

CONSUMER'S RIGHT TO WITHDRAW

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Abstract

The right of withdrawal (of a contract) belongs to the consumer, and is an essential means for the improvement of regulations that protect the consumer. Right of withdrawal is not a recent creation and is not even specific to the consumer field. He was previously recognized in civil and commercial law (without special regulation).

The right to withdraw may even have as ground the parties will. Thus, based on the contractual freedom, the parties may agree that one of them has the right to terminate the contract unilaterally

The possibility of unilateral denunciation of the contract, gives the consumer, added protection by being able to reflect the decision and to check how the trader fulfil its obligations.

In this context, through its effects, the right of denunciation, forces the professional parties to conduct themselves as fair as possible to the consumer and to execute the contract properly. In the study of the consumer protection, the time of conclusion is essential because in this stage is manifested, the inequality between the consumer and professional.

Thus, the lack of information, the major of products and activities, commercial practices, influence the formation of consumer will, preventing the expression of a freely and knowingly consent.

Key words: *contract, consumer, unilateral denunciation, contractual freedom, obligations.*

Introduction

The regulations in the field of consumers law, have determined the occurrence of new ways of concluding the contracts between professionals and consumers. Thus, it has been settled the legal regime of distance and off-premises contracts¹. The field concerning the effects of distance and off-premises contracts was seriously affected, inter alia, by a new institution, particular for consumptions law, the right to withdraw of the consumer. The most important regulations containing provisions concerning the right to withdraw are:

- O.G. no.106/1999 on contracts concluded off-premises;
- O.G. no. 130/2000 concerning the consumer protection in the conclusion and implementation of distance contracts;
- Law no. 296/2004 (Consumer Code);
- O.G. no. 85/2004 concerning the consumer protection, in the conclusion and implementation of distance contracts that provide financial services.

The right to withdraw – the concept

The right to withdraw (a contract) that belongs to the consumer is an essential means for the improvement of regulations that protect the consumer. Under this right, the consumer has the responsibility to decide on the existence and effects of the contract without being required, the consent of the contracting partner. The right to withdraw is not, however, a recent creation and is not even specific for consumer protection field. He was previously recognized in civil and commercial law (without a special regulation).

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For example, the Civil Code has express provisions regarding the existence of this right in the regulation of certain contracts. Thus, according to art. 1816 part. (1) NCC, if the rental was concluded without determining the duration, either party may terminate the contract by notice.

The doctrine qualifies the right of withdraw (provided by common law) as an exception from the irrevocability of the contract². Right to withdraw may even has as ground the parties. Will. Thus, based on contractual freedom, the parties may agree that one of them has the right to terminate the contract unilaterally³. The possibility of unilateral denouncement of the contract, gives the consumer extra protection by being able to reflect the decision and to check how the trader fulfils its obligations. In this context, through its effects, the right of denunciation forces the professional to have a fair conduct as possible to the consumer and to execute the contract properly.

Legal nature of the consumer's right to withdraw In doctrine, the right to withdraw of the consumer was established by law and remains a subject of dispute. The main issue is related to this special institutions harmonization, to the general theory of contracts. In terms of its legal nature, the consumer's right to "withdraw" raises two issues:

- a) the consumer's right to withdraw is related to the formation of the contract or its termination phase?
- b) if the consumer's right to withdraw is related to the conclusion, then: What validity condition is affected (consent, capacity or cause)?.

Trying to answer the above questions we do brief clarification. The effects of the legal act are ordered by following three rules (with rank of principles): the principle of compulsory force, irrevocability principle and the principle of relativity. Based on the principle of compulsory force (*pacta sunt servanda*) the contracts legally concluded have legal effects (mandatory) for the contracting parties. According to the principle of irrevocability contract cannot be denounced unilaterally. Thus as a rule, once the subjects gave their consent and the contract was legally concluded, the parties cannot unilaterally return to the existence of the contract, being obliged to execute the contract terms. It follows that the right of withdraw constitutes an exception from the above rule (except as may be imposed by law or contract, through the will of parties).

In particular through *acquis* provisions, in order to protect consumers' interests, the right to withdraw of the buyer, was governed mainly for distance contracts, which provided products and services.

Thus, according to art. 82 of Law no. 296/2004 (Consumer Code) contract for purchasing products and services should require a specific clause about the consumer's right to withdraw the contract. Consumer's right to withdraw "cannot be cancelled by any contractual provision or agreement between the parties, in cases provided by law, it is considered null and void." In this case, the rights of the parties on a fair compensation will not be affected by the withdraw (art. 84 C. consumption). We mention, that right to withdraw, belonging to the consumer, received several qualifications in literature.

The French doctrine⁴, has been argued that the signing of the contract by the customer is only a stage in the gradual formation of his will.

Thus, consumer will, is not final, because he, it is able to reflect in the period that time of denunciation offers him (hence, the right of denunciation does not affect the binding force of the contract, the exercise of the right being placed at a time when the contract is not finally completed⁵). In another opinion (this time given by the national doctrine), it was considered that we

² See G. Boroï, *op. cit.*, (2008), p 211 (which makes direct reference to the termination of the rent agreement for an indefinite period).

³ Obviously, in this case, we are in the presence of exceptions from the the binding force of the contract, but an expression of free will.

⁴ See J. Goicovici, *Progressive formation of the contract*, Wolters Kluwer Publishing, Bucharest, 2009, p 29.

⁵ The consumer's right to withdraw is not an issue of revocation of the contract, see G. Boroï, *op. cit.*, (2008), p 208..

are in the presence of a faculty granted (*ad legem*) to the "purchaser" to "withdraw from the contract signing", which translates legal to the possibility of deny (return) the consent given in the concluding the contract⁶. In the above conditions, denunciation is not a way to terminate the contract, but a "withdrawal of consent". Therefore, in substance, the faculty given to the consumer translates into his right to return the consent previously given at conclusion of the contract. Please note that French law is also established a "time of reflection". Thus, it is compulsory; the contract may not be concluded only after the expiry of that period.

Although it is only right to withdraw regulated belonging consumer and professional it is possible that enjoy a similar right. Worth mentioning that the exercise of the right to withdraw can be made without the obligation of the consumer to justify his option . The right to withdraw is not susceptible of abuse of law and cannot be censored by the county court.

The judicial control can be exercised over compliance with the formal requirements, for example, deadline set by the law, the manner of communication the will of the consumer to the trader .The right to withdraw is a potestative right⁷ .

Exercising the right of denunciation draws the retroactive abolition of the contract, with the consequent of the refund of benefits. Although the right of denunciation constitutes a better alternative for the consumer, it may resort to other means made available either by common law or by specific regulations in this area in order to protect their interests. Thus, it may request cancellation of contract for fraud of consent or the annulment of a clause as being abusive. Finally, we consider that in the study of consumer protection, the time of conclusion is essential because at this stage is manifested the inequality between consumer and professional. Thus, the lack of information, the improvement of products and activities, the commercial practices influence the formation of consumer will, hindering the expression of a freely and knowingly consent.

The withdraw in distance contracts

The main regulations on the right of withdraw of contracts are included in O. G No. 130/2000 on consumer protection in distance contracts the conclusion and implementation. The contract concluded in distance is a contract for the supply of goods or services concluded between a professional and a consumer, under an organized system by the trader who uses exclusively, before and at the conclusion of this contract, one or more away communication techniques [art. 2 par. (1). a) of the ordinance]⁸. According to art. 7. (1) of the ordinance, in the distance contract, the term to withdraw the contract by the consumer is 10 working days.

We specify that it does not support penalties for late withdraw and does not require "invoking any reason". An only cost that may involve to the consumer is the direct cost of returning the goods.

The 10 days specified for the exercise of this right shall run differently in relation with the object of the contract:

- For products it begins from the date of receipt by the consumer;
- For services, from the day or after the conclusion of the contract or agreement, on condition that the delay does not exceed 90 days. The flowing of the term of withdraw is conditioned by providing the information's required by law to consumers.

⁶ The period of reflection (of withdrawal, the penalty, etc.) should not be confused with the term of reflection (granted to the consumer .prior to the conclusion of the contract, for example, for the purchase of a real estate) or grace period (granted by the court to the debtor for payment of the debt), see G. Boroi, L. Staniciulescu, Civil institutions, Hamangiu Publishing, Bucharest, 2012, p 398.

⁷ Potestative rights assigns to the owner , the power to interfere unilaterally in existing legal situations to amend them, extinguish or create new situations, see I. Reghini Considerations on potestative rights in D.R.C. No. 4/2003, p 236.

⁸ Remote communication technique can be "any means that can be used for the conclusion of a contract between the trader and the consumer and does not require the simultaneous physical presence of both parties" [Art. 2 par. (1). d) of the ordinance].

According to art. 3 of the ordinance before the end of the contract, in due time, accurate and complete, the professional must inform the consumer about :

- Identity of the trader, address and how to contact him, phone / fax, e-mail and the unique registration code;
- Essential characteristics of the product or service;
- The price of goods or services charges, all taxes included;
- The costs of delivery, if any;
- Arrangements for payment, delivery or performance;
- The right to withdraw the contract, except as provided in the present ordinance;
- The cost of the use of remote communications technology, where it is calculated other than the basic rate;
- The validity of the offer or the price;
- Duration of the contract, for contracts providing current or periodic supply of a product or service;

The deadline for execution of the obligations under the contract.

The above information's must be communicated in a clear, easily understood by the consumer, by any means adapted to the technique of distance communication used, taking into account the principles of good practice in commercial transactions and the principles governing the protection of minors and other persons without legal capacity, and the principles of good morals [art. 3. (2) of the ordinance]⁹.

According to art. 4. (1) of the ordinance, the consumer must receive, in writing or on another durable medium available and accessible to him in due time, during the execution of the contract and no later than the time of delivery, the following:

- the confirmation of the information's (if they have not been submitted prior to the conclusion of the contract) in that cases where goods are not for delivery to third parties;
 - the conditions and procedures for exercising the right of withdraw.
- Contract clause to exercise the right of denunciation shall have the following formulation, drafted in bold type :

"Consumers have the right to notify in writing the trader, the denunciation of the purchase without penalty and without giving any reason, within 10 working days of the receipt of the product or in the case of the services, of the conclusion of the contract"

In case of omission of the unilateral denunciation clause , the product or service is considered delivered without request control from the consumer [art. 4. (1). b)].

Other professional data, to be transmitted to the consumer (during execution of the contract) are: address, telephone, e-mail, information on after-sales service and guarantees, conditions for withdraw the contract (if it lasts indefinitely or the period exceeds one year).

In the case of exercising the right of withdraw the contract by the consumer, the professional has the obligation to repay the amounts paid by the consumer, free of charge from the repayment of amounts. Reimbursement will be made within 30 days from the date of denunciation of the contract by the consumer (art. 8 of the ordinance). If case that for the product or service, subject of the contract, the professional credits the consumer, directly or under a merchant agreement with a third party ,with the right of withdraw the contract the credit contract will be ceased without penalty for the consumer. (art. 9 of the Ordinance).

According to art. 10 of the Ordinance, the consumer may denounce the following types of contracts, unless the parties have agreed otherwise:

- a) contracts for the supply of services whose performance has begun, with the consumer's agreement, before the expiry of 10 working days;

⁹ The above provisions do not apply to services which are performed by means of distance communication techniques, if these services are provided once and their billing is handled by the communication provider.

- b) contracts for the supply of goods or services whose price depends on fluctuations in the financial market which cannot be controlled by the trader;
- c) contracts for the supply of goods made to the consumer's specifications or clearly personalized products and those which, by their nature cannot be returned or are liable to deteriorate or expire rapidly;
- d) contracts for the supply of audio or video recordings or computer software if they have been unsealed by the consumer;
- e) contracts for the supply of newspapers, periodicals and magazines;
- f) contracts for gaming and lottery services.

In case of dissolution of the contract, both contracting parties must repay benefits received. Because the contract is abolished retroactively, the retention of benefits is not possible (being concerned). Thus, the professional must return the amount received, within 30 days from the date of denunciation of the contract, and the consumer will have to return the product supplied to him and also to bear the costs of that refund. We specify that the law does not contain provisions on the state in which the good can be returned. In this case we consider that the good is returned in the state it is at the time of denunciation of the contract¹⁰.

For services, the refund of benefits is not possible, however, the amounts paid by the consumer must be returned (in this case, the common law principles concerning the unjust enrichment cannot be applied because it would lead to the removal of the protection established by imperative rules for the benefit of the consumer.).

Cancellation of the contract takes effect also on the credit contract. Thus, the credit agreement by which the professional credits the consumer directly or under a merchant agreement with a third party, along with the unilateral denunciation, the distance contract shall automatically be terminated without penalty for the consumer (art. 9 of the ordinance).

The withdraw under the conditions of O.G. no. 85/2004

O.G. no. 85/2004 is governing the protection of consumers on the conclusion and implementation of distance contracts for financial services. It follows that, purpose of the regulation through the legal ordinance is the financial services that occur between financial services providers and consumers. The consumer has the right to withdraw the distance contract, within 14 calendar days without penalty and without any reason necessary. As an exception, in the case of distance contracts whose object are life insurance and pension contracts relating to individual transactions, the period during which the consumer may exercise right to withdraw is 30 days (art. 9 of the ordinance).

According to art. 10 of the ordinance, the period of 14 days (or 30 days) begins:
- from the day of the conclusion of the contract, unless the contract relating to life insurance covers, for which it will begin to run from the date when the consumer is informed that the contract is concluded;

- from the day the consumer receives the contractual terms, conditions and information's provided by law. According to art. 7. (1) of the ordinance, the supplier must inform the consumer, entirely, about his contractual terms, conditions and information's provided by law, in writing, on paper or on a durable medium available and accessible to the consumer, in due time before it can be bound arising from the signing of a distance contract or acceptance of an offer of such financial service remotely¹¹.

¹⁰ Between the conclusion of the contract and its denunciation, the consumer can use the property, but to the legal provisions, the trader is obliged to receive it without charged and deducted from the price that must repay in full to the consumer.

¹¹ Before concluding a distance contract or at the time of the offer, the supplier is required to inform the consumer in the due time, accurate and complete on the following elements related to his identification ,concerning at

We mention that the failure to execute the prior information obligation has as result the delay of the denunciation term (and not its extension, as it appears under the regulation of the Government Ordinance no. 130/2000). According to art. 11 para. (1) of the ordinance, the right to withdraw the contract does not apply to financial services whose price depends on fluctuations in the financial market which cannot be influenced by the supplier, that may arise during withdraw the contract. Thus, are exempted from the reglementations of O.G. no. 185/2004: foreign exchange transactions, money market instruments, including government securities with maturity less than one year certificate of deposit, securities, units in collective investment, financial futures, including equivalent cash-settled final funds, forward rate agreements; interest rate swaps, currency and shares, options on any instruments, including equivalent cash-settled instruments (this category includes options on currency and interest rate).

According to art. 11 para. (2) of the ordinance, the right to withdraw the contract does not apply to:

- travel insurance policies for baggage or other short-term insurance policy with a maximum period of one calendar month;
- contracts fully executed by both parties at the express request of the consumer, brought before it to exercise the right to withdraw the contract;

Likewise, the right of denunciation does not apply to credit agreements bearing on acquiring a timeshare right of real estate [Art. 11 para. (1) of the ordinance]. To exercise the right of withdraw, the consumer is bound by the arrangements that have been established and communicated by the supplier. Instead, the methods used by the supplier must give the consumer the opportunity to prove his right by any means, before the expiry of 14 days. In the situation that, to a contract for financial services joined another distance contract for services provided by the supplier, exercising the right to withdraw will cause additional the cancellation of the contract [art. 12. (2) of the ordinance]. When exercising the right to withdraw the contract, the consumer may be required (by the provider) to pay, without undue delay, expenses related to the service already provided in accordance with the contract, without additional costs. In this case, the performance of the contract may only begin after the consumer has given his consent (article 13 of the ordinance).

Consumers have the right to request cancellation of the contract if the supplier does not communicate contractual terms, the conditions and the information's provided by law (without penalty and without charge - art. 20 of the ordinance).

Since cancellation is a penalty of the non-culpable contractual terms, it should be noted that under art. 20, cancellation occurs also for failure to fulfil pre obligations imposed by law.

Since the special law, does not specify a period within which the consumer may request cancellation, we consider that the incident in question is the 3 year period provided in art. 2517 of the Civil Code. We appreciate that cancellation of the contract may be requested by the consumer, even if he has not exercised his right to withdraw.

Given the above conditions, cancellation can occur because of the lack of information and also in the situation of fulfilling this obligation after the time established by binding law. Similarly, cancellation may be required if the provider has not complied with the practical arrangements for information, according to art. 7. (1) of O.G. no. 85/2004.

We conclude our concise doctrinal and legislative exposure about the right to withdraw of a contract by mentioning, that this right cannot be cancelled by any contractual provision or agreement between the parties. Any clause to the contrary, is considered null and void (art. 17 of ordinance no. 106/1999).

least: the name of the provider, representative or intermediary characteristics of the service provided, price, etc.. (art. 4 of the ordinance). The information's concerning contractual obligations must be provided to the consumer in the pre-contractual stage. The information's must be in accordance with contractual obligation resulting from the law applicable to the distance contract if it is concluded (art. 6 of the ordinance).

Conclusions

Through the present study, we aimed to tackle a topical issue for national practice and doctrine. Although it is regulated only as a right of the consumer, is not excluded that the professional benefit as well of a right of withdraw a professional and as a . The right of the consumer, to withdraw his consent, established by the Consumer Code and also by special laws is a legal right and free of charge way to withdraw the consent.

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