

UNFAIR CONTRACTUAL TERMS AND PRACTICES IN RELATION BETWEEN PROFESSIONALS

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Abstract

The purpose of this study is to analyse the main elements of novelty brought by the transposition of the Directive 2011/7/EU of the European Parliament and of the Council on combating late payment in commercial transactions in the Romanian national legislation by Law no. 72/2013 on the measures for combating late payment of a certain amounts of money resulting from the agreements concluded between the professionals and between professionals and contracting authorities. The current analysis is based on the interpretation of the legal provisions of the above mentioned acts as well as on the related secondary legislation. It is important to underline that at the moment of this study there is few court practice on this subject matter at the national level as well as of the European community level. Further more, considering the relatively new presence of the Law no. 72/2013 in the national legislation, albeit this law is adopting certain elements from the existent legislation, there is a lack of substantial doctrine in this respect. Starting form the considerations expressed above, we intend by this article to underline the main measures to be take into consideration by the professionals in the commercial relations established between them as well as in the commercial relations established with contracting authorities.

Keywords: *professionals, unfair terms, contractual relations, contracting authority*

JEL Classification: *K12, K22, K33*

I. General domain

Four years after the moment when the Law no. 469/2002 on contractual discipline between merchants have been repealed, a new la reinstate for the professionals, as parties to a contractual relations, specific obligations in performing the contract and regulates particular mechanisms for securing the payment of the price for the services provided and delivered goods.

Adopted in order to implement in the Romanian legislation the provisions of the Directive 2011/7/EU, Law no. 72/2013 on the measures for combating late payment of a certain amounts of money resulting from the agreements concluded between the professionals and between professionals and contracting authorities, creates a certain discipline for the contractual partners and limits for their freedom in establishing the applicable conventional framework.

According with art. 1 paragraph (1) of the Law no. 72/2013, its general domain of applicability regards only the contracts concluded between the professionals or between them and contracting authorities. This law is not including the contracts concluded with consumers, this category being protected under a different set of legal provisions.

In accordance with the provisions of Law no. 72/2013 professionals are defined as a natural person or an entity operating an undertaking for profit. Furthermore the contracting authority is defined by the law as:

- (a) any public authority of the Romanian state acting at the central level, regional or local, or,
- (b) any public entity, other than those provided under a) above, having legal capacity and which was established for meeting general interest needs, non-profit, and which is in one of the following situations:
 - (i) is financed, mainly by contracting authority, as is this defined under a) above, or by another public law entity;
 - (ii) is under or is under control of a contracting authority, as is this defined under a) above, or by another public law entity;

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(iii) in the structure of the board of directors or, as the case may be, of the supervisory board or directorate, more than half of the members are elected by a contracting authority as is this defined under a) above, or by another public law entity

It is important to mention that the definition of the term undertaking² from the Directive has not been implemented, the motivation of the Romanian legislator being that the provisions of the Civil Code and of the Law implementing the Civil Code regulates the term “professional”³ which corresponds to the term “undertaking” from the Directive⁴. We cannot agree with this interpretation because between the definition from the Directive and the one from the Civil code there is no matching. Furthermore, the Civil code is not defining the term undertaking but is describing the operation of an undertaking by a professional.

Also, Law no. 72/2013 is not implementing the terminology from the Directive on commercial transactions. This may result from the enactment of the new Civil code, together with which the Romanian civil law adopted the monist system in what concerns contractual obligations, system which is not making any differences between civil contracts and commercial contracts.

By taking into consideration the applicability domain of the law as this was defined in art. 1 of it, we understand that not all the contracts can be subject to this law but only the payment obligations arising from contracts of goods delivery or service provision.

Law no. 72/2013 establishes:

- (i) the due term for payment of the price (30 days for the professionals and 60 days for the contracting authority, from such terms being possible to derogate only if by such derogation the term for making payment contractually established is justified in an objective manner by taking into consideration the nature and the specific circumstances of the contract);
- (ii) default interests and the terms from which such interest is payable;
- (iii) damages of minimum EUR 40;
- (iv) absolute nullity of the contractual clauses which stipulates terms for issuing or receiving the invoices.

The main novelty brought by Law no. 72/2013 is the introduction, in relation between professionals and the professionals and contracting authorities, of the concept of abusive clause (and practice), institution applicable until the enforcement of Law no. 72/2013 only to consumer protection. It is important to underline that the Directive is not using the term abusive but unfair.

Thereby, the Law no. 72/2013 qualifies as abusive the contractual clauses and practices by which it is established in an obvious unfair way, in relation with the creditor, payment terms, level of the default interest or supplemental damages.

In this respect the law creates a general framework for ascertainment of the abusive character of a contractual clause establishing the following highlights to be considered in this process:

- (a) serious misconduct in relation with the practices established between the parties or the usages consistent with public policy or good morals;
- (b) failure to act in good faith or in accordance with the diligence principles in performing contractual obligations;
- (c) the nature of the goods and services
- (d) the lack of providing the objective reasons of the derogation from the general payment term or the level of default interest;
- (e) the dominant position of the counterparty in relation with a small or medium size enterprise

² Directive 2011/7/EU, art. 2 point 3 - ‘undertaking’ means any organization, other than a public authority, acting in the course of its independent economic or professional activity, even where that activity is carried out by a single person;

³ Romanian Civil Code, art. 3 - are considered professionals all those who operate an undertaking. It is considered operation of an undertaking the systematic performance by one or more persons, of a certain organized activity which consist in production, administration or selling goods or providing services no matter if it is or not a non profit activity.

⁴ Correlation table corresponding to the project of Law no. 72/2013, http://www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=13107

It is important to mention here the fact that the highlights mention above are not listed exhaustively, a court asked to establish if a clause is abusive or not having the freedom to take into consideration and to argue its decision also on other grounds or circumstances of the case.

On the other hand, article 14 of the Law no. 72/2013 is establishing as being abusive by law without being necessary to apply the highlights above the following clause:

- (a) those excluding the possibility of applying default interests or which establishes the level of such interest under the legal level;
- (b) the one which establishes the obligation of formal notification for the starting of default interest;
- (c) those who are providing a term longer than 30 days (or 60 days in the cases established by law) from which the receivables are producing interests;
- (d) establishes in the contracts concluded between the professionals and contracting authorities a payment term longer than 60 days;
- (e) it excludes the possibility for payment for supplemental damages;
- (f) establishes a term for issuing/receiving the invoice.

In the cases indicated above such clauses are declared abusive *ab initio*, without being necessary of performing further checks of the circumstances of the case.

When the courts decide that a certain contractual clause is abusive such clause will be considered null. In our opinion such nullity is only partial affecting only that specific clause and not the entire contract. We also consider that, as long as that clause considered null was considered essentially for the contractual relation than the whole contract will be dissolved with reinstatement of the parties in the situation previous to such contract.

II. Considerations on the applicability in time of Law no. 72/2013

According to the general rule of law, the provisions of Law no. 72/2013 shall not be applicable retrospectively to the contracts concluded before its enactment on 5 April 2013.

However, art. 21 of the Law no. 72/2013 states that the provisions of this law, excepting art. 15, are not applicable to the payment obligations of certain amounts of money resulting from contracts concluded by professionals and between the professionals and contracting authorities before the enactment of the current law. Still, art. 15 makes references to the sanction of absolute nullity applicable for abusive clause as well as the fact that the liability for damages will be applicable in accordance with the provisions of the Civil code.

A possible interpretation of this provision is that not only art. 15 will be applicable to the contractual relation established before the coming into force of Law 72/2013 but the entire chapter concerning abusive clauses, or at least the provisions of art. 13 regarding the highlights to be considered in assessing a contractual clause is abusive. This interpretation in practice will allow the courts to establish that certain clauses form contracts concluded before 5 April 2013 and which fall under the Law no. 72/2013 are abusive and consequently to declare them null.

By way of example, we indicate the case of a professional which have concluded a contract with another professional before the entering into force of Law no. 72/2013 and in this contract is established a payment term longer than 30 days or a default interest under the legal default interest (legal interest established by National Bank of Romania plus eight points). In this case such clause, if will be subject to the control of the competent courts, may be qualified as abusive and consequently to be null.

Consequently the professionals who have concluded contract with other professionals or with contracting authorities, together with the other contracting party, shall review the terms of their contract in order to adapt it to the new legal framework.

From another perspective, the problem presented above may be the result of a legislative inconsistency.

In the initial project of the Law no. 72/2013 released for public debate, article 20 had the following content: “*the provisions of this law, excepting the provisions of art. 15 are not applicable to the payment obligations of certain amounts of money arising from contracts concluded between professionals and between them and contracting authorities before the entering into force of this law*”. In the respective project the content of art. 15 was: “*if the debtor delays in making payments, the creditor may obtain a writ of execution by using the payment ordinance procedure, provide by art. 999-1010 of the Code of civil procedure*”. As we can observe from the above articles the initial cross reference was to the payment ordinance procedure. Such cross reference had the purpose to recognize for the professionals with contract concluded before the entering into force of the Law no. 72/2013 the access to the procedure of payment ordinance with effect for an accelerated recovery of the outstanding debts.

As we can see the provisions of art. 21 are identical with those of article 20 from the initial project of law but the cross reference from the second article was not adapted to the new numbering (in our case the cross reference should refer to art. 16 from the current law).

If we are in the presence of a technical error, it should be expressly remedied, such error having the capacity to adversely in a material way the business environment.

III. Conclusions

Law no. 72/2013 establishes a favourable framework for creditors, by establishing a set of supplemental guaranties for the performance and efficiency of the commercial activity.

However, certain misunderstandings and lack of correlation exist between the provisions of the Law no. 72/2013 as well as with the provisions of the Directive 2011/7/EU. *De lege ferenda* such issues should represent a priority for the legislator in order for the law to be able to produce its effects and to achieve its objectives and to create true benefits for the professionals subject to its protection.

Until 16 March 2016 the European Commission will elaborate a report regarding the implementation of the Directive in member states, the impact of the new legal provisions being considered most precisely at that time.

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