

THE CONSUMER'S RIGHT OF WITHDRAWAL FROM CONTRACTS CONCLUDED BY ELECTRONIC MEANS IN ROMANIAN LAW

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Abstract

The purpose of this paper is to analyse the legislation, doctrinal opinions and relevant case law regarding the consumer's right of withdrawal from contracts concluded by electronic means (e-contracts).

The objectives pursued by the author are:

- *establishing the juridical nature of consumer's right of withdrawal from e-contracts;*
- *identification of problems that could arise from law's interpretation,*
- *issuing of the de lege ferenda proposals.*

Governmental Ordinance no. 130/2000 introduces a new exception to the principle of irrevocability of contracts in Romanian law: the consumer's right of withdrawal from distance contracts. The same Ordinance sets the scope and conditions for the applicability of this right.

Consumer's right of withdrawal from e-contracts, as a type of distance contracts, can be exercised without the need to give any specific reason and without penalties, within 10 working days from the date of receiving the goods or from the another moment depending on the specifics set out in GO no. 130/2000. If consumer cancels the distance contract on the basis that he does not like the goods, the withdrawal from the contract is valid, even if the withdrawal solely depended on the will of the consumer; this sets out a legal exception from the provisions of art. 1010 of Civil Code which stipulate the nullity of the obligations undertaken by the liable person under the condition "if I want".

Sales of goods by electronic means, as a particular case of a distance contracts, is, therefore, a new form of selling, governed by its own specific legal regime.

Keywords: *distance selling contracts, contracts concluded by electronic means, right of withdrawal, consumer, online auctions*

1. Introduction

This paper outlines the legal regime applicable to the consumers' right to withdraw from contracts concluded by electronic means, focusing specifically on: 1) the legal nature of contracts concluded by electronic means, 2) conditions of exercise of right of withdrawal, 3) legal effects of exercitation of the right of withdrawal; 4) form of exercising the right of withdrawal, and 5) the field of application of the consumer's right of withdrawal.

The subject of the paper is of a great interest, both from the perspective of scientific research and from a practical perspective, as the global Internet enabled markets have gradually expanded, amounting today to a significant share of total world's trade.

As a method of research, the paper starts from analyzing the legal provisions, relevant case law, and the doctrine in the field, both in Romania and in the European Union. It highlights the particularities of the transposition of the of EU law in the Romanian law and outlines the current status of research in Romania. Finally, the paper draws specific conclusions meant to complement the existing scientific literature on the subject, and to contribute to the development of the Romanian doctrine in this field.

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2. The right of withdrawal from contracts concluded by electronic means – exception from the contract irrevocability principle

The above mentioned theme will be treated hereinafter with special reference to sale-purchase contracts for goods, given the frequency and large spread that these contracts have in the electronic trade. The terms which will be used herein are borrowed from the Governmental Ordinance no.130/2000 on the consumers' protection upon the conclusion and execution of distance contracts¹ (hereinafter "GO no. 130/2000").

Our analysis will focus on the customization of the legal regime applicable to the consumer's right of withdrawal from distance contracts, so as to be able to determine the legal regime applicable, in particular, to the consumer's right of withdrawal from sale-purchase e-contracts.

Paragraph (2) from art. 969 of the Romanian Civil Code² regulates the contract irrevocability principle in Romanian Civil Law:

"Agreements can be revoked by mutual consent or for reasons authorized by the law". In the draft of the new Romanian Civil Code³, the contract irrevocability principle is mentioned under the name „Binding force”, in paragraph (2) from art. 1.270, thus: “The contract can be amended or terminated only with the parties' consent or for reasons authorized by the law”.

In doctrine, contract irrevocability is treated either as a principle different⁴ from the contract obligativity principle, or as a consequence and, at the same time, as a guarantee for the principle of the binding force of a legal document⁵.

As per art. 1295 from the Romanian Civil Code, a sale-purchase contract concluded by traditional means is considered validly concluded when the parties express their agreement, when the conveyance of the right of ownership is made from the seller to the purchaser, even if the good was not handed over, and the price was not paid. As a rule, in compliance with the contract irrevocability principle, after its conclusion, the sale-purchase contract produces full legal effects, and neither party can withdraw from it unilaterally, unless expressly stipulated otherwise in the contract or by the law.

The mutual consent principle applies to the distance selling contracts, also. Unless otherwise agreed by parties, the distance selling contract is validly concluded when confirmation message is received by the consumer, on his command (article 5 of the GO no. 130/2000). As exception from the contract irrevocability principle, art. 7 and subseq. from GO no. 130/2000 regulates the consumer's right of withdrawal from a distance contract. This normative act represents a transposition at a national level of the Directive 97/7/EC of the European Parliament and of the Council from May 20, 1997 on the protection of consumers in respect of distance contracts⁶ (hereinafter the “Directive 97/7/EC”).

Whereas e-contracts concluded between a trader and a consumer are a sub-species of distance contracts (which results from the corroboration between paragraph (1) art. 2 letter (a) and paragraph (2) art. 2 from GO no.130/2000), with the same legal regime as theirs, the consumer's right of withdrawal from an e-contract is an exception from the contract irrevocability principle.

Until GO no. 130/2000 became effective, the Romanian legislation also had legal cases allowing the withdrawal from a contract, for example: the right of either of the parties of withdrawal from an unlimited lease contract (art. 1436 paragraph 2 of the Civil Code), the principal's right to

¹ Official Gazette no. 431 from 02.09.2000, republished in the Official Gazette no. 177 from 07.03.2008

² BRO no. 0 from 26.07.1993

³ Official Gazette no. 511 from 24.07.2009. The document will take effect on the date which will be established in the law concerning the putting in application thereof.

⁴ Gheorghe Beleiu, *Drept civil Român. Introducere în drept civil. Subiectele dreptului civil* (Bucharest: Șansa, 1995), 170

⁵ Jean Chevallier and Louis Bachi, *Droit civil. La famille – Les personnes. Les biens. Le obligations – Les suretes* (Paris: Sirey, 1974), 348

⁶ JO L 144, 04.06.1999, p. 19.

revoke the mandate at any moment (art. 1552 and art. 1556 of the Civil Code), the depositor's right to ask for the return of the deposit at any moment (1616 of the Civil Code), etc⁷; all of these are also legal exceptions from the contract irrevocability principle.

3. Conditions for the consumer to exert the right of withdrawal from an e-contract

As per paragraph (1) from art. 7 (thesis 1) of the GO no. 30/2000, Consumer's right of withdrawal from distance contracts can be exercised *without the need to give any specific reason and without penalties*, within 10 working days from the date of receiving the goods.

3.a. The *ad litteram* interpretation of the phrase “*without the need to give any specific reason*”, makes us conclude that, in the case of e-contracts, the consumer has the legal right of withdrawing from the contract even for reasons of not liking the goods, although the goods are compliant with all the technical characteristics stipulated upon the conclusion of the contract. According to Romanian Law, the consumer from the sale-purchase contract concluded by traditionally means may not change its mind on the grounds of not liking the goods, after the contract was validly concluded.

According to the reasons given in the Grounds of the mentioned Directive 97/7/EC, such unlimited character of the reasons for withdrawal from a contract is not a legislative inadvertence, but it represents a means of protecting the consumer's interest, whom, not being physically present at the venue of the goods, is not able to take physical contact with the goods, to examine and test them prior to deciding whether to purchase them or not, and at the same time, it represents a means of increasing the consumer's confidence in this new sale modality, in the purpose of encouraging it. In *Travel-Vac SL v Sanchis* Case, European Court of Justice rules that the consumer can exercise his right of renunciation under Article 5 (1) of Directive 85/577 (this right is similar to the right of withdrawal stipulated by Directive 97/7/EC) without there being any need to prove that the consumer was influenced or manipulated by the trader.⁸

Still in order to protect the consumers' interest, the Romanian legislator set for traders, by art. 4 paragraph (1) letter b) from GO no. 130/2000, the obligation to include in the contract the following provision, in bold characters: "The consumer has the right to notify the trader in writing that it gives up making the purchase, without penalties and without the need to give any specific reason, within 10 working days from the date of receiving the goods or, in case of service supplies, from the date of concluding the contract". In case this provision is omitted, the goods will be considered as being delivered without a call-off order from the consumer. As per art. 14 from OG no.130/2000, in the case of deliveries for which no prior order was made, the consumer is exonerated from any counterperformance, the lack of an answer not being interpreted as a consent.

In our opinion, the acknowledgment of the consumer's right of withdrawing from a distance contract does not remove its right to make a complaint, both during the withdrawal term and after the expiry thereof, on the grounds that the goods are not compliant with the description thereof, submitted by the seller or that they are faulty. A contrary interpretation would be that, according to paragraph (1) from art. 7 (thesis 2), the consumer will be liable for the expenses incurred with the

⁷ C-tin Stătescu and Corneliu Bîrsan, *Drept civil. Teoria Generală a Obligațiilor* (Bucharest: All, 1997), 57

⁸ „Curia Europa”, accessed at February 19, 2011, <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurftp=jurftp&numaff=C-423/97&nomusuel=&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&alldocrec=alldocrec&docor=docor&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoor=docnoor&docppoag=docppoag&radtypeord=on&newform=newform&docj=docj&docop=docop&docnoj=docnoj&typeord=ALL&domaine=&mots=&resmax=100&Submit=Rechercher>

return of the goods it did not want at any time, which would be against the scope of the Directive 97/7/EC (consumer protection), in reality prejudicing the honest-minded consumer.

Our interpretation is also supported by the dispositions of art. 23 from GO no. 130/2000:

“The provisions regarding the sale of goods and services according to this Ordinance are supplemented by the provisions from Law no. 363/2007 on the fighting against the incorrect practices of traders in their relationship with consumers and on the harmonization of the regulations with the European legislation on the protection of consumers, as well as with the national dispositions which transpose European regulations regarding certain aspects concerning the supply of goods and services, which are applied with priority, unless otherwise stipulated in this Ordinance.”

Consequently, even in the case of distance contracts, the legal regime concerning the delivery of certain goods which are not compliant with the trader’s specifications or which are faulty is regulated by Law no. 449/2003 on the sale of goods and guarantees related thereto⁹ and which entitle the consumer to ask the trader to make such goods compliant, without payment, by repairs or replacement, as per art. 11, or to benefit from the corresponding reduction of the price or from the cancellation of the product for such goods, according to art. 13 and 14, within the terms stipulated in chapter V from Law no. 449/2003. According to art. 12 from Law no. 449/2003, the wording “without payment”, as stipulated in art. 10 and 11, makes reference to all the costs necessary for making the goods compliant, including expenses related to mail, transportation, handling, diagnosis, expertise, dismantling, mounting, labor, materials used and packaging.

As far as the delivery of goods similar to the ones ordered, this is subject to the dispositions of art. 11 paragraph (3) from GO no. 130/2000, according to which: the trader can deliver to the consumer certain goods or services at a quality and price equivalent to the required ones only if this was stipulated before the conclusion of the contract and/or in the contract, so that the consumer is clearly informed about this possibility. Otherwise, the supply of certain goods or services similar to the required ones will be assimilated to the delivery lacking an order, as stipulated in art. 14. The expenses incurred with the return of goods, in case the right of withdrawal is exerted, are in this case the trader’s responsibility, element which the consumer needs to know about.” Art. 14 stipulates that „in the case of deliveries for which no prior order was made, the consumer is exonerated from any counter-performance, the lack of an answer not being interpreted as a consent”.

3.b. *Withdrawal term. Legal nature and duration.*

The 10 days term stipulated in paragraph (1) from art. 7 (thesis 1) of GO no. 130/2000 is, in our opinion, a “*cooling off period*”, at the discretion of Consumer, during which the consumer may change its mind about its offer of purchasing the goods and when it may revoke it, although the contract was validly concluded in a prior stage.

Analyzing the legal status of the contract during the cooling off period, we consider that, during the cooling off period, the contract is subject to a resolutive condition – the consumer’s decision to withdraw from the contract. Whereas the consumer’s decision should not be justified, it results that such resolutive condition has the form of a purely potestative condition on the consumer’s part, when the consumer withdraws from the contract because it does not like the goods. In this type of situation, the legal clause that permit to the consumer to withdraw from the contract without need to justify any reason (art. 4 litt. b of GO no. 130/2000) becomes an exception from art. 1010 of the Romanian Civil Code¹⁰, according to which “The obligation is null and void if it was contracted under a potestative condition on behalf of the party undertaking it.”

In doctrine¹¹, the term of 10 days was interpreted as a progressive step in distance selling contract formation considered to be concluded in three steps: (i) the meeting of consents; (ii) the

⁹ Official Gazette no. 347 from 06.05.2008

¹⁰ Alexandru Bleoancă, *Contractul în formă electronică* (Bucharest: Hamangiu, 2010), 161

¹¹ Juanita Goicovici, *Formarea progresivă a contractului* (Bucharest: Wolters Kluwer, 2009), 292 - 303

payment of the price/collection of product by the consumer; (iii) the confirmation of the initial consent by un-using of the right of withdraw belong to the consumer. In our view, this interpretation is lawful only if the parties have agreed on this modality of contract conclusion, otherwise, as we noted above, the distance contract is validly concluded when the confirmation message is received by the consumer, on his command.

As far as the start of the cooling off period is concerned, this is marked by the date when the consumer receives the goods, if the provisions in art. 4 were fulfilled (*the obligation to inform the consumer*) of the same GO no. 30/2000. If the trader omits to transmit to the consumer the information stipulated in art. 4, the term for the withdrawal from the contract is of 90 days and it starts flowing from the date when the consumer receives the goods. If during the 90 days period, the information stipulated in art. 4 is transmitted to the consumer, the 10 working days term for the withdrawal from the contract starts flowing from that moment.

By analyzing the dispositions from the Directive 97/7/EC, it can be seen that the term stipulated by the Romanian legislation is three days longer than the seven working days term imposed by the Directive as minimum term. According to art. 27 from GO no. 130/2000, the Romanian consumer will enjoy the ten days term even in the case when, upon purchasing goods from outside the Romanian borders, the contracting parties choose as applicable law for the distance contract the law of a State which is not a member of the European Union, and the contract is closely connected to the territory of Romania or with that of other Member States of the European Union, as well as in case GO no. 130/2000 includes provisions that are more favorable for the consumer. The Proposal for a Directive of the European Parliament and of the Council on consumer rights¹² (hereinafter “Proposal for a new Directive”) approved by the Council in January 25, 2011, which will replace the Directive 85/577/EEC on contracts negotiated away from business premises and Directive 97/7/EC on distance contracts, set up a minim general term of fourteen days (beginning from the day on which the consumer or a third party other than the carrier and indicated by consumer acquires the material possession of each of the goods ordered) to withdraw from a distance contract, without giving any reason.

In our opinion, the consumer may exert its right of withdrawing from the distance contract also between the date when the contract is concluded and the date when the legal 10 days term starts to flow, even if the goods are in transit or were not yet delivered. This interpretation has been supported by the customary law developed in electronic commerce field. Another interpretation would lead to the situation in which the consumer who did not received the goods, although it paid the price for them, is not entitled to withdraw from the contract and immediately recover the price it paid, but it must choose the rescissory and claims action.

The doctrine¹³ was also supported the view that in case of the refusal of the good reception by the consumer or in case of the lack of good delivery by the trader, the distance selling contract is not validly concluded in the second stage of its structural (confirmation *in re* of the buyer’s consent).

The anniversary of the 10 working days cooling off period leads to the loss of the consumer’s right of withdrawing from the contract, without giving any reason, and to the retroactive consolidation of the contract, the consumer only preserving its right to claim the lack of conformity and flaws that the goods have within the terms stipulated by Law no. 449/2003.

3.c. Absence of the sanction for withdrawal from a contract

The *ad litteram* interpretation of the wording “*without penalties*”, means that, if the consumer exerts its right of withdrawal, it may not be forced to pay any compensation for the prejudice caused to the trader as a consequence of its withdrawal from the contract. From this statutory provision can

¹²Access to European Union law, accessed February 19, 2011, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0614:FIN:EN:PDF>

¹³J. Goicovici, *above n. 11*, 304

not be derogated from by agreement between the parties to the detriment of consumers, whereas under article 26 of the GO no. 130/2000, the consumer can not be deprived of his rights conferred by that Ordinance. The only costs that may be required are the direct costs of returning the goods, as we shall see below.

4. Effects of the withdrawal from the e-contracts.

In case of the termination of a contract which is to be executed starting on a particular date, as is the case of the sale-purchase e-contracts, the main effect of the resolutive condition (the manifestation of the consumer's will, in the sense of withdrawing from the contract) consists in the retroactive cancellation of the document. Consequently, the trader will refund the price and the consumer will return the goods.

4.a. *The trader's obligations*

According to art. 8 from GO no. 130/2000, if the consumer exerts its right of withdrawal, the supplier will reimburse the amounts paid by the consumer, within at most 30 days after the date of the consumer's withdrawal from the contract.

As far as the scope of the wording "*amounts paid by the consumer*" is concerned, in our opinion, the trader will reimburse to the consumer any amount paid by the consumer in relation to the contract, such as the full price of the goods and the price reimbursement expenses, including the bank commissions.

If, for the goods constituting the object of the distance contract, the trader credits the consumer directly or based on an agreement concluded between the trader and a third party, once with the consumer's withdrawal from the distance contract, the loan contract also terminates by law, without penalties for the consumer. Consequently, the trader must return any amount received until that moment either to the consumer, or to the financier.

If the consumer makes the payment by a credit card, a debit card or a shopping card, the contract between the consumer and the card issuer does not terminate, and the returned money will be transferred to the consumer's account.

The reimbursement of the amounts may not be conditioned by the consumer's obligation to first return the goods, because the consumer's right of withdrawing from the contract and having its amounts reimbursed, within at most 30 days since the date of its withdrawal from the contract is an unconditioned right, according to art. 8 from GO no. 130/2000. We believe that if the consumer refuses to return the goods, although the amounts it spent were reimbursed, the trader may take an action for the recovery of its possession against the consumer, in order to recover its goods. In the Proposal for a New Directive on consumer rights it is stipulated contrary: „For sales contracts, the trader may withhold the reimbursement until he has received or collected the goods back, or the consumer has supplied evidence of having sent back the goods, whichever is the earliest”.

In order to establish a fair dividing of risks in case the buyer withdraws from the contract, and also not to discourage the consumer from using its right, the Community and the Romanian law giver stipulated a fair dividing of the costs incurred with the delivery of the goods from the trader to the consumer and their return to the trader. Thus, as per paragraph (1) art. 7 (thesis 2), if the consumer withdraws from the contract, the only costs it is responsible for are the direct expenses for returning the goods (transport expenses from consumer to trader), while the indirect cost of the distance trader (as would be, for example, a handling fee for checking the product, if it is damaged, or for repacking and shelving the product or for cancelling the invoice) and the expenses incurred with the delivery of the goods from trader to consumer will be borne by the trader, meaning it will not withhold them from the price of the goods¹⁴.

¹⁴ Siegfried, Fina. *The Consumer's Right of Withdrawal and Distance Selling in Europe, A Consumer Stronghold in European Distance Selling and E-Commerce*. Wien,

For this, the Court of Justice of the European Union has recently given a verdict in the C-511/08, *Handelsgesellschaft Heinrich Heine* trial:

„Article 6 paragraph (1) paragraph one, thesis two and paragraph (2) from Directive 97/7/CE of the European Parliament and of the Council from May 20th 1997 on the protection of consumers in respect of distance contracts must be interpreted as opposing to a national regulation which allows the supplier, in a distance contract, to ask the consumer to bear the goods delivery costs, if the latter exerts its right of withdrawal.”¹⁵

4.b. *Consumer's obligations*

As an exception from the contract withdrawal retroactivity principle, the risk of the *pendente conditione* goods is borne by the buyer, as owner, under a resolutive condition. As a consequence, the consumer must behave like a good owner in relation to the goods.

If after the return of the goods, the trader ascertains that the goods were not returned in a good state of preservation, it may start an action for remedy against the consumer.

In our opinion, the wording “good state of preservation” may not be interpreted in the sense that the goods should not be unsealed, if the examination of the goods presupposes the unsealing and testing thereof.

The exception is represented by the goods which bear a seal for hygiene reasons and which can be examined without the removal of such seal. However, the trader may ask the consumer, based on certain contractual clauses, that, in case it withdraws from the contract, the consumer should return the goods in their original package, but not sealed.

Relative recently the European Court of Justice has confirmed that, unless limited exceptions, a consumer who exercises his right of withdrawal from a distance contract must not be obliged to compensate the trader for the use of the goods. In *Pia Messner v Firma Stefan Kruger* (Case C-489/07), European Court of Justice ruled that the provisions of the second sentence of Article 6(1) and Article 6(2) of Directive 97/7/EC must be interpreted as precluding a provision of national law which provides in general that, in case of withdrawal by a consumer within the withdrawal period, a seller may claim compensation for the value of the use of the consumer goods acquired under a distance contract. However, those provisions do not prevent the consumer from being required to pay compensation for the use of the goods in the case where he has made use of those goods in a manner incompatible with the principles of civil law, such as those of good faith or unjust enrichment, on condition that the purpose of that directive and, in particular, the functionality and efficacy of the right of withdrawal are not adversely affected, this being a matter for the national court to determine.¹⁶

If the trader sent gifts to the consumer together with the ordered goods, then we consider that the consumer's withdrawal from the contract has the following implications:

- If the contractual clauses stipulate the existence of a gift that is granted together with the ordered goods, then the consumer which exerted its right of withdrawing from the contract concerning the ordered goods must also return the gift.

- If the contractual clauses do not stipulate the existence of a gift that is granted together with the ordered goods, then the gift will have the legal regime of non-ordered goods, as stipulated in art. 14 from GO no. 130/2000, the consumer being entitled to keep it, without the obligation to make any counterperformance.

Accessed February 19, 2011,

http://unternehmensrecht.univie.ac.at/fileadmin/user_upload/privat_fina/Fina_Beitrags_FS_Zehetner.pdf

¹⁵ Official Journal of the European Union from 05.06.2010, C 148/6

¹⁶ Official Journal of the European Union from 24.01.2009, C 256/4, accessed February 19, 2011, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:256:0004:0004:EN:PDF>

GO no. 130/2000 did not regulate the situation when the consumer paid the price or part of the price by offering a good in exchange.

In our opinion, and as a proposal for a *de lege ferenda*, we consider that in such situations, if the consumer exerts its right of withdrawal, the trader must return to the consumer the good received in exchange, in good state of preservation.

If, meanwhile, the trader alienated the good received in exchange from the consumer or can no longer return it in its original state, we consider that it should be forced to pay to the consumer an amount equal with the amount represented by the value of such good. The respective value can be determined in relation to the value of the trader's goods (the object of the exchange), because the parties, at the time of accepting the good, evaluated the goods as having the same value.

GO no. 130/2000 does not stipulate a period within the consumer is required to return the goods to trader. The Proposal for a new Directive requires the consumer to send back the goods or hand them over to the trader or to a person authorised by the trader to receive them, within fourteen days from the day on which he communicates his withdrawal to the trader, unless the trader has offered to collect the goods himself.

5. Form of exercising the right of withdrawal

GO no. 130/2000 does not provide any express form of exerting the right of withdrawal.

But, the proof of the exercising of the right of withdrawal is the consumer's task. In our opinion, we consider that the right of withdrawal is exercised, through an exteriorized manifestation of will, either by the non-acceptance or return of the goods, or by a written form of manifestation of the will, i.e. a letter, a facsimile, an e-mail. A part of the doctrine¹⁷ considers that the withdrawal should be notified to the trader in writing. In Proposal for a New Directive, it is stipulated that, for a distance contracts concluded on the Internet, the consumer shall inform the trader of his decision to withdraw on a durable medium either in a statement addressed to the trader drafted in his own words or using the standard withdrawal form as set out in the Annex I(B) to Directive. Also, the trader may, give the option to the consumer to electronically fill in and submit the standard withdrawal form on the trader's website. In that case the trader shall communicate to the consumer an acknowledgement of receipt of such a withdrawal by email without delay.

6. Field of application of the consumer's right of withdrawal from e-contracts

The consumer's right of withdrawal from e-contracts concluded between a trader and a consumer is applicable for all such contracts, except for those stipulated in art. 6, art. 10, art. 12 from GO no. 130/2000.

As it can be seen from the provisions of art. 6, GO no. 130/2000 excludes the following from its field of application:

- a) distance contracts for financial services, as regulated by the Governmental Ordinance no. 85/2004 on the protection of consumers upon the conclusion and execution of distance contracts for financial services, as approved by Law no. 399/2004, with subsequent amendments and supplements.
- b) contracts concluded via automatic distributing machines or in automatic commercial centers;
- c) contracts concluded with telecommunication operators in the purpose of using public phones;
- d) contracts concluded for the construction and sale of real estate goods or which make reference to other rights related to real estate goods, except for rental contracts;
- e) contracts concluded during auction sales.

¹⁷ Marcel Bocşa, "*Înceierea contractelor de comerț internațional prin mijloace electronice*" (Ph.D diss., Academy of Economic Studies Bucharest, 2009).

Given the extent and complexity of the conclusion of the e-sales by methods that are similar to or derived from the classic auction procedure, it is necessary to regulate the notion of auction, as stipulated in GO no. 130/2000. The problem of the absence of a legal definition of the notion of "online auction" in the context of contracts concluded on websites can be felt also at Community level, because the Member States gave a different definition of the notion of "on-line auction" which generates a different protection for consumers in the Member States. Thus, for example, in France, the e-Bay website or other similar ones are subject to the Directive 97/7/EC, the consumer being able to exert its right of withdrawal, while in the U.K. this is not the case.¹⁸

The Proposal for a New Directive define the "auction" as a method of sale where goods or services are offered by the trader through a competitive bidding procedure which may include the use of means of distance communication and where the highest bidder is bound to purchase the goods or the services. A transaction concluded on the basis of a fixed-price offer, despite the option given to the consumer to conclude it through a bidding procedure is not an auction.

According to art. 10 from GO no. 130/2000, the consumer may not withdraw from the following types of contracts, unless otherwise agreed by the parties:

- a) service supply contracts whose execution started, with the consumer's approval, prior to the expiry of the 10 working days term;
- b) contracts for the supply of products or services whose price depends on the fluctuations from the financial markets which the trader cannot control;
- c) contracts for the supply of certain products executed according to the consumer's specifications or of certain distinctly customized products, as well as of those which, through their nature may not be returned or which can rapidly degrade or deteriorate;
- d) contracts for the supply of audio, video or IT programs recordings, in case they were unsealed by the consumer;
- e) contracts for the distribution of newspapers, reviews, magazine journals;
- f) contracts for betting or lottery services.

In addition, according to art. 12 from GO 130/2000, the dispositions of art. 3 (prior informing), of art. 4 (additional informing), of art. 7-10 (withdrawal from the contract) and of art. 11 paragraph (1) (execution of the delivery obligation within 30 days) are not applicable to contracts regarding:

- a) the sale of food products, beverages or of household products of current use, delivered regularly by the trader to the domicile, residency or workplace of the consumer;
- b) the supply of accommodation, transportation services, of culinary products, of leisure time products, when the trader undertakes in the contract to supply such services on a precise date or in a specified period; exceptionally, in the case of leisure activities organized outdoors, the trader may retain the right not to comply with the provisions of art. 11 paragraph (2), in specific circumstances.

7. Conclusions

The theoretical analysis of the consumer's right of withdrawing from an e-contract is important for determining the legal regime applicable to the sale-purchase e-contract.

Although, at first sight, the sale of products by electronic means looks similar to the sale of goods that you can try, the two types of sale are fundamentally different from one another from at least two points of view:

- In the case of the sale of goods that you can try, the contract is concluded under the condition precedent of trying the good¹⁹, while in the case of the sale by electronic means, between a

¹⁸ Chirstine Riefa, "The reform of electronic consumer contracts in Europe: towards an effective legal framework?", *Lex Electronica* 2 (2009), vol 14.

¹⁹ Francisc Deak, *Tratat de drept civil. Contracte speciale* (Bucharest: Actami, 1998), 81

trader and a consumer, the contract is concluded under the resolutive condition of the consumer's changing its mind;

- In the case of the sale of goods that you can try, the buyer cannot refuse the conclusion of the contract for not liking the good, but only if the good is incompliant, while in the case of a sale by electronic means between a trader and a consumer, the consumer can refuse to conclude the contract without giving a reason for that, including for not liking the good.

The comparison with the sale of goods that you can taste does not need an analysis, because the consumer's right of withdrawing from the contract, stipulated in art. 7 from GO no. 130/2000 is not applicable to contracts having as object goods that are susceptible of make the object of a sale of goods that you can taste (art. 12 from GO no. 130/2000).

In conclusion, the consumer's right of withdrawing from e-contracts represents an legal exception from the contract irrevocability principle. Instead, the withdrawal term is a legal cooling off period, at the discretion of the consumer. Until the expiry of the withdrawal term, the sale-purchase e-contract is affected by a resolutive condition, that in base of the law regulations, is purely potestative from the consumer's part. In our opinion, the sale of products by electronic means between a trader and a consumer, as a sub-species of distance selling contracts, is a new and independent type of sale, with a specific legal regime.

This paper does not analyze the consumer's right of withdrawal from e-contracts concluded with businesses outside European Union, the subject being open to future research.

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