

MANDATORY RULES OF PUBLIC POLICY CONCERNING CONSUMER PROTECTION IN RECENT JURISPRUDENCE*

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Abstract

The following article attempts to dismantle the assumptions that the administrative acts oriented towards consumer protection can be subsumed under the unitary concept of 'public policy', in the context in which the contemporary administrative and legislative measures tend to be divided into two categories: (a) those related to the State's economic intervention (public policy of direction) and (b) those pertaining to the protective and anticipatory legal intervention (public policy of protection). The fundamental issue that needs to be addressed is whether it is possible to refine the concept of 'mandatory rules of public policy', despite its appearance as a vague notion, giving it a precise, positive and unequivocal meaning.

Since the interests at stake are general and reverberating on national economy, the mandatory character of the rules pertaining to the public policy of direction is absolute, as none of the protagonists (consumer or professional) is allowed to deviate from the rules involved. Thus the infringement of a mandatory rule from this category protects the interests of the society as a whole, while the interests usually attached to the rules of public policy of protection are fundamentally individual, though common to large groups of consumers who may find themselves placed in a similar situation.

Keywords: mandatory rules, public policy of protection, public policy of direction, public authorities, withdrawal rights, consumer protection.

1. Introductory notes on the concept of 'mandatory rules of public policy'

The present study is concerned with the judicial meaning of the notion of mandatory rules and the various degrees in which a mandatory rule must be applied through the means of an administrative act, in the field of public policy oriented towards consumer protection. A twofold distinction is made between (a) mandatory rules of public policy, on one hand and (b) mandatory rules concerning private interests, on the other. The main objective is to deliver a set of characteristics for the applications of corrective mandatory rules in Consumer Law and to observe, through the means of a brief inventory of the legal remedies, the role played by mandatory rules in erasing disequilibria existing between professional parties and profane consumers, in response to the presumably intrinsic vulnerability of the latter.

The present paper is meant to primarily dwell upon a third set of limitations concerning the territorial scope of mandatory rules of consumer protection: The Common European Sales Law may only be used for cross-border contracts; Member States may, however, allow its use also for domestic transactions (Wagner, 2010, p. 47). This restriction to consumer contracts recalls the intense efforts which were made at European level over the course of several decades to define the scope of the administrative mandatory rules (Doralt, 2011, p. 9). Also to be discussed is the meaning of mandatory rules of public policy as compared with domestic contracts under conditions of mandatory rules concerning private interests. A further point of concern relates to transactions involving professionals and profane consumers.

As opposed to the 'economic' or 'utilitarian' approaches of Consumer Law, it should also be taken into account that the notion of 'public policy' has the purpose of safeguarding society's fundamental values, although its content and margins tend to vary between different branches of law. Traditional contracts were supported by few interventions of State's authorities, as the parties were presumed to be equally capable of managing their interests; instead, in contemporary law, contracts concluded between professionals and profane consumers tend to be subject to a series of administrative or judicial regulations, meant to equilibrate the balance of power between the parties¹. While in traditional legislation², buyers are requested to play a vigilant role, accumulating by their own efforts the information needed for clarification of consent, recent Consumer law changes the perspective, enhancing disequilibria existing between professional parties and profanes, in terms of information on characteristics of goods, for example or on the manufacturing chain³. It follows from the principle of freedom of contract that

1 Several administrative acts with incidence in the field of consumer protection are elaborated by the National Authority for Consumer Protection, that functions as an administrative body subordinated to the Romanian Government, as for example Authority's President' Order no. 632/2009 on consumers' right to information concerning currencies.

2 See, for instance, the provisions of the previous Romanian Civil Code, applicable between the years 1865-2011.

3 In fact, none of the traditional legal principles of informed consent are applicable to the case of product purchase, due to the fact that the consumer is rather forced by the power of

whenever a rule is not mandatory, the parties are allowed to deviate from it. However, there are certain limitations to be observed in the perimeter of the mentioned category of rules. For example, deviation is allowed only in the interest of one party (the one who is protected by the non-mandatory rule), as Romanian Consumer law includes many examples⁴. In other cases, deviation is permitted, but only marginally, as the parties can modify the rule or exclude some of its specific consequences, but they are not allowed to touch upon its core or to exclude it as such (Piedelièvre, 2008, p. 57). The best example is probably the domain of public policy of mandatory nature involving situations of asymmetrical distribution of information between the parties, to the extent that such informational asymmetries create an unbalanced contractual content (Dupuis, Guédon and Chrétien, 2007, pp. 78-82)⁵.

'Half-mandatory rules' are to be found in the field of regulations concerning the foundation and functioning of consumer associations. As a social partner of the public administration organisms, consumers' associations play three kinds of roles: (a) repre-

things to rely on professionals' honesty in terms of precise information on risks and benefits associated to the product, in a context in which the consumer does not witness the manufacturing or the design process, nor has he or she the specialization requested to comprehend or manipulate data on specific production.

- 4 It is the case of manufacturers' strict liability for defective products, in the field of which it is only the consumer who is allowed to choose another legal remedy than the one attached to the strict liability (contractual liability for delusive conduct, for instance), the manufacturer, along with the professional vendor being forced to respect the strict liability rules, the imperative character of which indicates they are compulsory for the professional party. Manufacturers' liability for physical injury and economic harms caused to consumers by defective products has been regulated at the European Union's level by Directive 85/374/EEC of the European Parliament and of the Council of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, modified and completed by Directive 1999/34/EC of the European Parliament and of the Council. The aforementioned Directive had been transposed in the Romanian legal system by Law no. 240/2004 on manufacturers' responsibility for damages generated by defective products, modified by Law no. 363/2007 on repressing illegal commercial practices in contracts concluded by consumers and the harmonization of national law and the European Communities Law in the field of consumers' protection. In addition, it is Directive 2001/83/EC of the European Parliament and of the Council on the Community code relating to medicinal products for human use that becomes incident in terms of uniform rules applicable to pharmaceutical products, in terms of safety standards, duty of information and manufacturers' liability.
- 5 The violation of professionals' duty of information represents a hypothesis of delusive (illicit) conduct, as professionals are presumed to know the technical limits and precautions associated to the use of the respective product and compelled to self-informing in order to be able to adequately inform the profanes. Another example, in Romanian Consumer Law, is that of liability for conformity of products, as professional distributors are allowed to modify the content of the legal warranty in the sole sense of ameliorating its conditions for the consumer (offering, for instance, an extended warranty of 3 up to 5 years, instead of the minimal warranty of 2 years).

senting the consumers in front of the public administration; (b) informing and advising their members in questions related to the purchase of products or the supply of services; (c) taking legal actions in order to obtain the protection of a collective interest of consumers or the cessation of an illegal commercial practice. It is also worth stressing the importance of non-governmental organizations of consumers' right to be consulted by the public administration representatives, in the process of elaborating legal norms and procedures related to consumer protection; in accordance with Chapter IV of the Romanian Consumption Code, the non-governmental organizations of consumers are entitled to be treated as social partners, while representing their members in the specialized organisms, at a national or local level, in which the public authorities are also represented.

A similar limitation is found in the rules which police unfair terms in contracts concluded by consumers⁶, especially when it comes to credit conventions (Smits, 2010, pp. 5-14). Since the implementation of the Directive on unfair terms in consumer contracts, the contract laws of all Member States now contain rules which protect consumers against unfair terms; as the result of the invalidity of an abusive contractual clause, a non-mandatory rule will be applicable⁷, as retained in Romanian legislation by Law no. 363/2007 on repressing illegal commercial practices in contracts concluded by consumers and the harmonization of national law and the European Communities Law in the field of consumer protection.

2. Methodology and objectives

The present study presents the results of the research initiated on the national jurisprudence valorizing mandatory rules in terms of ensuring efficient consumer protection. The object of the analysis was represented by the Romanian jurisprudence between 2009-2012 concerning the applicability of mandatory public law; only the published judicial solutions were utilized (around 300 decisions), using jurisprudential solutions published in specialized periodicals and/or indexed in electronic data bases such as Legalis.ro, portal.just.ro and Jurindex. No unpublished decisions emitted in the last four years were valorized; therefore, the study results have to be understood as reflecting national published jurisprudence only.

The main concerns of the present study may be resumed as follows:

1. is it possible to refine the concept of 'mandatory rules of public policy', despite its appearance as a vague notion, making difficult to give it a precise, positive and unequivocal meaning? Would it be preferable instead to use a merely functional definition of the notion, keeping in mind the dichotomy separating State's interven-

6 Where the terms offered by the trader are disproportionate in terms of the equal advantages of the parties, then the provisions of Law no. 193/2000 on unfair terms are violated. Furthermore, where the contract terms offered by the trader are confusing, unduly complicated, or ambiguous, they will be interpreted in favor of the consumer.

7 See the Court of Mizil, Decision no. 1126/October 7, 2010, [Online] available at portal.just.ro, accessed on June 8, 2012.

tion in the field of consumers' rights in a two-branched division of 'public policy of direction' and 'public policy of protection'?

2. should the notion of 'mandatory rules' be maintained, even though it is easier to define it negatively, by reference to its opposite: the optional, noncompulsory rules? In this perspective, are the terms 'mandatory' and 'compulsory' synonymous?;
3. is it possible to speak indifferently of 'public policy' in the perimeter of consumer protection, avoiding 'the public policy of protection vs. the public policy of direction' dichotomy? An analysis of the legal and jurisprudential information would lead to the conclusion that the two terms are not interchangeable (Buxbaum, 2007, p. 90; Hesselink, 2005, p. 53). The distinction is also essentially maintained in comparative law, which tends to differentiate between the two terms (Wagner, 2010, p. 48). From this perspective, the question arises as to whether different rules extracted into contemporary Romanian legislation from certain European directives are types of mandatory rules. Similarly, the economic approach of the public authorities' intervention only represents one facet of the 'public policy', aside the political aspects of the state intervention; the two cannot be considered as being synonymous;
4. is splitting 'public policy of protection' and 'public policy of direction' in the field of consumers' regulations a mere convenience of language, or is it indicative of an approach that distinguishes more clearly, from a terminological point of view, as well as from an executive or administrative one, public policy in a subjective sense (valorizing the type of interest – general or particular – that is at stake) and public policy in an objective sense (strictly focusing on its economic valences)?;
5. following from the previous question, should the expression 'public policy of protection' systematically be qualified with the use of the adjectives 'objective' and 'subjective'? In order to answer, it is necessary to question the relevance of such distinction with regard to the applicable legal regime for the administrative act involved (burden of proof, possibility of unilateral revocation, a possible control of the supreme courts or superior administrative bodies, and so on); and
6. should the different functions of public policies in the area of consumers protection lead to the use of different terms, as to refer to mandatory rules as tools to interpret and extend the content of a contract concluded between the subjects on one hand and as tools of enforcement, on the other? The terminological study of the notion of 'mandatory rules of public policy' reveals that this notion runs through a number of concepts. It is found in areas as company law, bankruptcy law and property law. Moreover, the success of the notion of mandatory rules finds a real echo in developments of contemporary European, Community, international and national law (Buxbaum, 2007, p. 91).

3. Practical guidelines on a twofold theoretical distinction

The concept of public policy covers an 'open-ended' list of public interests identified as concerning general interests of society, such as protection of the recipient of services, protection of consumers, prevention of fraud, and preservation of the proper administration of justice. Before delving deeper into the topic of mandatory rules of public

policy, it is important to outline and define the antagonist approach of two kinds of State's intervention through legislative, administrative and judicial means: the public policy of protection vs. the public policy of direction.

Arguably, each of these factors can be linked to one important aspect, which is the influence of European consumer law on general contract law and the need for harmonization. Consumer law is partly public law and partly private law. Areas pertaining to, for instance, the prevention of dangerous products coming on to the market, foodstuff and pharmaceuticals regulation, but also the already mentioned liberalization of former state monopolies in the areas of postal services and telecommunications, energy and public transport are generally governed by public law regulations.

3.1 Public Policy of Protection

In the opinion of the author, the emphasis must be placed on the aim of the public policy of protection, which is that of protecting, through administrative and legislative measures, the vulnerable contracting party by granting specific rights and judicial remedies. From the angle of the mandatory character of the specific rule involved, the administrative measures taken in the sphere of public policy of protection present the specificity of being, in their majority, half-mandatory, in the sense that the protected party may voluntarily abandon the application of a protective measure, while the other protagonist (in this case, the professional vendor, distributor or service provider), being considered to be placed in a favorable or at least superior position⁸ (from an economic, financial, psychological or simply informational point of view) is compelled to respect the administrative or legislative rule. Additionally, as in the case of a cross-border contract⁹ for example, the consumer has an option for the application of 'the most favorable rule' rather than be forced to place the dispute with a professional on the grounds of Consumer law (Doralt, 2011, p. 4)¹⁰.

As a field of public law, mandatory rules of Consumer law generally serve to regulate the private law dealings between members of the public as consumers¹¹ and traders

8 The *de facto* and *de jure* situation resulting from those national differences in some cases may lead to distortions of competition among creditors in the Community and creates obstacles to the internal market where Member States have adopted different mandatory provisions more stringent than those provided for in Directive 87/102/EEC. It restricts consumers' ability to make direct use of the gradually increasing availability of cross-border credit.

9 Thus it is possible to distinguish between two types of mandatory rules: (1) national mandatory rules which may be rendered inapplicable by the parties' choice of the Principles to govern their contract, where this is allowed by the law which would otherwise be applicable; (2) mandatory rules which are applicable regardless of the law governing the contract according to the relevant regulations of international private law.

10 For instance, the consumer may choose to be judged under the Civil law rather than under the specific Consumer law, if the latter is exceptionally considered to be less favorable for the subject involved.

11 By the law a consumer is a natural or legal person who expresses a wish to purchase, purchases or might purchase goods or utilizes a service for a purpose which is not directly

that provide goods and services (Fasquelle and Meunier, 2002, p. 112)¹². To this purpose these rules span a wide range of issues, including: product liability, unfair contracts, privacy rights, unfair business dealings and fraud, misrepresentation, redress procedures and remedies. They also cover issues concerning the various trader/consumer business relationships, bankruptcy, financial services, product safety, service contracts and bill collector regulation, pricing and utility provision.

3.2. Public Policy of Direction

The public policy of direction refers to governmental or parliamentary measures aiming to organize the national economy by eliminating from contracts, concluded between consumers of products or services and professionals, the clauses which potentially interfere with the economic direction chosen by the public administration bodies (Kleinheisterkamp, 2009, p. 92). Since the interests at stake are general and reverberating on the national economy, the mandatory character of the rules pertaining to the public policy of direction is absolute, as none of the protagonists (consumer or professional) are allowed to deviate from the rules involved¹³. Thus the infringement of a mandatory rule from this category protects the interests of the society as a whole, while the interests usually attached to the rules of public policy of protection are fundamentally individual, though common to large groups of consumers who may find themselves placed in a similar situation. For instance, contractual terms are considered to be unfair where they restrict or exclude the possibility of the consumer to exercise his or her lawful right to claim if the manufacturer, seller or service provider has failed to perform contractual obligations, or have performed them partially, including also the extinguishing of the claim of the manufacturer, seller or service provider with a counterclaim from the consumer (Taormina, 2004, p. 87).

Similarly, in cases in which contractual clauses provide the determination of the price of goods or services at the moment of supply, or permit the manufacturer, seller of service provider to increase the price and do not give the consumer the right to revoke the contract if the final price is unreasonably high in comparison with the price on which the contracting parties agreed when entering into the contract¹⁴. While the legal hypostasis of consumerism embodies an economic approach of this phenomenon and, hence, the consumer contracts are reined, by what is called a 'mercantile type of affection', the public policy hypostasis depicts a more morally inclined type of contractual relationship between professionals and consumers.

related to his or her entrepreneurial or professional activity (paragraph 13 of the Annex to the Romanian Consumer Code).

12 See the High Court of Justice, Decision no. 192/January 19, 2011, [Online] available at www.scj.ro, accessed on June 8, 2012.

13 See the 5th Section of the Court of Appeal of Bucharest, Decision no. 153/March 19, 2009, [Online] available at <http://www.jurisprudenta.org/>, accessed on June 10, 2012.

14 See the Commercial Section of the High Court of Justice, Decision no. 64/January 12, 2011, [Online] available at www.scj.ro, accessed on June 8, 2012; the High Court of Justice, Decision no. 620/February 26, 2009, [Online] available at www.scj.ro, accessed on May 18, 2012.

Although we are discussing about business to consumer contracts, a concept which, under private law, automatically implies the idea of liberty, consumers often find themselves trapped in a legal paradox: on one side, they are supposed to have full negotiation powers, but on the other side, by adhering to such a contract, they adhere to potential unfair terms, which, allegedly should be controlled via the good faith doctrine, a universal panacea, a flawless moral weapon that should be able to transform the consumer, in an ideal legal paradigm, from being hunted into being the hunter. Nonetheless, mandatory rules of public order are not and cannot be functioning, not even existing in the same way in all legal systems, because not all of these necessitate the concept itself, mainly due to the fact that they have had a completely different evolution of the consumer contractual context.

Many of the mandatory rules characterizing the legal consequences of the communications at the contract formation stage are also corollaries of the good faith or the transparency principle (Vasilescu, 2006, p. 16; Preston, 2010, p. 261). The requirement of definiteness can be viewed as another implication of the transparency principle. When the agreement fails to include important terms, and a consensus over this issue is lacking, no legal remedy can be provided against the consumer (Wagner, 2010, p. 48). For the business enterprise contracting with the consumer, these rules are unilaterally mandatory in the sense that the business entity must not derogate from the statutory provisions to the detriment of the consumer¹⁵. We should thus highlight the normative character of the 'professional diligence requirement' envisaged by Law no. 363/2007 on repressing illegal commercial practices in contracts concluded by consumers and consider the latter as an 'objective standard', since professional diligence is measured by a standard of skill and care commensurate with honest market practice and good faith¹⁶.

4. Relevance of the distinction made between political public policy and economical public policy concerning consumer rights

As a general assumption, Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety is viewed as containing rules of mandatory law, meaning that it is assumed that the directive does not leave room for contractual deviation of the rules laid down in it. In my opinion, Directive 2001/95/EC does not require implementation into mandatory rules of law. Instead, the directive offers a framework on how to process liability cases when there is no contractual relationship, or when the contract does not concern the processing of contractual forms, even though such clauses form part of the relationship between professionals

15 See the Court of Vaslui, Decision no. 2815/August 18, 2010, [Online] available at portal.just.ro, accessed on June 10, 2012.

16 See the Court of Appeal of Alba Iulia, Decision no. 22/A/February 26, 2010, [Online] available at <http://www.jurisprudenta.org/>; the 5th Commercial Section of the Court of Appeal of Bucharest, Decision no. 340/2009, [Online] available at <http://www.jurisprudenta.org/>; the Administrative Section of the Court of Appeal of Bacău, Decision no. 1277/December 10, 2009, [Online] available at <http://www.jurisprudenta.org/>; all accessed on June 10, 2012.

and consumers. Therefore, it is possible to deviate from the rules laid down in Directive 2001/95/EC on the basis of a contract concluded by consumers and professional distributors. The question as to whether this directive imposes mandatory rules of law is important as it determines the character of consumers' rights in relation to the principle of freedom of contract.

In the opinion of the author, product safety liability in consumer contracts is a 'hybrid instrument' in several respects. It occupies the grey area between mandatory law and default rules. More precisely, it transforms the vast body of safety default rules into semi-mandatory rules, since the manufacturer is allowed to prove the 'risk of development' element as an exonerator factor. As a result of the legal transformation, it is for the courts to decide, on a case-by-case basis, whether a safety default is exorbitant and thus not binding on the consumer in terms of financial costs¹⁷.

As a general trend, it is necessary to refine the concept of 'mandatory rules of public policy', giving it a precise, positive and unequivocal meaning and keeping in mind the dichotomy separating State's intervention in the field of consumers' rights in a two-branched division of 'public policy of direction' and 'public policy of protection'. Though usually defined by reference to its opposite – the optional, noncompulsory rules – the notion of 'mandatory rules' does not become synonymous to the concept of 'compulsory rules', as the definition of the later insists on the implacable, unavoidable and absolutely imperative character of the rule, while splitting 'public policy of protection' and 'public policy of direction' in the field of consumers' regulations is indicative of an approach that distinguishes more clearly public policy in a subjective sense (valorizing the type of interest – general or particular – that is at stake) and public policy in an objective sense (strictly focusing on its economic valences).

Thus, it is the opinion of the author that it is not possible to speak indifferently of 'public policy' in the perimeter of consumer protection, avoiding 'the public policy of protection vs. the public policy of direction' dichotomy. An analysis of the legal and jurisprudential information would lead to the conclusion that the two terms are not interchangeable (Buxbaum, 2007, p. 90; Hesselink, 2005, p. 52). The distinction is also essentially maintained in comparative law, which tends to differentiate between the two terms (Wagner, 2010, p. 49). As noted above, the question arises as to whether different rules extracted into contemporary Romanian legislation from certain European directives are types of mandatory rules, with regard to the applicable legal regime for the administrative act involved (burden of proof, possibility of unilateral revocation, a possible control of the supreme courts or superior administrative bodies etc.).

In other terms, administrative acts attached to the political public policy tend to prohibit certain types of contracts or clauses (considered to be abusive)¹⁸, while the

17 See the Court of Mizil, Decision no. 2219/December 21, 2009, [Online] available at www.scj.ro, accessed on June 8, 2012.

18 See, for instance, Law no. 193/2000 on the repression of abusive clauses, modified by Law no. 363/2007 on repressing illegal commercial practices in contracts concluded by consumers

public measures took by the specialized authorities (such as the National Authority for Consumer Protection, through its local departments) related to the economical public policy are imposed in order to organize the economic relations between the professionals of services and commerce and the profane parties, thus being more concerned with imperative, prohibitive norms.

5. Political public policy, as reflected by mandatory norms

As explained above, political public policy aims at prohibiting certain types of commercial behavior, thus making national provisions compatible with those applicable in other Member States. However, from a technical point of view, the use of the mentioned notion does not provide any information regarding the extent to which a rule derived from the political public policy in the field of consumer protection is mandatory. The imperative character of a norm is usually expressly indicated by the legislator, as in the case of article 84¹ of the Consumer Code, it is prohibited for professional vendors to insert in the contracts concluded with the consumers any clauses restricting or annulling the consumer's right of withdrawal. Unfortunately, in other cases, the legal norm does not contain proper support for its infringement, such as in the case of article 27 of the Government Ordinance no. 99/2000 on the commercial sales and performance of services, which imposes on the local professional vendors a duty of making public an official announcement at the city's mayoralty or town hall, containing the essential information on the seasonal promotional sales addressed to consumers, without enabling however the city halls to judicially react to the violation of the mentioned rule, by applying proper sanctions (as the cited legal text is elusive of precise sanctions).

In its most robust form, the doctrinal approach delimiting political from economical public policy also supports a broader normative vision of a protective legal system that relies entirely – with respect to public law as well as private law – on party autonomy (Bruère, 1996, p. 1715; Girolami, 2006, p. 264).

Traditional Civil law¹⁹ insisted on the party's autonomy of choice and freedom of judicial will; instead, contemporary administrative measures oriented towards consumer protection are compelled to take into account a recent change of views in the distribution of economic power between the contractual parties, granting the consumer the lost autonomy of choice (Vasilescu, 2012, p. 244). For instance, in the hypotheses making necessary to repress an abusive clause, the administrative act adopted by the National Authority for Consumer Protection, through its local department, will apply the sanction of the 'striking out clauses', depriving the concerned clause of its obligatory value, while maintaining the validity of the contract as a whole, indifferently of the importance which the parties may have attached to the litigious phrase, thus the mentioned administrative acts presenting a mandatory character.

and the harmonization of national law and the European Communities Law in the field of consumers' protection.

¹⁹ As observable in the case of the Romanian Civil Code of 1856; the mentioned Civil Code which was replaced in October 2011 with the New Civil Code.

5.1. National Authority for Consumer Protection's intervention

As mentioned above, most of the mandatory rules adopted as part of the public policy of protection are derived from the National Authority for Consumer Protection's acts or administrative measures, which are subject to the control of the specialized minister. Surprisingly, the double legislation applicable in the field of consumer protection does not offer details on the concrete role allocated to the mentioned organism of public administration, regarding the defense of individual or collective interests of consumers. Subsequently, the simultaneous application of two legal variants testifies about a certain superficiality of the Romanian legislator in the mentioned field; the massive modifications of various legal norms concerning consumer protection, materialized in a single legal act²⁰ do not participate to clarifying the consumer associations' mission, as long as the legislator modified, by the Law no. 363/2007 on repressing illegal commercial practices in contracts concluded by consumers, the articles subsumed by the Chapter VI (Consumer Associations) of the Government Ordinance no. 21/1992 on consumer protection, while keeping unchanged the similar articles of the Chapter IV of the Consumer Code (The non-governmental organizations of consumers) and thus generating an incompatibility between the two legal sets of norms. On the other hand, there is a paradox of the insufficient legal regulation of the forming procedure in the field of consumer associations: the foundation framework of the mentioned associations and their relations with the National Authority for Consumer Protection is not regulated by special legal norms, the sole regulation being offered by common norms applicable to forming non-governmental organizations²¹.

A large number of the National Authority for Consumer Protection's administrative acts of mandatory nature are related to prevailing the breach of the 'informative formalism' imposed to certain consumer contracts (such as the credit conventions, for instance); the reason for the informative form requirement is that of protecting the consent of the consumer involved in a specific legal operation, thus ensuring the awareness of those who wish to execute certain legal acts, namely the off-premises contracts, contracts agreed at distance, including electronic bargains and credits offered to consumers, for which the law requires the informative form for the validity of contractual clauses as to the serious effects specific to such acts (Debbasch, 1998, pp. 56-57). More precisely, the reason of the informative formalism would come down to that of obtaining an advised consent (Pop, 2006, p. 131).

Thus, the main characteristic of this recent type of formalism is that of targeting the protection of consumers away from their own impulsivity, by avoiding a rushed consent to judicial acts whose financial or legal implications are not fully understood by

20 The concerned regulation is the Law no. 363/2007 on repressing illegal commercial practices in contracts concluded by consumers and the harmonization of national law and the European Communities Law concerning consumer protection, which modifies more than 15 previous legal regulations in the field on consumer protection.

21 The Governmental Ordinance no. 26/2000 on non-economic associations.

consumers. It must be mentioned that currently the reasons of informative formalism may no longer be reduced to the function of obtaining an informed consent, despite the fact that the informative form requirement is meant to exercise administrative control over the act (Cuijpers, 2007, p. 305). The objectives of this control are manifold: to ensure the security of the commercial circuit and the confidence in the public policy of protection measures (which must be based on acts whose legal value is guaranteed), and nevertheless to ensure professionals' compliance with certain limitations or restrictions imposed by the law (le Tourneau and Cadiet, 2000, p. 104).

5.2. E-governing oriented towards consumer protection

Notwithstanding the mentioned examples, the use of mandatory rules in national consumer regulations seems underdeveloped. If indeed lack of knowledge of consumer rights restrains consumers from cross-border consumption, the Romanian Authority for Consumer Protection, which functions as an administrative body, subordinated to the specialized minister (in this quality is situated among the first administrative organisms using e-governing platforms), might be helping to mitigate disputes between consumers and professionals (by permitting the former to address online petitions) and thus offering a cost-effective route to better public services for every consumer and business professional, while ensuring transparent government by allowing citizens to get properly informed on the most recent legislation. Using e-technologies can improve the quality of consumer information and education, prevent certain abuses in the business behavior, reduce administrative costs implied by the petition system and foster adequate administrative reaction to the breach of consumer rights.

6. Public policy based on the fundamental right to a fair administration of justice

Romanian Law, much like French and Belgian Law (Brunaux, 2010, p. 214; Picod and Davo, 2005, p. 273), treats agreements between professionals and consumers which tend to interfere with a fair administration of justice – such as the compromise clauses and the arbitration agreements – in a differentiating manner:

1. by denying the validity of the arbitration clauses, which are signed before any conflict appearance, thus placing the consumer in the fragile position of renouncing rights on the implications of which the consumer does not have a clear image; specific provisions of the Romanian Code of Civil Procedure, as well as Annex 1 to Law no. 193/2000 on abusive clauses prohibit bargains that are harmful to the administration of justice in the profit of consumers, such as agreements under the terms of which the consumer agrees not to report a future breach of the law committed by the contracting professional; and
2. by allowing bargains concluded on the administration of justice after the arrival of a litigious motif, in which case it is not necessarily illegal for the professional party to have been acted in an abusive manner, unless proven by the consumer.

When drafting a contract including a dispute resolution clause, the agreement to go to arbitration separable from the main contract, the potential nullity of which will not interfere with the legal effects of the arbitration agreement (de Matos, 2001, p. 98).

As well known, if the parties have signed the contract containing an arbitration clause, those signatories of the contract are bound to arbitrate any dispute arising out of that contract, and not turn to, for instance, the local courts, the competency of which are overcome through the means of the arbitration agreement (Hesselink, 2005, p. 58).

7. Mandatory rules on the right of withdrawal

An important part of the public administration's measures pertaining to the protective and anticipatory legal intervention (public policy of protection) are associated to the enforcement of the right of withdrawal or the right to a period of reflection, the exercise of which can terminate an off-premises agreement (Chapus, 1999, p. 67). As opposed to the mandatory rules concerning private interests, those referring to general interests of the society cannot be extirpated by the parties of the agreement (Scoditti, 2006, p. 121). The inference that administrative contracts assorted with a right of withdrawal are also formed in order to serve the public interest is apparent in article 28 of the Government Ordinance no. 21/1992, later modified, on consumer protection, which mentions the Government's mission of establishing regulations concerning consumer protection through the specialized organisms of the central and local public administration. Furthermore, the regulations that are in effect concerning the functioning of the National Authority for Consumer Protection (Government Decision no. 882/2010) clearly reinforce this idea.

In Consumer Contract law, the mandatory right of withdrawal is the exception rather than the rule, since it allows the consumer to terminate certain types of contract within a set cooling-off period, thus being at odds with the principle of *pacta sunt servanda*, which is commonly regarded as one of the pillars of Contract law and which maintains that when parties have concluded a contract, they are bound to perform their part of the contractual duties (Vasilescu, 2008, pp. 81-95). However, protecting consumers against aggressive commercial practices or against rushed decisions justified the mushrooming of different types of withdrawal rights, as in the case of distance selling and distance marketing of financial services, off-premises contracts, credit, timesharing or distance marketing of life insurance (Raymond, 2008, p. 133; Van Boom and Loos, 2009, pp. 452-464).

Let us note, however, that certain texts referring to the right of withdrawal, incident in the case of agreements concluded by consumers, also result from harmonized regulations, such as Directive 85/577/ECC relating to consumer protection in the context of contracts negotiated away from business premises. The consumer is therefore released from all obligations generated by the canceled contract and it is up to the National Authority for Consumer Protection to further determine proper measures in order to ensure the extirpation of contrary abusive clauses inserted in contracts as a violation of the mentioned mandatory rule. The crux of the matter is that the national legal texts transposing the European directives that have introduced a right of withdrawal, have very different lengths for the cooling off-period, varying from seven calendar days (in the case of doorstep selling), ten calendar days (timeshare), seven working days (distance selling), fourteen working days (distance marketing of financial services; con-

sumer credit) up to even thirty calendar days in the case of life assurance contracts. This lack of uniformity may lead to confusion for consumers, entrepreneurs and lawyers as to the length of the applicable cooling-off period, especially in the case of cross-border contracts (Wollenschläger, 2011, pp. 2-34).

In determining the effects of an illegal clause upon a withdrawal right, regard is to be had first to what the mandatory rule in question lays down upon the matter. Article 4 of Law no. 193/2000 on abusive clauses gives judicial courts a choice from a range of possible measures, including that of leaving the contract wholly unaffected and fully enforceable, thus extirpating from the contractual text the abusive stipulation violating the consumer's right of withdrawal allocated by a mandatory rule. Equally, the contract may be given some but not complete validity, as for instance in the case of partial nullity, when the agreement may be enforceable by one of the parties only, or only in part, or only at a particular time, respecting the vulnerable party's interests (Debbasch, 1998, p. 216). In other judicial hypotheses, some remedies, such as specific performance, are not available, while others, such as damages for non-performance, are upon the consumer's request (Calais-Auloy and Steinmetz, 2000, p. 82). It may also be decided, as effect of the violation of a mandatory rule, that the contract is of no effect at all, or that its enforceability is subject to modification by the court (Fauvarque-Cosson, 2007, p. 957).²²

8. Concluding remarks

The role of mandatory rules in consumer legal protection is more than a sort of taxonomical challenge that conflicts competing definitions and systems of classification as it intersects with important debates about the nature and limits of public law itself. Mandatory rules of public policy rely on manifold sources, including legislative measures, administrative acts adopted by the National Authority for Consumer Protection, national laws on arbitration, rules and practices implemented by arbitral institutions and court decisions. While the public policy of protection aims at protecting, through administrative and legislative measures, the vulnerable contracting party by granting specific rights and judicial remedies, political public policy is concerned with prohibition of certain types of commercial behavior, thus making national provisions compatible with those applicable in other Member States. The mandatory rules of public policy based on fundamental rights, such as the right to a fair administration of justice, aims to protect essential social values, such as contractual freedom, consumer safety and consumer dignity. Thus the different functions of public policies in the area of consumers protection lead to the use of different terms, as to refer to mandatory rules as tools to interpret and extend the content of a contract concluded between the subjects, on one hand and as tools of enforcement, on the other.

²² If the mandatory rule in question provides for a criminal or administrative sanction against the wrongdoer (the professional party), the imposition of that sanction may be necessary to deter the conduct in question without adding the ineffectiveness of the agreement.

The present study was also concerned with the case where a contract concluded between consumers and professionals infringes a rule of positive law which is mandatory. The first aspect to be noted is the relation between the mandatory character of a rule deriving from the public order of direction and the compulsory character of the administrative act thus adopted, the application of which becomes unavoidable for the parties, the beneficiary (consumer) included, as the latter is no longer allowed to renounce his or her rights on conventional premises. It is implicit in the structure of the mandatory rules of public policy that the infringement of an administrative act also involves a violation of a fundamental principle of the general interest, such as consumers' dignity, fair administration of justice or consumer safety.

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