

A FRESH APPROACH TO UNFAIR TERMS IN COMMERCIAL CONTRACTS: ARE THE LATEST LAW AMENDMENTS BENEFICIAL TO CONSUMERS?

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Abstract

Mostly in consumer contracts, the economic and juridical imbalances between trade participants give the party of superior negotiating strength a considerable advantage by defining terms in advance. Consequently, an unfair business-to-consumer practice emerged in which sellers and suppliers impose a series of non-negotiable terms to the detriment of the consumer. Romanian regulations tried to efficiently tackle this problem being driven by the new European legislative trends. Law no.193/2000, which is the main regulation in this field, has been amended twice in the last two years and a series of new provisions on unfair contractual terms were introduced by Law no. 72/2013 and the new Romanian Civil Code. The main objective of the Romanian legislator was to reduce the massive number of lawsuits regarding unfair terms in consumer contracts and to provide a more effective protection for consumers. However, the new provisions also made changes which favour banks, insurance companies and other businesses that often insert predetermined terms in contracts.

Keywords: *Unfair terms, standard clauses, consumer protection, abusive clauses, contractual imbalances*

1. Introduction

The power imbalances between parties are the basis of many Romanian and European regulations on consumer protection. Still, few have generated more litigation than the unfair business-to-consumer practice when companies impose non-negotiable terms which harm the interests of the consumer. In recent years, more than 2,000 civil actions challenging possible abusive clauses incorporated into contracts were filed in Romanian courts¹.

Moreover, the number of lawsuits on this subject matter is increasing in the wake of latest jurisprudential tendencies, which were generally favourable to consumers. The courts' reasoning was based on consumer protection regulations which were adopted by Romania in order to align its legislation to the European law. These rules were designed to provide effective protection for consumers as well as to ensure their rights and fair trade competition.

However, in recent years several amendments to the Romanian consumer law were introduced and others are currently discussed. These changes may become a turning point for the surge in lawsuits on abusive clauses and are able to change the jurisprudence on this subject matter.

This paper approaches the issue of latest amendments to Romanian regulations concerning unfair commercial terms. A closer examination of these legal developments and other draft amendments leads us to the surprising conclusion that they may be to some extent less beneficial to consumers than the previous legislation in this field.

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¹ On March 7th 2014, there were 2,076 actions concerning unfair terms filed between 2005 and 2014, according to the Romanian e-Justice Portal (portal.just.ro).

Furthermore, the new provisions make certain changes which favour banks, insurance companies and other businesses that often insert predetermined terms in contracts. Consequently, these legal amendments may put a dent in the efforts to efficiently safeguard consumers' interests in the matter of unfair terms incorporated into contracts.

As regards legal literature, the analysis of current legislation on unfair terms was intensely examined from all standpoints in several books and scientific papers. In Romania, there are more than twenty studies which observe Law no. 193/2000, which is the main regulation on abusive clauses and several books which refer to abusive clauses incorporated into consumer contracts. However, little reference was made to latest legal developments in this field.

Far from thoroughly analysing the regulations in force, the aim of this study is to present the most significant regulations on unfair terms and to investigate whether the latest amendments are exclusively beneficial to consumers. Also, unfair terms laws are going to be examined from a juridical and economical point of view.

2. Relevant Legislation Review

The incorporation of unfair terms into commercial contracts is subject to several Romanian and European regulations regarding consumer protection. This section lists only the domestic and European laws on unfair terms relevant for this study and further scientific research on this topic.

The main domestic regulation in this field is Law no. 193/2000 regarding the abusive clauses in contracts concluded between professionals and consumers², recently amended by Law no. 76/2012³ implementing Law no. 134/2010 of the Civil Procedure Code⁴ which transposes the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts⁵.

Another important regulation is Order no. 531/2001 of the National Authority for Consumer Protection⁶ which establishes the Unfair Terms Commission as an independent consultative body, composed of representatives of the public administration, consumers and other relative bodies.

In addition, there are several special consumer regulations relating to unfair terms such as: Government Ordinance no. 21/1992 on consumers' protection⁷ (in Articles 2, 10 and 37), Government Ordinance no. 99/2000 regarding the commercialization of products and market services⁸ (in Articles 71 and 72) and Law no. 296/2004 regarding the Consumption Code⁹ (in Articles 27, 78 and 79).

The unfair terms issue is not exclusively regulated by consumer protection laws. In Romania, a breakthrough in this field was made by Law no. 72/2013 regarding the measures for combating delayed payments of amounts resulting from agreements concluded between professionals and contracting authorities¹⁰ which transposes Directive 2011/7/EU of the European Parliament and of the Council on combating late payment in commercial transactions¹¹.

² As further amended and republished in the Romanian Official Journal no. 543/2012.

³ As published in the Romanian Official Journal no. 365/2012.

⁴ As published in the Romanian Official Journal no. 545/2012.

⁵ As published in the Official Journal of European Communities, L 095 from 21 April 1993, pp. 29-34.

⁶ As published in the Romanian Official Journal no. 4/2002.

⁷ As further amended and republished in the Romanian Official Journal no. 208/2007.

⁸ As further amended and republished in the Romanian Official Journal no. 603/2007.

⁹ As further amended and republished in the Romanian Official Journal no. 224/2008.

¹⁰ As published in the Romanian Official Journal no. 182/2013.

¹¹ As published in the Official Journal of the European Union L48/2011.

Furthermore, there are several provisions in the Romanian Civil Code¹², which are of interest in this subject matter, such as: Article 14 (good faith), Article 15 (abuse of right), Article 1175 (adhesion contract), Article 1202 (standard terms), Article 1203 (unusual terms), Article 1221 (lesion)¹³, Article 1269 (subsidiary rules of interpretation), etc.

Reference to unfair terms and practices may also be made in the next Constitution, thus highlighting the importance of this issue for the Romanian legislator. The latest draft regarding the revision of the Romanian Constitution¹⁴ contains articles regarding fraudulent clauses (Article 134.3), unfair practices (Article 135.11) and consumer protection (Article 135.12).

The main European regulations on unfair contract terms are Council Directive 93/13/EEC of 5 April 1993¹⁵ and Directive 2011/7/EU of the European Parliament and of the Council on combating late payment in commercial transactions (mentioned above).

However, there are several other European laws which tangentially refer to our topic, such as, for instance, Council Directive 97/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit¹⁶, Directive 2002/65/EC of the European Parliament and of the Council concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC¹⁷, Regulation no. 2006/2004 of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation)¹⁸, Directive 2008/48/EC of the European Parliament and of the Council on credit agreements for consumers and repealing Council Directive 87/102/EEC¹⁹, etc.

3. Literature Review

As regards world literature, there are dozens of books, articles and studies regarding unfair terms in commercial contracts.

In the United Kingdom, Elizabeth Macdonald published a comprehensive guide to Britain's regulations on unfair terms in consumer contracts in the 2nd edition of her book - *Exemption Clauses and Unfair Terms* (2006). Other recommended books by English authors concerning this topic are: Richard Lawson, *Exclusion Clauses and Unfair Contract Terms*, 10th Edition, Sweet & Maxwell, 2011; Hugh Collins, *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law*, Kluwer Law International, 2008; Paolissa Nebbia, *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, Hart Publishing House, 2007 (which mainly examines English law, including the 2005 Unfair Terms in Contracts Bill and the Italian law, but frequent references are also made to French and German regulations); Chris Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms*, Ashgate Publishing, 2007; etc.

There are plenty of books and studies on unfair terms regulations published in Germany as well, among which: Geraint Howells, Reiner Schulze, *Modernising and*

¹² Law no. 287/2009 regarding the Civil Code, as further amended and republished in the Romanian Official Journal no. 287/2009.

¹³ For a detailed presentation on the relationship between unfair terms and lesion, see Emilia Mihai, *General law notions involved in the regulation of unfair terms*, in Curentul Juridic Journal no. 43/2010, pp. 96-100.

¹⁴ Reasoning on the draft regarding the revision of Romanian Constitution from December 10th 2013, as published in the Romanian Official Journal no. 100/2014.

¹⁵ For the implementation of Directive 93/13/EEC in several European countries, see the reports available online on http://ec.europa.eu/consumers/cons_int/safe_shop/unf_cont_terms/event29_03.pdf (Last consulted on March 7th 2014).

¹⁶ As published in the Official Journal of the European Communities L 42/1987.

¹⁷ As published in the Official Journal of the European Communities L 271/2002.

¹⁸ As published in the Official Journal of the European Communities L 364/2004.

¹⁹ As published in the Official Journal of the European Union L 133/2008.

Harmonising Consumer Contract Law, Sellier European Law Publishers, Munich, 2009; Yvonne Gehrke, *Die Richtlinie 1993/13/EG (über missbräuchliche Klauseln in Verbraucherverträgen), die Umsetzungsprobleme in Deutschland und ihre Umsetzung in verschiedenen europäischen Staaten (The Directive 1993/13/EC (on unfair terms in consumer contracts), the implementation problems in Germany and their implementation in various European countries)*, GRIN Verlag, 2007; Matthias Felix Henke, *Enthält die Liste des Anhangs der Klauselrichtlinie 93/13/EWG Grundregeln des Europäischen Vertragsrechts? (Does the Directive 93/13/EEC comply with the Principles of European Contract Law?)*, Mohr Siebeck, 2010; etc.

French doctrine is also rich in books and articles regarding abusive clauses, among which: Abbas Karimi, *Les clauses abusives et la théorie de l'abus de droit (Unfair terms and the abuse of right theory)*, L.G.D.J., 2001; Christophe Jamin, Denis Mazeaud, *Les clauses abusives entre professionnels (The unfair terms between professionals)*, Economica, 1998 (which presents specific French regulations which govern abusive clauses in contracts concluded between professionals); Gérard Biardeau, Philippe Flores, *Le Contentieux du droit de la consommation: Clauses abusives et contrats réglementés (The litigation of consumer law: Unfair terms and regulated contracts)*, Ecole Nationale de la Magistrature, 2003, etc.

Furthermore, the Research Group on European Private Law drafted a study in 2007 on pre-contractual obligations, conclusion of contract and unfair terms (published by Sellier European Law Publishers, Munich).

As for the Romanian legal literature, there are dozens of articles which thoroughly deal with unfair terms in commercial contracts, among which we may mention: Ioan Ilieș Neamț, *Considerații generale cu privire la acțiunea reglementată de art. 12 și 13 din Legea nr. 193/2000. Analiză de drept comparat (General considerations on the action regulated by Articles 12 and 13 of the Law no. 193/2000. Analysis of comparative law)*, in *Revista Română de Drept Privat (Romanian Private Law Magazine)* no. 6/2013, pp. 87-113; Lucian Bercea, *Configurarea contractelor standard. O aplicație la noile acțiuni în eliminarea clauzelor abuzive din contractele de consum (Standard agreements configuration. An application to new actions for the removal of unfair terms incorporated into consumer contracts)*, in *Curierul Judiciar (Judicial Courier)* no. 6/2013, pp. 347-351; Romeo Glodeanu, *Clauzele abuzive în contractele comerciale (Unfair terms in commercial contracts)*, in *Revista de Drept Comercial (Commercial Law Magazine)* no. 2/2010, pp. 97-105; Romeo Glodeanu, *Discuții în legătură cu clauzele abuzive în contractele comerciale (Discussions referring to unfair terms in commercial contracts)*, in *Dreptul (Law Magazine)* no. 9/2009, pp. 47-55; Ana-Maria Lucia Zaharia, *Clauzele abuzive în contractele încheiate de consumatori (Unfair terms in agreements concluded by consumers)*, in *Revista Forumul Judecătorilor (Judge's Forum Magazine)* no. 3/2009, pp. 67-71; Monna Lisa Belu Magdo, *Clauzele abuzive în contractele încheiate între comercianți și consumatori (Unfair terms in agreements concluded between traders and consumers)*, in *Revista de Drept Comercial (Commercial Law Magazine)* no. 12/2006, pp. 9-15; Norel Popescu, *Clauzele abuzive din contractele încheiate între comercianți și consumatori (Unfair terms in agreements concluded between traders and consumers)*, in *Revista de Drept Comercial (Commercial Law Magazine)* no. 2/2005, pp. 47-49; Elena Maria Minea, *Clauzele abuzive în contractele de asigurare (Unfair terms in insurance agreements)*, in *Revista de Drept Comercial (Commercial Law Magazine)* no. 10/2004, pp. 114-145; Ionuț-Florin Popa, *Reprimarea clauzelor abuzive (Repression of Unfair Terms)*, in *Pandectele Române* no. 2/2004; Cătălin Ciubotă, *Clauzele abuzive în contractele comerciale (Unfair terms in commercial contracts)*, in *Revista Română de Drept al Afacerilor (Romanian Magazine of Business Law)*, no. 2/2004, pp. 26-34; Ioan Bălan, *Clauzele abuzive din contractele încheiate între comercianți și consumatori (Unfair terms in*

agreements concluded between traders and consumers), in *Dreptul* (Law Magazine) no. 6/2001, pp. 34-42; Camelia Toader, Andreea Ciobanu, *Un pas important spre integrarea europeană: Legea nr. 193/2000 privind clauzele abuzive, Ordonanța Guvernului nr. 87/2000 privind răspunderea producătorilor și Ordonanța Guvernului nr. 130/2000 privind contractele la distanță* (An important step towards European integration: Law no. 193/2000 on unfair terms, Government Ordinance no. 87/2000 regarding producers' liability and Government Ordinance no. 130/2000 regarding long distance agreements), in *Revista de Drept Comercial* (Commercial Law Magazine) no. 3/2001, pp. 67-82; Daniel Dascălu, *Considerații privind protecția intereselor economice ale consumatorului în contractele de adeziune cu clauze abuzive* (Considerations regarding consumer economic interests' protection in adhesion contracts with unfair terms), in *Revista de Drept Comercial* (Commercial Law Magazine) no. 1/1999, pp. 51-60 and many others.

There are also extensive case law books and studies in this field such as, for instance: Dana Cristiana Enache, *Clauze abuzive în contractele încheiate între profesioniști și consumatori. Practică judiciară* (Unfair terms in agreements concluded between professionals and consumers. Jurisprudence), Bucharest, Hamangiu Publishing House, 2012; Lucian Săuleanu, Alina Dodocioiu, *Jurisprudență în materia clauzelor abuzive în contractele bancare* (Jurisprudence regarding unfair terms in credit agreements), in *Revista Română de Jurisprudență* (Romanian Magazine of Jurisprudence) no. 1/2011, pp. 217-231.

A noteworthy contribution in this field was made by Professor Gheorghe Piperea who presented several scientific papers on theoretical and practical aspects regarding unfair terms in consumer contracts in conferences concerning commercial law. Many of his studies and legal opinions concerning this issue are available online²⁰.

However, even if there is plenty of material on this topic, few studies discuss the latest amendments to unfair terms regulations and whether they are beneficial to consumers or other natural or legal persons.

4. The Adhesion Contract – Controversial Source of Legal Development and Unfair Terms

The emergence of powerful enterprises which use large scale production and distribution led to the development of a new type of contract – the adhesion contract²¹. According to Article 1175 of Romanian Civil Code, “the contract is of adhesion when its essential terms are imposed or drafted by one party or in the wake of its instructions, the other party only having the option to accept them as such”. However, we may add, the other party is free to refuse the contract.

As concerns their form, adhesion contracts are similar to standard form contracts, general conditions or frame contracts. Their peculiarity resides in the fact that these agreements create a power imbalance, as the terms are drafted, standardised and imposed by the party of superior negotiating strength. This generates a freedom limitation for the “weaker” party which generally has two options: either accepts the contractual terms unreservedly or refuses to conclude the contract²².

²⁰ For instance, see Gheorghe Piperea, *Despre clauzele abuzive din contractele de credit* (About unfair terms in credit agreements), available online at <http://www.piperealaw.ro/ro-48-358-Despre-clauzele-abuzive-din-contractele-de-credit-bancar.html> (Last consulted on March 7th 2014).

²¹ The adhesion contract is also known as adhesive contract, adhesory contract, adhesionary contract, standardized contract, take-it-or-leave-it contract or leonine contract.

²² For further explanations, see Liviu Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, *Tratat elementar de drept civil. Obligațiile* (Elementary Treaty on Civil Law. Obligations), Bucharest, Universul Juridic Printing House, 2012, pp. 81-83; Dragoș-Alexandru Sitaru, *Dreptul comerțului internațional. Partea generală* (International Trade Law. General Part), Bucharest,

Nowadays, adhesion contracts are widely spread. Complex services such as telephone or credit facilities are often linked with a comprehensive list of terms and conditions, offered on a take-it-or-leave-it basis. In most cases, large businesses (e.g. telephone operators, transport companies, banks, insurance companies, etc.) do not allow for negotiation and consumers either accept the contract or seek services elsewhere.

This type of agreement is frequently used in practice given its widely recognised efficiency. An adhesion contract considerably lowers transaction costs by simplifying negotiations, saves contractual space, reduces the juridical risk of incomplete or inadequate contractual terms and frees companies from entering into contracts uniquely tailored to each customer. These advantages facilitate commercial transactions, being in line with the principles of celerity and certainty which govern trade relations. Thus, adhesion contracts may be considered a *legal development* in contracting.

However, the undeniable benefits of adhesion contracts are partially shadowed by their negative outcomes. In recent years, this kind of agreements fuelled many arguments between authorities, large businesses and consumers.

The legislation concerning adhesion contracts became *an apple of discord* between representatives and stakeholders of civil society, particularly in the economic field. While large businesses felt adhesion contracts are over-regulated, consumers argued that the current legislation does not provide adequate protection against unfair terms to which they would not agree if given the chance.

One of the *thorny issues* which stirred controversy between authorities, businesses and consumers is undoubtedly the *incorporation of unfair terms into adhesion contracts*. Romanian and European regulations already made steps towards removing abusive clauses from non-negotiated agreements.

However, *consumer regulations in force address only the tip of the iceberg* because they exclusively address to consumers (and not to other deprived entities, such as, for instance, small businesses) and only partially tackle the phenomenon of widespread unfair terms, incorporated both into consumer contracts and other types of agreements such as business-to-business contracts.

5. Regulations on Unfair Terms – Guardian or Assailant to Freedom of Contract?

Freedom of contract is a fundamental principle of the Romanian civil law. Article 1169 of the Civil Code provides that parties “are free to enter into any contract and determine its content”.

Freedom of contract has also been recognised as a “*general principle of the civil law*” by the European Court of Justice²³. It is also protected by Article 16 of the EU Charter of Fundamental Rights (“freedom to conduct business”) and has been considered by the EU Commission “as a fundamental point of reference for the future development of European contract law”²⁴.

The 2010 version of UNIDROIT Principles on international commercial contracts²⁵ states in Article 1.1 that “parties are free to enter into a contract and to determine its content”.

Universul Juridic Printing House, 2008, pp. 439-440; Flavius-Antoniou Baias *et al.*, *Noul Cod civil. Comentariu pe articole (The New Civil Code. Comments on Articles)*, Bucharest, C.H.Beck Printing Press, 2012, pp. 1232-1233.

²³ See, for instance, Case T-170/06 (*Alrosa Company vs. Commission of the European Communities*), July 11th 2007, paragraph 49, available on <http://eur-lex.europa.eu/> (Last consulted on March 7th 2014).

²⁴ See Simon Whittaker, *The Optional Instrument of European Contract Law and Freedom of Contract*, paper available on http://ec.europa.eu/justice/news/consulting_public/0052/contributions/333_en.pdf (Last consulted on March 7th 2014).

²⁵ The Principles of International Commercial Contracts is a document elaborated by UNIDROIT (The International Institute for the Unification of Private Law), intended to harmonize international commercial contracts law. These principles are

The official commentary related to this legal text explains that “the principle of freedom of contract is of paramount importance in the context of international trade. The right of business people to decide freely to whom they will offer their goods or services and by whom they wish to be supplied, as well as the possibility for them freely to agree on the terms of individual transactions, are the cornerstones of an open, market-oriented and competitive international economic order”. According to UNIDROIT, the principle of contractual freedom also includes the freedom to negotiate and the lack of liability for failure to reach an agreement (see Article 2.1.15).

The provisions mentioned above are in line with the *libertarian* concept regarding contractual freedom. According to libertarians (among which, see the works of Ludwig von Mises, Murray Rothbard, Milton Friedman), the freedom of contract is the consequence, from a theoretical perspective, of the freedom of will theory. These theoreticians believe that the man is free by its nature and its freedom may only be limited by its will and not by law. Consequently, they believe that other limitations, such as unfair terms regulations, *violate the principle of contractual freedom*.

However, in modern European law, *freedom of contract is not an absolute principle*, as viewed by libertarians. Freedom is not considered freedom as such and is subject to several limitations, established for different reasons, such as to protect, for instance, the interests of one party representing a specific protected social group, the interests of third parties, public morality or equity, to enhance efficiency and rationality, etc.²⁶

In Romanian law, freedom of contract has a specific content, as well. Article 1169 of the Romanian Civil Code provides that contractual freedom also includes certain limitations arising from “law, public order and morality”²⁷. In addition, the Romanian Constitutional Court established that *freedom of contract “is not a fundamental freedom from the constitutional point of view”*²⁸. The Court stated that contractual freedom may be protected only in the legal framework, “with respect to reasonable limits imposed by reasons of protecting public and private interests”. It also added that “exercised outside this framework, without hindrance, freedom loses all legitimacy and tends to convert into anarchy”.

Therefore, in my view, the current European and Romanian legislation is mostly based on the *positivism theory* (on this topic, see the works of Hans Kelsen and Georges Rouhette) and the *social contract theory* (for further explanations, see the works of John Rawls, Martha Nussbaum, Amartya Sen).

Positivists believe that contracts derive from law, regulations being the only able to ensure proportionality and the balance of rights in a society. Thus, freedom of contract may not exist without certain limits imposed by public order.

According to the social contract approach, the freedom of contract as understood by libertarianism is not basic, respectively “social and economic inequalities are to be arranged so that they are to be of the greatest benefit to the least-advantaged members of society”.²⁹

From this perspective, the control of unfair terms does not affect the parties’ contractual freedom; *it seeks to protect it, by avoiding abusive commercial practices*. Legal

available on http://www.unidroit.org/english/principles/contracts/principles2010/integralversion_principles2010-e.pdf (Last consulted on March 7th 2014).

²⁶ See Maria Rosaria Marella, *The Old and the New Limits to Freedom of Contract in Europe*, in *European Review of Contract Law* no. 2/2006, p. 258.

²⁷ For a detailed presentation on this topic, see Eugenia Voiceci, *Freedom of contract and its limitations in the Romanian Civil Code*, paper presented at the CKS - Challenges of the Knowledge Society Private Law 2013 conference and available on http://cks.univnt.ro/uploads/cks_2013_articles/index.php?dir=1_Juridical_Sciences%2F&download=cks_2013_law_art_051.pdf (Last consulted on March 7th 2014).

²⁸ See Romanian Constitutional Court, Decision no. 356/2005, available on www.jurisprudenta.com (Last consulted on March 7th 2014).

²⁹ John Rawls, *A Theory of Justice*, The Belknap Press of Harvard University Press, 1971, p. 302.

and judicial intervention is legitimate in order to correct a partial failure of the market and to preserve the public and private interests.

To sum up, *unfair terms regulations comply with the principle of contractual freedom*, as envisaged by the Romanian and European regulations in force. In relation to our topic, these protective regulations are considered in legal literature to be beneficial to society (seen as a whole) because they ensure proportionality and mitigate social and economic inequalities between trade participants. However, if we analyse these regulations *from a libertarian perspective, they constitute a trade barrier* and on the long run they are not beneficial to economy and to society as well.

6. The Emergence of Unfair Terms Regulations. Consumers, Presented as “Victims” of Large Businesses

Apart from the differences between civil and commercial regulations which are highlighted in most European legislations, nowadays we witness the emergence of another *duality*, comprised of consumer regulations and, respectively, laws regarding professionals. Special laws that protect consumers are designed to shield them from unscrupulous market participants and raise public awareness on the market’s risks in order to restore consumer confidence in the financial system³⁰.

Bearing this distinction in mind, we may form three categories of contracts: contracts between professional parties (also known as B2B contracts in electronic commerce operations), contracts between two individual parties (also known as C2C contracts) and consumer contracts, concluded between a professional party and a consumer. The latter category is governed by specific regulations, most of them derogatory from the general rules.

From the contracting parties’ perspective, *unfair terms regulations mostly address consumer contracts*, but there are also certain regulations which refer to contracts concluded between professionals.

Unfair terms are *traditionally incorporated into adhesion contracts*. Since the Industrial Revolution of the 19th century, standard contracts became the rule in both domestic and international trade due to their compelling advantages (as emphasized in the previous section).

However, now it is widely recognised that adhesion contracts, which primarily contain predefined terms, may also cause negative externalities. Practice has shown that many consumers are vulnerable to unfair terms incorporated into standard contracts because of their *lack of knowledge, age, credulity or infirmity*. Large businesses often use this opportunity to employ unfair practices which significantly distort the average consumer’s freedom of choice to their advantage.

Consumer regulations on unfair terms came as a response to the abuse of economic and juridical power of the seller or supplier (usually, large businesses) and the unfair exclusion of essential rights in contracts³¹.

³⁰ For further information on this topic in the United Kingdom, but relevant to Romanian consumer protection regulations, as regards their recognized purpose, see House of Commons Treasury Committee, *Financial Regulation: a preliminary consideration of the Government’s proposals*, Seventh Report of Session 2010-11, Volume II, London, TSO Publishing House, 2011, pp. 273-274.

³¹ As highlighted in the Preamble of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, paragraph 13.

7. The Flexible Concepts of “Consumer” and “Professional”

Consumer regulations apply if one party is a professional³² (or in the words of the Draft Common Frame of Reference - DCFR³³ a “business”) and the other party is a consumer.

According to Article 2 of Directive 93/13/EEC on unfair terms in consumer contracts, “consumer” means “any natural person who (...) is acting for purposes which are outside his trade, business or profession”³⁴. Law no. 193/2000 on unfair terms offers a more detailed definition in Article 2, namely: “consumer” means “any natural person or group of natural persons which form an association which, according to a contract governed by the present law, act for purposes outside their trade, industrial or production activity, business or profession”.

The Uniform Commercial Code³⁵ provides another definition of the “consumer”, respectively “an individual who buys or contracts to buy goods that, at the time of contracting, are intended by the individual to be used primarily for personal, family, or household purposes”.

Article 12 of the United Kingdom’s Unfair Contract Terms Act 1977³⁶ also includes a comprehensive definition of the “consumer”: “a party to a contract deals as consumer in relation to another party if he neither makes the contract in the course of a business nor holds himself out as doing so and the other party does make the contract in the course of a business and, in the case of a contract governed by the law of sale of goods or hire-purchase (...) the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption”.

As a rule, *the average consumer shall be reasonably well informed and reasonably observant and circumspect*³⁷. However, the European regulations are somewhat ambiguous because the lawmaker does not expressly state what it understands to be “reasonably well-informed and reasonably observant and circumspect”. The case law of the European Court of Justice established that an average consumer “is a critical person, conscious and circumspect in his or her market behaviour” and “shall inform about the quality and price of products and make efficient choices”³⁸.

In addition, European law does not preclude the possibility that, where national courts have particular difficulty in assessing the statement in question, they “may recourse, under the conditions laid down by its own national law, to a consumer research poll or an expert’s report as guidance for their judgement”³⁹.

³² The Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts mentions in Article 1 paragraph 1 that it applies “to unfair terms in contracts concluded between a seller or supplier and a consumer”.

³³ Christian von Bar et al. (editors), Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), as prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group, Munich, Sellier European Law Publishers, 2009, also available online on http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf (Last consulted on March 7th 2014).

³⁴ It is almost similar to the definition given by Article I. 1-105 DCFR, which states that “‘consumer’ means any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession”.

³⁵ See Article 2-103: Definitions and Index of Definitions. The Uniform Commercial Code (UCC) is an uniform act that has been adopted in order to harmonize the law of sales and other commercial transactions in 50 states within the United States of America (except for Louisiana which preferred to maintain its own civil law tradition for governing the sale of goods).

³⁶ The Unfair Contract Terms Act is available on <http://www.legislation.gov.uk/ukpga/1977/50> (Last consulted on March 7th 2014).

³⁷ As regards the average consumer’s obligations see, for instance, the reasoning made by the European Court of Justice in Case C-220/98 (*Estee Lauder Cosmetics GmbH & Co. OHG v. Lancaster Group GmbH*), January 13th 2000, paragraphs 27, 30 and 32, available on <http://eur-lex.europa.eu/> (Last consulted on March 7th 2014).

³⁸ See <https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.guidance.showArticle&elemID=15> (Last consulted on March 7th 2014).

³⁹ See the Judgment of the European Court of Justice in Case C-210/96 (*Gut Springenheide GmbH and Others v Oberkreisdirektor des Kreises Steinfurt Ä Amt für Lebensmittelüberwachung*, July 16th 1998, paragraph 31, available on <http://curia.europa.eu/> (Last consulted on March 7th 2014).

Regarding the concept of “professional”, Article 2 of Directive 93/13/EEC on unfair terms in consumer contracts defines “seller or supplier” as meaning “any natural or legal person who (...) is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned”. In accordance with Article 2 of Law no. 193/2000 on unfair terms, a “professional” means “any authorised natural or legal person which, according to a contract governed by the present law, is acting for purposes relating to his trade, industrial or production activity, business and profession, as well as any other person who is acting for the same purpose in its name or on its behalf”.

As for other European countries’ legislations, the French statute introduced the distinction between “professionals” and “non-professionals” into consumer regulations. However, English and German regulations on unfair terms may sanction “non-professionals” as well. According to English Unfair Contract Terms Act from 1977, Article 3, the regulation applies “as between contracting parties where one of them deals as consumer or on the other’s written standard terms of business”. Article 305 of the German Civil Code provides that unfair terms regulations apply to “standard contract terms” which are “drafted to apply to a multitude of contracts and set by one contracting party for the other at the time of contracting”⁴⁰.

Therefore, the *definitions of “consumer” and “professional” are not uniform in European and American legislations*. However, while researching whether the latest amendments are beneficial to consumers or to professionals we are going to use the legal definitions provided by the Romanian regulations in force.

8. Brief Analysis of Unfair Terms Laws

Unfair terms regulations may be analysed from various perspectives.

As regards the subjects which they refer to, unfair terms laws generally prevent the incorporation of abusive clauses into contracts concluded between professionals or businesses and consumers (B2C contracts). However, there are certain rules which apply only in case of contracts concluded between professionals (B2B contracts) such as, for instance, Law no. 72/2013 regarding the measures for combating delayed payments of amounts resulting from agreements concluded between professionals and contracting authorities.

Concerning the subject matter of the regulations on unfair terms, regulations on unfair terms deal exclusively with contract law. Abusive clauses are often seen by legal literature and case law as an unfair commercial practice which creates an *imbalance between parties at the time the contract is concluded*. These terms are usually *non-binding* on the weaker party in a contractual relationship, unless they are individually negotiated. Such identification is possible in any jurisdiction, provided that certain requirements are fulfilled. These particular conditions may differ from one legal system to another and represent the constitutive elements of an unfair commercial practice⁴¹.

As for defining unfair terms, there are two different approaches commonly encountered in European and American legislations.

The first approach is to generally define abusive clauses and to provide an exemplificative list of specific terms that could be deemed unfair. This is the case of the Romanian, French, English and German legislation⁴² and, respectively, the Directive 93/13/EEC on unfair terms in consumer contracts.

⁴⁰ See James Gordlev, Arthur Taylor von Mehren, *An Introduction to the Comparative Study of Private Law: Readings, Cases, Materials*, Cambridge University Press, 2006, p. 493.

⁴¹ For a detailed analysis on this matter see Salvatore Orlando, *The Use of Unfair Contractual Terms as an Unfair Commercial Practice*, in *European Review of Contract Law* no. 1/2011, pp. 25-56.

⁴² James Gordlev, Arthur Taylor von Mehren, *op. cit.*, pp. 493-494.

In accordance with Article 4 paragraph 1 of Law 193/2000 on unfair terms⁴³, “a contractual term which has not been directly negotiated with the consumer shall be regarded as unfair if, by itself or together with other contractual terms, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract to the detriment of the consumer”. A term “shall always be regarded as not directly negotiated with the consumer where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract or general conditions used by traders in the market of the respective product or service”.

The Annex of this regulation contains a comprehensive list of specific terms which could be considered unfair, such as, for instance, terms which have the object or effect of: “enabling the professional to alter the terms of the contract unilaterally without a valid reason which is specified in the contract; binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract; requiring the consumer to fulfil all his obligations, even when the professional does not perform his; automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express his desire not to extend the contract is unreasonably early; giving the professional the right to determine whether the goods or the services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract”⁴⁴; etc.

This solution is also adopted by other Romanian regulations on unfair terms. According to Article 12 of Law no. 72/2013 regarding the measures for combating delayed payments of amounts resulting from agreements concluded between professionals and contracting authorities, “the contractual term which establishes, in an obviously unfair manner, in relation with the creditor, the payment term, a particular level of interest for late payment or amount of additional damages is considered abusive”. While determining the unfairness of a term, “the court shall take into account all the circumstances of the case, in particular (a) the gross deviation from practices established between parties or usages consistent with public order or morality; (b) a violation of the principle of good faith and diligence in carrying out the duties; (c) the nature of goods or services; (d) failure to provide objective reasons to derogate from the terms of payment or interest law, in accordance with the law; (e) the dominant position of the counterparty in relation to a small or medium enterprise” (see Article 13).

Law no. 72/2013 also lists in Article 14 clauses deemed to be abusive such as terms which preclude the application of penalty interest or establish penalty interests lower than the legal penalty interest, set an obligation of formal notice to operate the flow of interest, set a term of payment higher than 60 days, eliminate the possibility of paying additional damages, establish a deadline for issuing or receiving the invoice, etc.

A different approach is not to designate particular contract terms which are deemed to be unfair, but instead to provide a general definition of unfair terms. This is the case of the Principles of European Contract Law (PECL)⁴⁵, the UNIDROIT Principles (2010)⁴⁶ and the U.S. Uniform Commercial Code. For example, in accordance with Article 4.110 paragraph 1

⁴³ The solution is similar to the one presented by the Directive 93/13/EEC on unfair terms in consumer contracts in Article 3.

⁴⁴ For examples of unfair terms in consumer contracts, see Elena Grecu, Oana Albu, *Ghidul contractelor pentru antreprenori (Contracting Guide for Entrepreneurs)*, Bucharest, Universul Juridic Publishing House, 2013, pp. 259-264.

⁴⁵ The Principles of European Contract Law (PECL) is a set of model rules on contract law drafted by leading contract law academics in Europe. They were created by the Commission on European Contract Law (also known as “Lando Commission”). The last version was completed in 2002.

⁴⁶ UNIDROIT Principles (2010) give a general definition of “surprising terms” in Article 2.1.20, but it also contains other provisions regarding unfair terms and practices, such as, for example, Article 3.2.7 (“Gross disparity”) or Article 7.1.6 (“Exemption clauses”).

of PECL, “a party may avoid a term which has not been individually negotiated if, contrary to the requirements of good faith and fair dealing, it causes a significant imbalance in the parties’ rights and obligations arising under the contract to the detriment of that party, taking into account the nature of the performance to be rendered under the contract, all the other terms of the contract and the circumstances at the time the contract was concluded”.

As for legal remedies to unfair commercial terms incorporated into contracts, national lawmakers usually consider abusive clauses (as well as other harmful terms) to be *null and void or non-written*, while the remaining part of the contract remains valid. In Europe, among other legislations, this legal solution was adopted by Romania, Austria, Bulgaria, Croatia, Estonia, Finland, France, Greece, Hungary, Italy, Portugal and Spain⁴⁷.

9. Amendments to Romanian regulations on unfair terms. Legislative turmoil

In Romania, prior to 2000 there were no express regulations on monitoring standard contractual terms in consumer contracts. In all cases, general contract law was applicable and parties which were harmed by alleged abusive clauses usually resorted to the abuse of rights theory in order to remove them from contracts. In 2000, the Romanian Parliament passed Law no. 193/2000 regarding the abusive clauses in contracts concluded between professionals and consumers. Since then, the legislation on unfair terms was subject to several alterations and additions.

Law no. 193/2000 was published in 2000, republished in 2006, 2008 and 2012 and amended several times - in 2002, 2007, 2010, 2012 and 2013. These alterations were sometimes consistent and significant.

First of all, by comparing the current regulation with the original version, the consumer was redefined as “any natural person or group of natural persons which form an association which, according to a contract governed by the present law, act for purposes outside their trade, industrial or production activity, business or profession” (see Article 2). The 2000 version also included in the “consumer” definition “any legal person which acquires and utilizes or consumes from traders products obtained under a contract or benefit from their services”.

Thus, the scope of regulations was limited only to natural persons or groups of natural persons. However, the scope of Law 193/2000 was extended to other types of contracts. In the original version, it was provided a limitative list of contracts: contracts concluded between traders and consumers, warranty certificates, purchase orders, invoices, delivery slips or receipts, tickets and vouchers which contain references to predetermined general conditions. In accordance with the current regulation, its provisions apply to “purchase orders, delivery receipts, tickets, vouchers and other similar types which contain predetermined terms or refer to predetermined general conditions” (see Article 3).

The current version also lists specific requirements under which a clause may be considered as being abusive, unlike the original version where this aspect was not provided. The lists of terms deemed to be abusive was also significantly extended.

In addition, there were terminological alterations such as, for instance, the original concept of “trader” was replaced by “professional”, in line with the recent Romanian civil law developments. The notions of “standard contract” and “standard clause” were also replaced with “predetermined standard contract” and “predetermined standard clause”.

Still, the amendments brought by Law no. 76/2012 implementing Law no. 134/2010 of the Civil Procedure Code which entered into force on July 1st 2013 have greater importance

⁴⁷ For a brief analysis of comparative law on this aspect see http://ec.europa.eu/justice/contract/files/expert_groups/unfair_contract_terms_en.pdf (Consulted on March 7th 2014).

than the previous ones. Essentially, only two articles were modified, respectively Article 12 and Article 13.

The alteration to Article 12 *changes the competence of the Romanian ordinary courts regarding unfair terms issues*. According to the updated version, in the event when the existence of abusive clauses is ascertained in adhesion contracts, the competent court to settle the litigation is the tribunal from the domicile or, where appropriate, the main premises of the professional. Previously, the local courthouse was competent to resolve issues regarding unfair terms incorporated into consumer contracts. It was held that the tribunal offers more guarantees for a fair judgement in cases concerning consumer protection.

Furthermore, in accordance with the revised Article 13, in case a contractual term is deemed as unfair in court, professionals may be obliged to remove this abusive clause from all adhesion contracts concluded considering their professional activity. This amendment has significant practical consequences because courts may decide that several contracts shall be altered accordingly if they determine the existence of an abusive clause in one particular contract.

Law 193/2000 is currently under scrutiny for further amendments.

Other important changes in this legal area were brought in recent years by the new Civil Code which defined the adhesion contract (Article 1175), standard terms (Article 1202), unusual terms (Article 1203) and other aspects relevant to the subject matter of this research.

Also, the entry into force of Law no. 72/2013 regarding the measures for combating delayed payments of amounts resulting from agreements concluded between professionals and contracting authorities constitutes an *important breakthrough* concerning this legal aspect. It represents a small step in the way of *extending the scope of domestic unfair terms regulations to contracts concluded between professionals*. The main beneficiaries are especially small and medium enterprises which may be easily affected by contractual imbalances.

10. Who benefits from the unfair terms regulations in force? Are the latest amendments in favour of consumers?

Mainly, unfair terms regulations aim to remove the harmful consequences arising from imbalanced contracts, where the weaker party is unable to negotiate and express its free will. The economic, juridical and technical disparities between contracting parties are the prerequisite of all laws on abusive clauses which constitute a remedy for the imbalance existing at the time when the contract was concluded.

These regulations are *essentially inegalitarian* because they *limit the freedom of professionals* which are subject to several constraints. From this point of view, unfair terms regulations have been *traditionally favourable to consumers* and small businesses because their declared purpose is, at least to an extent, to correct the imbalance of market power between them and large businesses. The prohibition of unfair terms is therefore a sanction for the bad faith of the party who is in an advantageous contractual position.

As regards consumer contracts, the Romanian legal system adopted both criteria of good faith and significant imbalance to characterise unfairness through Law no. 193/2000. Consumers which are harmed by unfair terms have the right to choose between filing an action or raising an exception in court, in accordance with the civil procedure regulations in force, and notifying the competent authorities to monitor compliance with the law, respectively the authorised representatives of the National Authority for Consumer Protection (hereinafter "ANPC"), as well as authorised specialists of other government bodies. Regardless of the procedure chosen by the consumer (directly or indirectly through reports

drafted by authorised specialists), the ordinary courts are the only competent authorities to establish the unfairness of a contractual term.

The latest legislative amendments to Articles 12 and 13 from Law no. 193/2000⁴⁸ grant active procedural legitimacy to ANPC and other authorities for consumer protection. The competent courts vested by these entities which defend consumers' interests may force sued professionals to remove unfair terms from all adhesion contracts concluded by considering their activity. Consequently, the new regulation *constitutes an exception from the principle of relativity of court decisions* – *res inter alios judicata, aliis neque nocet neque prodest*.

These alterations aimed to reduce the large number of trials which caused court congestions, delays and sometimes significant legal expenses. *Apparently, these amendments are exclusively favourable to consumers.*

Firstly, the competent courts are empowered to declare the contractual terms deemed as abusive null and void from all adhesion contracts⁴⁹. Thus, *consumers may benefit from collective lawsuits* even if they are passive and are not part of the proceedings against large businesses which harm their interests by incorporating unfair terms into their contracts.

Secondly, consumers also *receive specialised expertise from ANPC and other authorities for consumer protection* and might enjoy lower trial expenses. Due to lack of legal knowledge and financial means, consumers are sometimes reluctant to directly file an action in court and prefer to rely on the help of specialised bodies to protect their interests in disputes with large companies.

Last but not least, by forcing professionals to remove abusive clauses from all adhesion contracts, irrespective of being or not sued by counterparties, the latest amendments *encourage a more responsible behaviour on the market*. In recent years, there was a *high rate of success for consumers* in lawsuits against banks, insurers and other large companies which resulted in the elimination of unfair terms incorporated into various agreements⁵⁰. Moreover, since the entry into force of the new regulations (on October 1st 2013), ANPC recorded more than 900 claims relating to abusive clauses, among which approximately 700 refer to contracts concluded with financial institutions⁵¹. Because of this tendency, professionals are likely to become more cautious in the future when it comes to drafting standard clauses.

Another important amendment concerns the *competent court* for settling the disputes arising from incorporation of unfair terms into consumer contracts. According to the new

⁴⁸ According to Article 82 from Law no. 76/2012, these amendments apply starting from October 1st 2013.

⁴⁹ It is noteworthy to highlight that these regulations apply only to adhesion contracts. For a more detailed presentation, see section 4 of this paper.

⁵⁰ See, for instance, Înalta Curte de Casație și Justiție (Supreme Court of Justice), Decision no. 3913/2013, available on <http://www.juridice.ro/313286/solutie-iccj-ref-dobanda-tipica-variabila.html>; Înalta Curte de Casație și Justiție (Supreme Court of Justice), Decision no. 2421/2013, available on <http://www.scj.ro> and Indaco; Înalta Curte de Casație și Justiție (Supreme Court of Justice), Decision no. 1936/2013, available on <http://www.scj.ro> and Indaco; Înalta Curte de Casație și Justiție (Supreme Court of Justice), Decision no. 1768/2013, available on <http://www.scj.ro> and Indaco; Tribunalul Gorj (Gorj Tribunal), Secția a II-a Civilă, Decision no. 110/2012, available on Indaco and portal.just.ro; Judecătoria Oradea (Oradea Courthouse), Decision no. 5590/2012, available on Indaco; Judecătoria Vaslui (Vaslui Courthouse), Decision no. 116/2012, available on Indaco; Înalta Curte de Casație și Justiție (Supreme Court of Justice), Secția Comercială, Decision no. 1994/2011, available on Indaco and [scj.ro](http://www.scj.ro); Curtea de Apel Brașov (Brașov Court of Appeal), Secția Civilă, Decision no. 103/2011, published in Buletinul Curților de Apel (Courts of Appeal Bulletin) no. 2/2012, pp. 34-37; Judecătoria Bacău (Bacău Courthouse), Decision no. 6040/2011, available on Indaco; Judecătoria Bârlad (Bârlad Courthouse), Decision no. 1683/2011, available on Indaco; Judecătoria Oradea (Oradea Courthouse), Secția Civilă, Decision no. 13185/2011, available on Indaco; Judecătoria Brașov (Brașov Courthouse), Decision no. 12479/2011, available on Indaco and portal.just.ro; Judecătoria Târgu Jiu (Târgu Jiu Courthouse), Decision no. 279/2009, available on Indaco; Judecătoria Mizil (Mizil Courthouse), Decision no. 1419/2009, available on Indaco; etc.

⁵¹ See http://www.economica.net/nica-anpc-avem-11-procese-cu-bancile-pentru-eliminarea-clauzelor-abuzive-din-toate-contractele-interviu_73211.html (Last consulted on March 7th 2014).

regulations in force, the local courthouse was replaced with the tribunal from the domicile or, where appropriate, the headquarters of the professional.

Theoretically, all courts irrespective of their competence are required to ensure a fair, impartial and transparent trial. However, the Romanian lawmaker considered that tribunals *offer higher guarantees in settling complex issues such as unfair terms* than local courthouses due to the experience and higher specialisation of their judges.

However, practically, *consumers are sometimes disadvantaged* by the current regulations because they are required to file the action at the tribunal from the main premises of the professional. The majority of large businesses have their headquarters in Bucharest and this suggests that the Bucharest Tribunal is in most cases the competent court to settle this kind of disputes. This frequently incurs additional expenses for consumers which have their habitual residence outside Bucharest, especially when they choose to directly sue their counterparties.

By extending the competence of tribunals to solving litigations arising from unfair terms, *tribunals become more crowded and packed with pending cases*. This situation often results in *less efficiency* and *further delays* in settling these kinds of disputes.

Also, *collective lawsuits may cause extended trials*, a solution not preferable for consumers which seek to solve their dispute in a timely manner.

Consequently, in my view, this amendment is only partly beneficial to consumers.

From a different perspective, *professionals may benefit* from the latest amendments brought to Law no. 193/2000. According to Article 13 paragraphs (1) and (2), when the court establishes the existence of unfair terms in a contract, it forces the professional to modify all adhesion contracts being executed and to eliminate abusive clauses from predetermined contracts, which are to be used in its professional activity. However, in this case the professional is sanctioned only once. This means that companies which employ unfair terms into adhesion contracts *have to pay only one contravention fine, irrespective of the number of lawsuits* concerning the respective abusive clauses.

As regards Law no. 72/2013 regarding the measures for combating delayed payments of amounts resulting from agreements concluded between professionals and contracting authorities which transposes Directive 2011/7/EU of the European Parliament and of the Council on combating late payment in commercial transactions, we believe it constitutes a *decisive shift* in the Romanian law perspective on unfair terms which have been traditionally associated with consumer contracts.

Chapter V comprised of Articles 12, 13, 14 and 15 refers exclusively to unfair terms incorporated into business-to-business contracts. The purpose of this regulation⁵² is to discourage late payment and to prohibit “abuse of freedom of contract to the disadvantage of the creditor”. Therefore, this regulation aims to protect the interests of the creditor against any practice which is “contrary to good faith and fair dealing”.

It is noteworthy to mention that Directive 2011/7/EU refers in particular to the protection of small and medium enterprises (see the Preamble and Articles 1 and 4). However, in Law no. 72/2013 there is only one reference to small and medium enterprises in Article 13e, which stipulates that “the dominant position of the counterparty in relation to a small and medium enterprise” is deemed to be an unfair practice. Consequently, Law no. 72/2013 *favours creditors, irrespective of their turnover or economic and juridical power*.

To sum up, the *latest amendments are mostly, but not exclusively beneficial to consumers*. Indeed, consumers may acquire significant advantage from collective actions, but these regulations sometimes hide additional expenses and further delays in solving these kinds of disputes. Professionals may also benefit from the latest amendments being sanctioned only

⁵² See the Preamble of Directive 2011/7/EU of the European Parliament and of the Council on combating late payment in commercial transactions. As presented above, Law no. 72/2013 transposes this directive into Romanian Law.

once with a contravention fine, irrespective of the number of trials concerning the same abusive clauses. In addition, Law no. 72/2013 represents an important breakthrough in Romanian law, because it protects certain categories of professionals harmed by unfair terms.

11. Concluding Remarks

The issue of unfair terms has become a “fashionable” topic in recent years, being widely tackled by both theoreticians and practitioners. At a glance, the European and American legal literature is packed with research studies which cover unfair terms incorporated into consumer contracts. In Europe, these papers generally provide a detailed analysis of national laws which transposed Council Directive 93/13/EEC on unfair terms in consumer contracts. Jurisprudence is also rich in lawsuits regarding unfair terms and in recent years these disputes often resulted in the elimination of unfair terms incorporated into various agreements.

Still, few studies focus on the latest amendments to unfair terms laws and only tangentially express an opinion on whether they are beneficial to consumers or to other entities, such as professionals.

Abusive clauses are often seen by legal literature and case law as an unfair commercial practice which creates an imbalance between parties. This is frequently the case of weaker parties which are protected against the abuse of economic and juridical power of large businesses. There are also important differences when it comes to defining unfair terms, various solutions being adopted by domestic lawmakers. As for legal remedies to such unfair practices, abusive clauses are often considered null and void or non-written by European regulations.

Unfair terms regulations are usually linked with adhesion contracts. The emergence of standard clauses incorporated into commercial contracts opened a Pandora box. On one hand, consumers argued that adhesion contracts are the source of several unfair practices and they need adequate legislative protection. On the other hand, businesses felt that an over-regulation of standardised contracts became an assailant to the principle of contractual freedom.

From a different perspective, unfair terms laws usually prevent the incorporation of abusive clauses into contracts concluded between professionals and consumers. However, the definitions of “consumer” and “professionals” are not uniform across European and American legislations and may raise significant interpretation problems. Still, there are laws on abusive clauses which address to contracts concluded only between professionals such as Law no. 72/2013 regarding the measures for combating delayed payments of amounts resulting from agreements concluded between professionals and contracting authorities.

In Romania, prior to 2000 there were no express regulations on unfair terms in consumer contracts. Frequently, parties harmed by alleged abusive clauses resorted to the abuse of rights theory in order to remove them from standardised contracts. Since then, there was a legislative turmoil concerning this subject matter.

The latest amendments brought by Law no. 76/2012 to Articles 12 and 13 were the most significant and apparently they are exclusively favourable to consumers. Indeed, consumers may benefit from collective actions - even if they are not part of the proceedings - and receive specialised expertise from ANPC. Also, in the wake of the new regulations, professionals tend to become more cautious when it comes to insert predetermined clauses which are not individually negotiated with consumers.

However, the extension of tribunals’ competence to solving litigations arising from unfair terms incurs additional expenses and sometimes less efficiency in settling these kinds of disputes. Furthermore, collective lawsuits may also cause significant delays in lawsuits against large businesses.

From a different perspective, professionals may also benefit from the latest amendments being fined only once, irrespective of the number of lawsuits concerning the same abusive clauses.

In conclusion, by providing a distinct approach to the complex issue of unfair terms, this paper raises questions to theoreticians and practitioners who believe that the latest amendments to unfair terms regulations are exclusively beneficial to consumers. Furthermore, it brings into attention the fact that unfair terms regulations do not focus solely on consumer contracts -consumer regulations being a recurring topic for legal theorists. The Romanian law literature currently offers little analysis on regulations which refer to unfair terms incorporated into business-to-business contracts.

Unfair terms regulations remain a controversial issue between economists and European lawmakers still have different approaches in this legal area. Further research on this subject matter needs to be conducted from a juridical or economical perspective. Future studies may address several layers of regulations - domestic, European and international.

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