by a trader to a consumer's home or in the context of travel organised by a trader with the purpose or effect of promoting or selling goods to consumers (Article 9(1), sentence II of the Ordinance).

According to Article 9 para. 2 of the Ordinance, the withdrawal periods mentioned above expire within 14 days or 30 days, as the case may be:

- from the date of conclusion of the contract, in the case of service contracts;
- from the day on which the consumer or a third party other than the carrier acquires physical possession of the goods, in the case of sales contracts ;
- where the consumer orders in a single order multiple goods to be delivered separately, the day on which the consumer takes physical possession of the last good;
- in the case of delivery of a good consisting of several lots or pieces, the day on which the consumer or a third party takes physical possession of the last good or piece;
- in the case of contracts for the periodic delivery of goods over a fixed period of time, the day on which the consumer or a third party acquires physical possession of the first good;
- from the date of conclusion of the contract, in the case of contracts for the supply of water, natural gas, electricity, where they do not provide for the sale of a limited volume or set quantity, of heat or of digital content not supplied on a tangible medium.

During the withdrawal period, the contracting parties must fulfil their obligations in accordance with the legal provisions (Article 9(3) of the Ordinance).

If "Omission of information on the right of withdrawal" has occurred, the withdrawal period differs as follows:

- if the trader has not provided the consumer with the information on the right of withdrawal, the withdrawal period expires 12 months after the end of the initial withdrawal period;
- where the trader has provided the consumer with the information, the withdrawal period shall expire 14 days or 30 days, as the case may be, from the date on which the consumer receives that information (Article 10(1) of the Ordinance) ³⁵.

In the information procedure, the consumer can choose between two forms:

- using the model form, set out in the annex to the Ordinance, or,
- another unequivocal statement in which he expresses his decision to withdraw from the contract.

Consequently, the consumer has exercised his right of withdrawal when his communication is sent by the consumer before the expiry of the period in question.

In addition to the above possibilities, the trader may also "give the consumer the option of completing and submitting the communication electronically" on the trader's website :

- either the model withdrawal form set out in the Annex,
- an unequivocal statement of any other type.

The effects of the contract are reflected in the obligations of the parties (trader and consumer).

The trader must reimburse the consumer all sums received by way of payment, including those relating to delivery costs incurred by the consumer (within a maximum of 14 days from the

³⁴ Emergency Ordinance of the Government No. 34/2014 was substantially amended by the Emergency Ordinance of the Government No. 58/2020 (which transposed into national law EU Directive 2019/2.161 of the European Parliament and of the Council of 27 November 2019).

³⁵ In the exercise of the contract and during the withdrawal period, the consumer must inform the trader of his decision to withdraw from the contract (Article 11(1) of the Ordinance).

date on which he was informed of the consumer's decision to withdraw from the contract).

It should be noted that Article 13 of the Ordinance uses the wording "without undue delay", which is left to the discretion of the court, but the insertion of this phrase is, in our opinion, redundant, given the specification of the maximum period for reimbursement³⁶.

The return of the goods is made by using the same methods of payment as those used by the consumer for the performance of the contract, the latter having the possibility of choosing another method of payment, in which case the professional will use the latter, without any commission being charged to the consumer.

By way of exception, the trader shall not be liable to reimburse the additional costs of the delivery made, at the express request of the consumer, in a manner other than the standard one offered by the trader.

On the other hand, the trader shall be liable to reimburse the costs incurred by the consumer up to the time when the right of withdrawal is exercised, may be postponed by the trader, in the case of sales contracts, until the time when the trader takes material possession of the goods sold or until he receives proof that the goods have been sent by the consumer to the trader, whichever is the earliest, unless the trader has undertaken to "recover" them himself.

The consumer shall be obliged to return the products to the trader (or to a person designated by the trader for this purpose) no later than 14 days from the date on which he communicated the withdrawal decision³⁷.

The consumer shall be liable to pay the costs of "costs directly related to the return of the products" unless the trader has assumed these costs or has not fulfilled his pre-contractual information obligation in relation to them.

For off-premises contracts, if the products have been delivered to the consumer's home at the time of the conclusion of the contract, their return shall be at the expense of the trader if the products, by their nature, cannot normally be returned "by post".

The consumer must bear the loss in value of the goods resulting from their handling, but this must not be a factor which deters the consumer from exercising his right of withdrawal.

According to Article 16 of the Ordinance, the following are exempted from the right of withdrawal for distance and off-premises contracts:

- service contracts, after the services have been provided in full and, where the contract gives rise to a payment obligation for the consumer, if performance has begun with the consumer's prior express consent and after the consumer has confirmed that he is aware that he will lose the right of withdrawal after the trader has performed the contract in full;
- the supply of goods or services whose price depends on fluctuations in the financial market which the trader cannot control and which may occur during the withdrawal period;
- the supply of goods made to the consumer's specifications or clearly personalised;
- the supply of goods which are likely to deteriorate or expire rapidly;
- the supply of sealed goods which cannot be returned for reasons of health protection or hygiene and which have been unsealed by the consumer;
- the supply of goods which, after delivery, are, by their nature, inseparably mixed with other items;
- the supply of alcoholic beverages the price of which has been agreed at the time of the conclusion of the sales contract, the delivery of which cannot take place before 30 days and the actual value of which depends on fluctuations in the market over which the trader has no control;
- contracts where the consumer has specifically requested the trader to come to his home to carry out urgent repair or maintenance work³⁸.

³⁶ See Gabriel Vasii, *op. cit.*, p. 269.

³⁷ It has been argued in the doctrine that the phrase "without undue delay" contradicts the second sentence of para. 1 of Art. 14 of the Ordinance, which states that "the time limit shall be observed if the products are returned by the consumer before the expiry of the 14-day period"; see Gabriel Vasii, *op. cit.*, p. 269.

³⁸ If, on the occasion of such a visit, the trader provides services other than those expressly requested by the consumer or supplies goods other than spare parts essential for the performance of the maintenance or repair work, the right of withdrawal shall apply to those additional services or goods.

- the supply of sealed audio or video recordings or sealed software which has been unsealed after delivery;
- the supply of newspapers, periodicals and magazines, with the exception of subscription contracts for the supply of such publications;
- contracts concluded under an invitation to tender;
- the provision of accommodation services, other than for residential purposes, transport of goods, car hire, catering or services relating to leisure activities, where the contract provides for a specific date or period of performance;
- contracts for the supply of digital content which is not delivered on a tangible medium, if performance has begun and, where the contract gives rise to a payment obligation for the consumer, provided that: the consumer has given his express prior consent to the start of performance during the withdrawal period; the consumer has confirmed that he is aware that he will lose his right of withdrawal as a result; the trader has provided confirmation of the conclusion of the contract.

According to Article 16 of the Ordinance, the following are exempted from the right of withdrawal for distance and off-premises contracts:

- service contracts, after the services have been provided in full and, where the contract gives rise to a payment obligation for the consumer, if performance has begun with the consumer's prior express consent and after the consumer has confirmed that he is aware that he will lose the right of withdrawal after the trader has performed the contract in full;
- the supply of goods or services whose price depends on fluctuations in the financial market which the trader cannot control and which may occur during the withdrawal period;
- the supply of goods made to the consumer's specifications or clearly personalised;
- the supply of goods which are likely to deteriorate or expire rapidly;
- the supply of sealed goods which cannot be returned for reasons of health protection or hygiene and which have been unsealed by the consumer;
- the supply of goods which, after delivery, are, by their nature, inseparably mixed with other items;
- the supply of alcoholic beverages the price of which has been agreed at the time of the conclusion of the sales contract, the delivery of which cannot take place before 30 days and the actual value of which depends on fluctuations in the market over which the trader has no control;
- contracts where the consumer has specifically requested the trader to come to his home to carry out urgent repair or maintenance work.
- the supply of sealed audio or video recordings or sealed software that has been unsealed after delivery;
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- contracts concluded under an invitation to tender;
- the provision of accommodation services, other than for residential purposes, transport of goods, car hire, catering or services relating to leisure activities, where the contract provides for a specific date or period of performance;
- contracts for the supply of digital content which is not delivered on a tangible medium, if performance has begun and, where the contract gives rise to a payment obligation for the consumer, provided that: the consumer has given his express prior consent to the start of performance during the withdrawal period; the consumer has confirmed that he is aware that he will lose his right of withdrawal as a result; the trader has provided confirmation of the conclusion of the contract.

However, the trader bears the risk of diminishing the value of the products when he has not fulfilled his pre-contractual obligation to inform the consumer of the right of withdrawal.

The burden of proof is on the trader to prove that the diminished value of the product results from "something other than what is necessary to determine the nature, characteristics and functioning of the products.

As a result of the exercise of the right of withdrawal, the obligations of the parties to the contract, if any, shall be terminated:

- to perform the distance contract or the off-premises contract;
- to conclude a distance or off-premises contract where the consumer has placed an order (Article 12 of the Ordinance).

Also as a result of the exercise of the right of withdrawal, the termination of the main distance or off-premises contract entails the termination of ancillary contracts, at no cost to the consumer (Article 15 of the Ordinance).

5. Conclusions

The issue of the implementation of the special institutions regulated by the provisions of the European directives actually arose with Romania's accession to the European Union and is still topical.

Although the field is broader, the study refers to the three most special consumer contractual institutions, namely: pre-contractual obligations, unfair terms and the consumer's right of withdrawal (all three difficult to harmonise with the common law established by the Civil Code).

Despite the difficulties of implementation, national doctrine and practice have proposed scientifically sound solutions.

However, the diversity of transposition regulations requires constant analysis and reconsideration of national contractual institutions.

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