

Considerations regarding consumer protection in Romanian and European law. The notion of consumer

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Abstract

Ensuring a high level of protection of consumer rights represents a concern of the European Union. The consumer is, in the broadest sense, the person who purchases goods and services. The policy of consumer protection is based on the presumption of vulnerability of the individual in relation to the professionals.

Keywords: *consumer, professional, vulnerability, objective acceptance, subjective acceptance, competitive market.*

JEL Classification: K20, K22, K23

1. Preliminary considerations

The treaties that established the European Communities did not give importance to the aspects referring to consumer² protection because, on one hand, the process of integrating the markets was at the beginning, and, on the other hand, on a social plan, the concept³ of consumer had not yet been affirmed. We cannot say that these aspects were totally unknown to the redactors of the founding treaties of the European Communities. By analysing the dispositions in the E.E.C., we notice that certain stipulations have been included regarding the raising of the standards of living and the improvement of the living conditions. These dispositions could be considered to be preceding a social policy that will be configured afterwards. The Maastricht Treaty introduced in the European Community Treaty stipulations consecrated to consumer protection. Therefore, art.129 A⁴ from the Maastricht Treaty constituting the European Union legislate distinctively the aspects concerning consumer protection. The introduction of the dispositions that refer to consumer protection had as scope the promotion of health, of legal and economic interests, and

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² The Treaty of Rome used the notion of user.

³ The first organisms of consumer protection, as well as the first normative acts which regulated this matter appeared in Western Europe in the 1980s (for a detailed analysis of these aspects, see Beauchard J., “*The right of distribution and consumption*”, P.U.F., Paris, 1996, p. 22)

⁴ (1) The community contributes in the insurance of a high level of protection of the consumer via:
a) measures adopted in accordance with article 100a in the realization of the intern market
b) specific actions that uphold and complete the policy of the member states in order to protect the security, health and the economic interests of the consumer and the insurance of their proper information.

the insurance of the right to information of the consumer. According to the dispositions of art.3⁵ lit. (s) from T.U.E., consumer protection is integrating in the principles of action of the E.U., meaning the sustainable development and the implementing of the social market economy characterised by a high degree of competitiveness. In the vision of the European Parliament, via these policies a Citizens' Europe is established. Furthermore, in accordance with the stipulations in art. 38⁶ from the Book of Fundamental Rights of the European Union, the policies of the Union establish a high level of consumer protection. The member states may maintain, or introduce stricter measures of protection for the consumer, to the extent that they are compatible with the Treaty, and if the Committee had been notified in this regard. We notice that the Union's concern is to ensure a high level of protection for the consumer rights, in addition to the possibility of the member states to establish stricter measures of protection.

2. The consumer in Romanian and European law

In the broader acceptance, the consumer is the person that buys a good intending to use it or not. In general, the concept⁷ of "consumer" is assimilated to the buyer of goods and services usually provided by companies. The consumer takes part in the economic activity by purchasing a good or service, and thus influencing the architecture of the concerned market. The consumer has the possibility to evaluate, directly and concretely, the competitive situation existing on the market, the profitability and efficiency of the economic agents' activity that compete by comparing their products and services to the ones of their competitors regarding quality and price. In principle, enterprises that activate on a competitive market will intensify their effort in providing the consumer goods and services of superior quality for competitive prices, in order to determine him to choose the products they offer. However, in practice, enterprises use-individually or in cooperation with other enterprises-practices or deals that affect the competition, in addition to endangering the consumer. In the opinion of a French author⁸, the law was born with the purpose⁹ of protecting the weak against the stronger. The desire to help the ones who are in an unfavourable position in a convention has as purpose the insurance of contractual equilibrium broken because of the disproportion of the economic power between the parties involved. The concept of consumer is differently understood depending on the points of view of the economic or juridical analysis, such that the given

⁵ For the realization of the objectives provided in article 2, the action of the Community contains, in accordance with the terms established in the present treaty:

(s) a contribution to the strengthening of consumer protection.

⁶ The policies of the Union insures a high level of protection for the consumer.

⁷ In literature, there are debates regarding the problem of applying the norms of consumer protection not only for the buyer, but also for the seller which contracts with a professional (Calais Auloy J., Temple H., "*The right of consumption*", 9th edition, Dalloz, 2015, p. 15).

⁸ Mazeaud M., "*The judge and the execution of contract*", Colleague IDA, Aix-au-Provence, May 28th, 1993, PUAM.

⁹ Calais-Auloy J.,Steinmetz F., "*The Law of consumption*", 5th edition, Dalloz, 2000, p. 126.

definitions from the two perspectives do not necessarily coincide. From an economic perspective, the consumer¹⁰ is the one towards which all efforts of the producers¹¹ and distributors are oriented. The consumer is the one who closes the economic cycle, as the consumption is the¹² last stage, following the production and distribution. From an economic point of view, the identification of the notion does not raise any problem, while from the juridical point of view, it is harder to define the notion. Furthermore, it is necessary to have such a definition from the perspective of the determination of the scope of application of the consumer's rights' dispositions. A paradoxical aspect concerning the defining of "consumer" is the use of the term¹³ before precisely determining its content. Until the appearance of a legal definition, the term of "consumer", the task of supplementing this gap, and defining "consumer" was assigned to the jurisprudence. Despite the fact that the jurisprudence did not realise a unitary definition, there has been the advantage of an evolutionary vision which emphasised and refined this definition. It must be mentioned that the notion of consumer was received differently in the states of E.U., existing a subjective acceptance and another objective. Thus, in the objective acceptance, the notion has an extended content, including¹⁴ the producers, manufacturers, traders¹⁵, the ones who are subsumed to the concept of economic agent, and who purchase¹⁶ the goods necessary for the development of economic activities, in addition to those who acquire goods¹⁷ for their personal use. This extension of the content of the notion of consumer is not useful to the essential purpose of the Legislation¹⁸, meaning the protection of the vulnerable party of a contract of consumption. Because of these reasons, the majority of the E.U. states have embraced the subjective acceptance of the notion, with a more restricted content. According to this subjective¹⁹ acceptance, in order to have the title of consumer, a person has to fulfil two conditions. Therefore, it is necessary that the person concerned to acquire, posses, or use a good or service, and the acquiring, possession and use must be for their personal needs. The consumer is defined in the *Rome Regulation I* as being the individual who concludes a contract for a purpose that can be considered as not²⁰ having any connection their professional activity. We notice that the Rome

¹⁰ Goicovici J., "*The Law of Consumption*", Cluj-Napoca: Legal Sphere, 2006, p. 17.

¹¹ Noblot C., "*The Law of consumption*", Montchrestien, 2012, p. 24.

¹² Ferier D., "*The Law of distribution*", 2nd edition, Litec, Paris, 2000, p. 163-170

¹³ Goicovici J., *op. cit.*, p. 12.

¹⁴ In the sense that we can acknowledge the quality of consumer of the legal persons, see C.A. Paris, 1st ch., July 3rd 1998, n°97/15750

¹⁵ Cass.Civ.1st, April 28th 1987, n°85-13.674, Bull. civ. I, n°134.

¹⁶ We determine, joining a doctrine opinion, that *de lege ferenda* the consumer should be defined as the individual who obtains or uses goods or services.

¹⁷ For the necessity of correcting this definition considered inadequate, as it doubles the action of purchasing with the verb to buy, see Goicovici J., *op. cit.*, p. 22-24.

¹⁸ C.J.C.E., June 21st 1978, Bertrand, aff. C-150/77, Rec. CJCE, I, p. 1431.

¹⁹ Bazin E., "*The exclusion of commercial companies from all consumer protection*", J.C.P.E., 1716.

²⁰ Cass.Civ.1st, December 11th 2008, no.07-18.128.

Regulation 1 adheres to the subjective acceptance of the notion which includes only²¹ the physical persons²² who conclude a contract that has not connection with their professional activities. Attributing the quality of consumer exclusively to a physical person considers the protection²³ of the vulnerable²⁴ party of the contracts²⁵ of acquisition of goods and services²⁶, thus correcting²⁷ the contractual²⁸ imbalance between the parties. According to this opinion current, the juridical person cannot achieve the quality of consumer, as it is presumed that the juridical person has the economic and juridical capacity that allow them to defend their own rights and interests. However, we mention that there are regulations which admit that in certain situations the juridical person can have the title of consumer. Furthermore, we mention that in the juridical practice there are solutions and opinions that move away²⁹ from the vision present in this regulations. French law does not exclude the possibility³⁰ that a commercial company has the quality of consumer. In this regard, we can mention decisions pronounced in French courts³¹ from the analysis of which we can conclude that not only a physical person³² can gain the quality of consumer. Thus, in one cause, the Court recognised the quality of consumer of a real estate agency that concluded a purchasing contract, grounding this decision on the fact that its activity object was completely foreign³³ from the domain to which the equipment belongs, thus not owning enough information to allow the conclusion of the contract in a non-vulnerable position. In addition, the adhering to the subjective acceptance of the notion of consumer from the Rome Regulation 1 is in accordance with the vision of the European legislator. Therefore, we mention that, according to

²¹ Meaning that the disposition of consumer law are also applied in the hypothesis where an individual is represented by a professional representative in signing a contract with a professional, see Goicovici J., *op. cit.*, p. 28.

²² C.J.C.E., November 22nd 2001, Sté Cape Snc et Ideal service Sri, aff. C-541/99 and Ideal service MN RE Sas, aff. C-542/99.

²³ Amiel-Donat J., "Contracts of consumption" Competition and consumer Juris-Classeur, Fasc. 800, 1989.

²⁴ Meaning that the French doctrine knows a presumption of consumer's inferiority, see Goicovici J., *op. cit.*, p. 21.

²⁵ The ignorance of the "unprofessional" quality of the one who contracts with the professional will not exclude the appliance of norms in the matter of consumer legislation, see Goicovici J., *op. cit.*, p. 23.

²⁶ De La Asunción-Planes K., "Can the legal person be protected by the law of consumption?" Petites affiches, March 3rd 2010, n°44, p. 3.

²⁷ Meaning that the regulation arsenal of the consumers postulates a factual imbalance between the position of the consumer and that of the professional, see Goicovici J., *Law of Consumption*.-Cluj-Napoca: Juridical Sphere, 2006, p.14

²⁸ We can notice that the state of vulnerability of the consumer has a strong collective character, considering the use on a large scale of this type of contract which can be assimilated to a social fact.

²⁹ Cass.Civ.1ère, April 2nd 2009.

³⁰ Feydeau M-T., "The notion of consumer, the state and the jurisprudence", in the Hebdomadaire (weekly magazine) of the National Institute of Consumption-Consommateurs Actualite (Consumer news), no. 1015/1997, p. 10-13.

³¹ Cass.Civ.1st, December 15th 1998, n°96-19.898.

³² Cass. Civ. 1st, March 15th 2005, n°02-13.285, Bull. Civ. I, n°135.

³³ Cass. Civ. 1st, April 28th 1987, n°85-13.674, Bull. civ. I, n°134.

dispositions of Directive 85/577/E.E.C.³⁴, the consumer³⁵ is the physical person that, in transactions, acts³⁶ for purposes that are not a part of their professional activity. Similar definitions of this concept are found in the Directives 93/13³⁷, 97/7³⁸, 99/44³⁹, 2001/31, 2002/65⁴⁰. From the analysis of the type of defining the concept of consumer in the directives presented above, we observe that there are certain aspects of differentiation, but we can detect, on the other hand, the presence of a common core present in the majority of the definitions. Thus, the common element of these definitions is, on one hand, the fact that only a physical person⁴¹ can have the title of consumer, and, on the other hand, the condition that they act for purposes that are not in connection with their commercial or business activities. Taking into account the multitude of definitions of the notion existing in the European law there are included by *lege ferenda* the offering of a unitary legal definition which would be useful in the process of harmonization between the member states. In Romania, the first normative act which stated at a national level the consumer rights, the case in which these rights are exerted, respectively the applicable sanctions in case the rules are violated, was Government Ordinance no. 21/1992 concerning the protection of consumers. We mention that the fundamental rights of consumers are provided in art. 3 of the Government Ordinance no. 21/1992 concerning the protection of consumers. From the normative acts with relevance in the matter of consumer protection, we recall Law no. 148/2000 concerning publicity, Law no. 193/2000 concerning the abusive clauses, Law no. 608/2001 concerning the evaluation of the products' conformity, Law no. 240/2004 concerning the responsibility of the producers for the damages generated by the faulty products, Law no. 289/2004 concerning the credit for consumption. What characterises the present situation in Romania is not the lack of definitions, but the existence of a too high number of them. Therefore, the annexe of the Code of Consumption adopted by the Law no. 296 from June 18th 2004 in point 13, the consumer is defined as any physical person

³⁴ Directive 2011/83/E.U. of the European Parliament and Council from 25th October 2011 concerning consumer rights, the modification of Directive 93/12/E.E.C. of the Council, and Directive 1999/44/E.C. of the European Parliament and the Council of abrogation of Directive 85/577/E.E.C. of the Council, and Directive 97/7/E.C. of the European Parliament and the Council of Text with relevance to E.E.S.

³⁵ "Consumer" means any physical person who, in the contracts regulated by the present directive, acts for purposes that do not belong to their commercial, industrial, craftsmanship or professional activities.

³⁶ Fauvarque-Cosson B., "*The Green book on European law of consumption, French responses*", Society of the comparative law edition, 2007, p. 18.

³⁷ Directive 93/13/E.E.C. of the Council from 5th of April 1993 concerning the abusive clauses in contracts concluded with consumers.

³⁸ Directive 97/7/E.C. of the European Parliament and the Council concerning the protection of consumers in the case of distance contracts.

³⁹ Directive 99/44 of European Parliament and Council from 25th May 1999 concerning certain aspects of the selling of consumption goods and the related warranties.

⁴⁰ Directive 2002/65/E.C. concerning the consumer protection in the cases of distance marketing of financial services.

⁴¹ In this regard, High Court of Cassation and Justice, Commercial Section, Decision no. 192/19.01.2011, www.scj.ro.

or group of persons constituted in associations⁴² which act for purposes which do not belong to their commercial, industrial, or productive activities. In Law no. 37 from January 16th 2002 concerning the approval of Government Ordinance no. 58/2000 for modifying and completing the Government Ordinance no. 21/1992 concerning consumer protection mentions that the consumer is a physical person or a group of physical persons constituted in associations which buy, acquire, use or consume products or services outside their professional activities. The consumer is defined in Law no. 65 from January 16th 2002 for the modification of Law no. 193/2006 concerning the abusive clauses from the contracts concluded between traders and consumers as being any physical person or group⁴³ constituted in associations which conclude a contract outside their authorised professional and commercial activities. We mention that, until the modification brought by the Law no. 65/2002 art. 2 to the Law no. 193/2000, it was maintained the extended sense of the notion of consumer, including the juridical person which acquires and uses, or consumes⁴⁴, respectively benefits from the products or services obtained based on a contract. Law no. 193/2006, which was modified in 2002, maintained the definition of consumer given in art. 2, point (b) from the Directive 93/13/E.E.C. concerning the abusive clauses in the contracts concluded with consumers, according to which it refers to any physical person which, by concluding a consumption contract, acts outside their professional activities.

3. Instead of conclusions: the vulnerability of the consumer

I must be mentioned that the consumer's law has its roots in civil law. However, the criteria based on which it can be established that a person is in a vulnerable position in the moment of a contract's conclusion is different in the consumer's law in relation to the situation in the civil law. Therefore, in the civil law, objective criteria are used for establishing that a person is vulnerable at the moment of a contract's conclusion. By approaching this aspect from an objective perspective, civil law considers that the arguments based on which the vulnerability of a person can be justified at the moment of the conclusion of a contract are the age, physical, or psychological state. To the extent that these conditions are met, the accordance of legal protection for the concerned person is justified. In consumer legislation, the determination of the vulnerability state of the consumer is realised in different matter in relation to the approach embraced in the civil law. Thus, from the perspective of the civil law, objective criteria such as age, physical or psychological state are essential, while in the vision adopted by the legislation for the consumer protection, the starting point of the analysis is the act of consumption. Such an approach is closer to an economic perspective than a juridical one. We can notice

⁴² Goicovici J., *op.cit.*, p. 18.

⁴³ In this regard, the use of the "group of people" expression is inadequate, see Goicovici J., *op.cit.*, p. 18.

⁴⁴ Meaning that the definition of the consumer in this law is inadequate, see Goicovici J., *op.cit.*, pp. 18-20.

that the way of determining the consumer's situation of vulnerability using objective or subjective criteria would generate different conclusions. Thus, from the perspective of the civil law, the vulnerability of the consumer is absolute, whilst using criteria from the consumer protection legislation it is relative, and it depends on the quality of the other party of the consumption contract. We can observe that, concerning the aspects of the consumer protection, the European legislator has a vertical approach, meaning that in each directive, a certain aspect is addressed, and solutions for this problem are offered. We believe that, by *lege ferenda*, a modification is needed in approaching these aspects, in the sense of adopting an integrative vision on the horizontal by adopting a normative framework act which would aggregate all directives issued in this regard and regulate the problems concerning consumer protection. Taking into account the multitude of definitions of the notion existing in the European law there are included by *lege ferenda* the offering of a unitary legal definition which would be useful in the process of harmonization between the member states.

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