

LEGAL ASPECTS REGARDING THE EXPRESSION OF BINDING CONSUMER CONSENT

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Abstract

The purpose of this study is to analyse the effect of the party's intent to enter into a legal relationship, in such cases where the powers of one party are significantly higher than the ones of the other contracting party. The article aims to acquire a practical approach on the effects of lack of intent expressed by consumers which are on unequal grounds with their contracting party, from the lenses of EU principles of effectiveness, proportionality and dissuasiveness in the area of consumer protection. Given that within commercial legal relationships, the intent to produce legal effects is presumed, the question is whether the same can be affirmed in respect to consumer agreements, which are likely to be concluded for services deemed as essential by the consumer, such as electricity, utilities, telecommunications or even banking services. The proportions of the discussion regarding a party's intent have increased considering that any aspect of modern society, from the access to Google or Facebook to the access to basic survival services, requires the consumer's consent to enter into a legal relationship.

Keywords: Contractual will, legally-binding agreement, intent to create legal effects, presumption to be legally binding, consumer agreements, aggressive consumer practices.

1. Introduction

Under Romanian law, the contractual theory has received a wide analysis by scholars throughout time, since its utility is establishing fundamental concepts which can be further used in practical applications. Pursuant to a well-renowned scholar¹, the theory of contracts is governed by three fundamental principles, namely contractual freedom, consensualism and mandatory force.

The contract in itself is viewed as an instrument used for individual and collective interests, in support of goods' circulation and social values. It represents an essential legal mechanism for economic activity and is one of the main institutions of civil law, which is identified in legal systems throughout the world.

Its importance lies not only on its functionality but also on the manner in which contractual relationship stem from a valid, duly performed contract.

In classical legal literature, the concept of contractual will and the autonomy of contractual will was of high significance but recent views show that contractual will must be correlated with the respect owed by contracting parties to the law². In addition, contractual will must be analyzed both from the point of view of the real, internal will and the will expressed externally. Of course, the autonomy of a party's will must be in strict correlation with the contractual freedom said party benefits from, within the limits of the law. In certain cases, however, the court may

intervene into the parties' contractual relationship, by modifying the parties' consent with respect to certain clauses. For example, legal doctrine³ reveals that in case of imprevision (art. 1271 of Romanian Civil Code) or in case of a penal clause (art. 1541 of Romanian Civil Code) the court is allowed to intervene in order to adjust the contractual conditions in order to adapt the contract to current conditions and respectively, to reduce the value of the penalty established by the parties.

Since legal acts may be classified into consensual, solemn or formal and real acts, a party's consent plays a valuable role in the accurate performance of a duly binding contract. The element exteriorizing the party's will is the contractual consent, which can be formed prior to the execution of the agreement itself, in the negotiation phase or at the exact moment of the execution of the agreement, in which case, the consent along with the fulfilment of the validity conditions result in the conclusion of the contract⁴. In contract law, consent is generally regarded as pivotal for contractual validity.

Pursuant to art. 1179 Romanian Civil Code, the conditions for the validity of a legal act are the party's capacity to enter into a contractual relationship, the party's consent, the determined and licit object and a licit and moral cause. For solemn agreements, the ad validitatem form is added.

In order to produce legal effects, consent must be free, serious and expressed with the direct intent to produce binding legal effects (*animo contrahendi negotii*).

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¹ L. Stănculescu, *Civil Contracts Law. Doctrine and Case Law*, 3rd Edition, Hamangiu Publishing House, 2017, p. 29.

² J.Ghestin, G. Loiseau, Y.M. Serinet, *La formation du contrat. Tome 1: Le contrat - Le consentement*, L.G.D.J., Paris, 2013, p. 378.

³ G.Boroi, C. Angheliescu, *Civil Law Course. General Part*, Hamangiu Publishing House, 2012, p. 136.

⁴ L. Stănculescu, *Civil Contracts Law. Doctrine and Case Law*, 3rd Edition, Hamangiu Publishing House, 2017, p. 43.

As opposed to classical civil agreements which are characterized by formalism, commercial agreements concluded under Romanian law are generally performed without formalities. Therefore, commercial agreements may be concluded through letters, telefax, fax, verbally or telephonically or through more modern electronic means (electronic contracts or smart contracts performed via blockchain technology)⁵.

Although generally, consent is viewed as a mandatory condition for the conclusion of a duly valid contract, this particular element is somewhat disrupted in consumer agreements, where the consumer may unwillingly enter contracts where the contractual balance is tilted in favour of the legal professional, whose contractual position is more characterized.

2. Consumer consent

2.1. General aspects regarding consumer consent in European Union jurisdiction

Each time an individual buys a product or service from a professional trader, they're entering into a contract, irrespective of the fact that they're buying their weekly grocery, they're ordering a gift online or they are signing up for a gym membership. In order for that contract to be concluded, the consumer must express a valid consent, for which it requires a full and adequate understanding of the commercial terms and conditions set out by the professional trader/service provider.

In the current modern world, most contracts are concluded online, in electronic form or most recently, as smart contracts using blockchain technology. Even if online concluded contracts contain standard terms, it is mandatory for the consumer to be well informed of those terms in order to express a valid consent. Also, in case the consumer was implicitly forced into accepting certain terms and conditions, where the consumer's consent was not fully provided, EU policies provide that effective remedies must be available.

In continental law, consent is viewed as a substantial condition for the materialization of a contractual relationship. The expression of consent represent an element of the contractual mechanism which is in its whole characterized by good-faith. For example, the principle of good faith (section 242, German Civil Code⁶ (BGB)) is a fundamental principle of law in Germany, which applies when contract negotiations commence. Also, under German law, the parties' consent has a high value, considering that the lack of agreement is not an obstacle to the creation of the contract if the parties start implementing the contract by mutual consent and by doing so show that

they do not regard the lack of conformity to be material⁷.

While in continental law, consent is treated under more strict terms, under common-law, things are a bit different.

For example, even if English contract law is based on the principle of freedom to contract without limitations, the Unfair Contract Terms Act 1977 (UCTA) applies in a number of circumstances including when a party is contracting on its 'written standard terms'. In such circumstances, the UCTA restricts a party's ability to exclude or limit its liability for breach of its obligations in such a contract. Also, in the United Kingdom, there is no implied obligation to use good faith when performing a contract⁸. Good faith in negotiating commercial contracts is not presumed in Irish law, either. This aspect results from constant case law, such as the Irish Court of Appeal case of Flynn and Anor v Breccia and Anor (2017), which overturned an Irish High Court ruling that there was a general principle of good faith in Irish commercial contract law⁹.

2.2. Recent developments and tendencies regarding consumer protection in the European Union

A press release of the Council of the EU dated March 2019 reveals that the European Union is improving the protection of consumers' rights. Member states' ambassadors meeting in the Council's Permanent Representatives Committee agreed on the Council's position on a draft directive which amends four existing EU directives protecting consumers' interests. The envisaged directive aims to amend the unfair commercial practices directive 2005/29/EC, the consumer rights directive 2011/83/EU, the unfair contract terms directive 93/13/EEC and the price indication directive 98/6/EC. It was proposed together with a proposal on representative actions for the protection of the collective interests of consumers as part of the 'New Deal for Consumers' launched by the Commission in 2017.

Most relevant provisions regarding the protection of consumers in the European Union are aimed to address the following issues:

- more transparency for consumers in online marketplaces. The directive requires online marketplaces to clearly inform consumers about:
 - a) the main parameters determining ranking of the different offers,
 - b) whether the contract is concluded with a trader or an individual,
 - c) whether consumer protection legislation applies and
 - d) which trader (third party supplier or online

⁵ V. Nemes, *Commercial Law*, 3rd Edition, Hamangiu Publishing House, 2018, p. 281.

⁶ Section 242, German Civil Code.

⁷ <https://www.lexology.com/gtdt/tool/workareas/report/commercial-contracts/chapter/germany>.

⁸ <https://www.lexology.com/library/detail.aspx?g=001f2473-c9b4-45ab-9344-8d36d69aac42>.

⁹ <https://www.lexology.com/gtdt/tool/workareas/report/commercial-contracts/chapter/ireland>.

marketplace) is responsible for ensuring consumer rights related to the contract (such as the right of withdrawal or legal guarantee).

In addition, digital applications such as online marketplaces, comparison tools, app stores and search engines have the obligation under the envisaged directive to indicate to their users which search results contain 'paid placements', i.e. where third parties pay for higher ranking, or 'paid inclusion', i.e. where third parties pay to be included in the list of search results;

– the protection of consumers in respect of 'free' digital services, namely digital services for which consumers do not pay money but provide personal data, such as: cloud storage, social media and email accounts.

All the envisaged remedies of the draft directive are aimed to assure transparency of contractual clauses, so that consumers may express a valid and committed consent, irrespective of the form of the agreement they are entering into - a direct one or an electronic one.

3. Consumer Rights Directive (2011/83/EU)

The Directive¹⁰ aims at achieving a real consumer internal market, striking the right balance between a high level of consumer protection and the competitiveness of enterprises. The Directive will apply to contracts concluded after 13 June 2014.

With respect to the conclusion of off-premises contracts, the Consumer Rights Directive provides that the trader shall give certain information to the consumer on paper or, if the consumer agrees, on another durable medium. That information shall be legible and in plain, intelligible language. Such information includes but is not limited to, as per art. 6 (1) of the Directive, the main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services, the identity of the trader, such as his trading name, the total price of the goods or services inclusive of taxes, the arrangements for payment, delivery, performance, the time by which the trader undertakes to deliver the goods or to perform the services and, where applicable, the trader's complaint handling policy and the a reminder of the existence of a legal guarantee of conformity for goods. This type of information is required so that the consumer is well aware of the legal binding relationship it is entering into and that the consent the consumer expresses is in strict connection to what the professional is offering.

Also, the Consumer Rights Directive stipulates that the trader shall provide the consumer with a copy of the signed contract or the confirmation of the

contract on paper or, if the consumer agrees, on another durable medium, including, where applicable, the confirmation of the consumer's prior express consent and acknowledgement. Where a distance contract is to be concluded by telephone, Member States may provide that the trader has to confirm the offer to the consumer who is bound only once he has signed the offer or has sent his written consent. Member States may also provide that such confirmations have to be made on a durable medium.

In addition to the consumer's express consent with respect to the main elements of the contract, the Consumer Rights Directive provides that before the consumer is bound by the contract or offer, the trader shall seek the express consent of the consumer to any extra payment in addition to the remuneration agreed upon for the trader's main contractual obligation, thus enabling the consumer to be fully aware of all and any supplementary costs which may arise and affect its will to undertake contractual obligations. If the trader has not obtained the consumer's express consent but has inferred it by using default options which the consumer is required to reject in order to avoid the additional payment, the consumer shall be entitled to reimbursement of this payment.

Consumer Rights Directive also tackles the situations when the consumer receives certain goods or is provided services which it did not request. In such case, the consumer shall be exempted from the obligation to provide any consideration in cases of unsolicited supply of goods, water, gas, electricity, district heating or digital content or unsolicited provision of services, prohibited by Article 5(5) and point 29 of Annex I to Directive 2005/29/EC¹¹. In such cases, the absence of a response from the consumer following such an unsolicited supply or provision shall not constitute consent.

The Consumer Rights Directive is completed by Unfair Commercial Practices Directive (2005/29/EC) and Alternative Dispute Resolution Directive (2013/11/EU), so that a complex legal framework is created to be comprehensive and address all the necessities of European consumers.

4. The Principles of Effectiveness, Proportionality and Dissuasiveness in the Enforcement of European Union Consumer Law

Even though consent is thought to be the pillar of contracts' formation, the conditions for a validly expressed consent differ from one legal system to another. Such differences may also result in cases

¹⁰ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (Consumer Rights Directive).

¹¹ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive').

when the consumer's consent was not validly expressed and measures must be enforced for supporting said consumer and protecting its position within the contract. This circumstance may be the direct consequence of the application of the principles of effectiveness, proportionality and dissuasiveness in the enforcement of EU consumer law.

The principles of effectiveness, proportionality and dissuasiveness derive directly from EU secondary law provisions¹². Effectiveness refers to the relationship between a particular goal set by the policy maker and the legal remedies available to reach the goal set by the legislator. (e.g. consumer protection or fair market competition)¹³. With respect to consumer law, Directive 2009/136/EC amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection law provide that Member States shall lay down the rules on penalties, which must be effective, proportionate and dissuasive.

The joint application of these principles leads to the conclusion that the national judge plays (and shall play) an important function in settling the procedural conditions for an "informed" remedial choice on the part of the consumer.

Conclusions

Even in view of recent changes brought by the immersing IT revolutionary tools into law, the contract's importance has remained unchanged. What previous and continuous developments in connection to the conclusion of an agreement may produce are solely a consequence of the world's constantly evolving nature, manifested in legal grounds. Irrespective of such developments, the parties' consent within a contract becomes even more relevant when analyzing electronic or smart contracts, since the possibility to verify such consent, and consequently, the possibility to verify whether the contract itself was duly concluded depends not only on legal knowledge but also on the close collaboration between legal specialists and IT experts.

Here is where the European legislator comes to amend the gaps in legislation in order to ensure a higher consumer protection policy, this being the trend of the current legislation adoption process.

Even if functionality and rapidness might be ensured by using more modern contractual methods, such as the electronic form of a contract or a smart contract, these methods bring inherent probation issued which should be carefully addressed by the legislator so that any disruptions in the contractual mechanisms may be prevented ab initio.

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