

THE LEGAL FRAMEWORK OF THE CONSUMER ASSOCIATIONS IN THE ROMANIAN CONSUMER LAW

Juanita GOICOVICI

Juanita GOICOVICI

Assistant professor, Faculty of Law, Babeş-Bolyai University,

Cluj-Napoca, Romania

Tel.: 0040-72 38 70 934

Email: juanitag@law.ubbcluj.ro

Abstract

This study is an analysis of the main legal aspects related to the activity of consumer associations, seen as promoters of collective interests of their members, in the Romanian Consumer Law. As a social partner of the public administration' organisms, these associations play three kinds of roles: (1) representing the consumers in the organisms of public administration; (2) informing and advising their members in questions related to the purchase of products or the supply of services; (3) taking legal actions in order to obtain the protection of a collective interest of consumers or the cessation of a illegal commercial practice. This article also stresses 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 consumers' protection. 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 Administration authorities are represented.

1. Introduction

The study of the administrative framework in the field of consumer organizations' functioning¹, in the Romanian Consumer Law implies the identification of two paradoxes. First, the contemporary Romanian Law permits the simultaneous application of two sets of legal norms, one established by the Chapter VI ("Consumer Associations") of the Governmental Ordinance 21/1992 on the consumers' protection, modified by the Law 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 (1) and, on the other hand, the one established by the Chapter IV of the Romanian Consumption Code ("The nongovernmental organizations of consumers") (2). Surprisingly, the double legislation applicable in the field of consumer associations does not offer details on the concrete role allocated to the mentioned organizations, 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 consumers' protection, materialized in a single legal act² do not participate to clarifying the consumer associations' mission, as long as the legislator modified, by the Law 363/2007 on repressing illegal commercial practices in contracts concluded by consumers, the articles subsumed by the Chapter VI ("Consumer Associations") of the Governmental Ordinance 21/1992 on the consumers' protection, while keeping unchanged the similar articles of the Chapter IV of the Romanian Consumption Code ("The nongovernmental 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 is not regulated by special legal norms, the sole regulation being offered by common norms applicable to forming non governmental organizations (Diaconescu, 2008, pp. 248-272), comprised by the Governmental Ordinance 26/2000³.

¹ The Consumption Code, adopted by the Law 296/2004 (published in the Official Monitor of Romania 593/2004 and modified by the Law 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) defines the consumers as being persons or a group of persons associated in a consumer organization who procure or utilize a product or a service in a non professional purpose (the Annex 13 of Consumption Code). The non professional purpose of the acquisition remains, in Romanian Consumer Law, an essential criterion for delimiting professionals and consumers.

² The concerned regulation is the Law 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, which modifies more than 15 previous legal regulations in the field on consumers' protection.

³ The Governmental Ordinance 26/2000 has been published in the Official Monitor of Romania no. 39/2000.

In terms of a legal definition, the consumer associations are seen as “non governmental organizations enjoying legal capacity, whose mission, excluding an economic pursuit in the name of their members, is that of promoting legitimate rights and interests of their members or of consumers, in general” (article 30 of the Governmental Ordinance 21/1992 on the consumers’ protection, modified by the Law 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). There are three observations to be made, inspired by the mentioned legal text: (1) in Romanian Consumer Law, the condition of the “sole purpose” regarding the protection of the individual and collective interests of consumers erase the possibility, for consumer associations, of including in their statutes other subsequent purposes; (2) an consumer association is not legally forced, in order to be legally formed, to limit its mission to promoting solely the economic and judicial interests of its members, the association having the right to militate for consumers’ security in general; (3) a triple role is reserved by law, for the consumer associations: (a) informing the consumers; (b) representing the consumers in court, in order to promote the collective interests of consumers; (c) participating, in their quality of social partners, in various organs of the Public Administration.

The general legal requirements for the foundation of a consumer association are those enounced by the Governmental Ordinance 26/2000 on non economic associations: (a) the intent of at least three persons to associate on an agreement bases, while participating materially or intellectually to the functioning of the association (article 4 of the Governmental Ordinance 26/2000); (b) the materialization of the agreement in a notary public’ authentic act, including the organization’s statute (article 6 of the Governmental Ordinance 26/2000); (c) an authorization elaborated by the specialized organ of Public Administration; in the case of consumer associations, competency goes to the National Authority for Consumer Protection (the “ANPC”); (d) the compliance of registration forms, in the Register of non profit organizations held by the local judicial court (articles 5 and 17 of the Governmental Ordinance 26/2000). In addition to these requirements and after their legal foundation, consumer associations are compelled to request their registration in the Register of consumer organizations held by the National Authority for Consumer Protection (article 34 of the Governmental Ordinance 21/1992 on the consumers’ protection).

As long as the financial sources of the consumer associations are concerned, there are three sources: (1) yearly financial participation of their members; (2) public subventions; (3) legal damages obtained in court by the association.

2. The “social partner” role

A. The representation of consumers in the structures of the Public Administration

The exploring of the consumer associations’ mission in the field of protecting the individual or the collective interests of consumers reveals a three-branched role: (a) informing the consumers; (b) representing the consumers in court, in order to promote

the collective interests of consumers; (c) participating, in their quality of social partners, in various organs of the Public Administration. As to the consulting role of consumer associations, conceived as a privilege by the legislator, the mentioned role is, in practice, exercised so rarely that comments on its failure had not been absent.

While annexing a description of consumer associations' mission to the succinct presentation of their rights and duties in relation to Public Administration authorities, Romanian Consumption Code mentions, in the Chapter IV ("The nongovernmental organizations of consumers") that "the non governmental organizations of consumers are entitled to be treated as social partners, while representing their members in the specialized organisms in the field of consumers' protection, at a national or local level, in which the Public Administration authorities are represented as well". A similar legal text is to be found in the Chapter VI ("Consumer Associations") of the Governmental Ordinance 21/1992 on the consumers' protection, modified by the Law 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.

As opposed to associations founded for the sole purpose of promoting the legitimate interests of consumers in general, those constituted in the view of militating for the interests of their members only "may become social partners of the Public Administration authorities and may represent their members in the specialized organisms in the field of consumers' protection, at a national or local level, in which the Public Administration authorities are represented as well, if they respect the condition of having more than 800 members" (article 33 of the Governmental Ordinance 21/1992 on the consumers' protection, modified by the Law 363/2007). The Romanian legislator had expressly included a condition of representation – that of a minimum number of members (800) – as "social partners" for consumer associations who have limited by statute their role to representing solely the legitimate collective interests of their members as consumers.

The "social partner" role permits for consumer associations to be consulted by the Public Administration authorities, at a national or local level, while discussing legal measures related to consumers' protection. At a national level, groups of consumer associations may form a federation or a confederation. Their right to participate to the sessions of the Public Administration authorities is of great importance, due to the impact of general decisions adopted by public authorities in the field of consumers' protection after consulting the persons concerned, as these are represented by the consumer associations. Consequently, it is because of their right to participate to the sessions of the Public Administration authorities that consumer organizations make their voice listened, while promoting the collective interests of their members or those of consumers in general and supporting consumers' claims in discussions related to general legal regulations in the field of consumers' security.

The legal framework of consumer associations' impartiality implies the impossibility, for an association's director and for its personnel to held public functions in the Public Administration structures (article 30 of the Romanian Consumption Code); a similar

interdiction is to be found in the 35th article of Chapter VI of the Governmental Ordinance 21/1992 on the consumers' protection, modified by the Law 363/2007.

Additionally, in terms of article 33 of the Consumption Code, the representatives of non governmental consumer organizations do not have a right to conduct investigations on producers and distributors' activity; an identical prohibition is contained by article 42 of the Governmental Ordinance 21/1992 on the consumers' protection, modified by the Law 363/2007. Unfortunately, the Romanian legislator, as opposed to the French legislator for example (Calais-Auloy and Steinmetz, 2000, p. 556), has not established the interdiction, for professionals in the field of industry, commerce or services, to participate in the directorial board of a consumer association; or, that kind of practice would compromise the independence of the organization in terms of sustaining consumers' legitimate interests against abusive conduct of professionals; therefore, a legal prohibition for an association's director and for its personnel to held decisive functions in the enterprises' structures proves to be vital for the impartial functioning of consumer associations.

Romanian Consumer Law does not provide a special agreement (authorization) procedure in order for the consumer associations to be legally formed, other than that applicable to the foundation of any kind of non profit organizations; in addition, the legislator had not restricted the official recognition of a consumer association as a "social partner" of the Public Administration structures, while conditioning the mentioned role by requirements related to a certain period of existence for the concerned association (at least an year, for instance) or to a certain public activity, measured in terms of associations' publications or reunions.

B. The consultative role of consumer associations

The consultative role of consumer associations, while modest in practice, is thoroughly regulated in article 31 of the Consumption Code, whose text mentions that "non governmental organizations of consumers have the right to be consulted by the Public Administration' representatives, in the process of elaborating legal norms and procedures related to consumers' protection, in terms of: (a) discussing consumers' complains in the field of quality and security of products; (b) determining producers and distributors' compliance to legal (non-abusive) commercial practices; (c) preventing abusive commercial practices and the use of defamatory or misleading publicity". A similar legal text is to be identified in Chapter VI of the Governmental Ordinance 21/1992 on the consumers' protection, modified by the Law 363/2007, whose article 36 reminds the fact that "consumer associations are to be consulted by the Public Administration authorities, on the occasion of elaborating legal norms and procedures related to consumers' protection". Unfortunately, however, the law does not describe the concrete procedure by which the Public Administration authorities are compelled to make effective or to implement the consultative role of consumer associations.

Nevertheless, certain administrative authorities play an indirect role in the field of consumer associations' consultancy; it is the case of the Commercial Competition

Council and that of the Commission of abusive clauses, whose activity implies a prior consult of consumer organizations.

C. The informative role of consumer associations

One of the central missions of consumer associations is that of informing consumers, while providing legal expertise. In terms of article 38 of the Governmental Ordinance 21/1992 on the consumers' protection, modified by the Law 363/2007, the centers of information and consultancy may be organized as bureaus of consumer associations, in order to develop activities of consultancy and recommendations, free of charges, addressed to consumers in general, in the field of commercial contracts, acquisition of products and deliverance of services by professionals. These centers are financed primarily by public sources and require a prior authorization in order to be legally founded, on the criteria enounced by the Order no. 256/2000 of the President of the National Authority for Consumer Protection.

The main rights and duties of consumer associations are enumerated in article 32 of the Consumption Code: (a) the right to receive financial and logistical assistance from the Public Administration authorities, in accordance to their legal mission; (b) the right to receive public financial support for certain activities, at a national or local level; (c) the right to be consulted by the Public Administration' representatives, in the process of elaborating legal norms and procedures related to consumers' protection; (d) the right to address petitions to Public Administration authorities regarding the appropriate measures to be taken, in view of retiring from the market of dangerous products, whose utilization would endanger consumers' physical integrity; (e) the right to make propositions addressed to economic agents, regarding the production of special products and the deliverance of special services, as a respond to the special needs of consumers presenting physical disabilities; (f) the right to request information on fixation of prices rules or on qualitative characteristics of products and services, in order to orientate consumers' decisions; (g) the right to inform consumers, by mass-media, on non security or non conformity of products; (h) the right to take legal actions, in a court of law, in defense of their legitimate interests or of consumers collective interests.

Exercising their right to inform the public, consumer associations may use the support offered by specialized periodicals and magazines or televised transmissions, as well as publishing comparative essays or organizing information campaigns. Unfortunately, in practice, the informative role of Romanian consumer associations has been poorly and modestly played, probably due to their lack of experience in the field of informative champagnes. In terms of legal advice and recommendations, however, as opposed to their activity related to consumers' information, these associations are not entitled by law to provide legal and economic consultancy for persons other than their members.

3. Conclusions

The hiatus installed between legal theory and practice in the Romanian Consumer Law, is mostly visible in the field of consumer associations' functioning. This difference in the way Public Administration authorities distribute the powers of decision within

consumers organizations has too often been neglected in legal and administrative science scholarship. Revising received theories from the angle of practical importance therefore promises to yield new insights. This study has suggested relationships between the allocation of legal powers for consumer associations, in the process of elaborating legal norms and procedures related to consumers' protection and the Public Administration' structures specialized in consumers' protection, at a national or local level. In addition to laying new paths for further research, a comparison between the distributions of legal roles in Romanian Law and in other European states legal systems, as the French Consumer Law, for example, would foster legal reform initiatives. In the contemporary Romanian Law, the sole specie of legal actions allocated to consumer associations is represented by "the actions in suppressing an illegal or abusive commercial practice", based on the identification, by the plaintiff, of a violation, by an economic agent, of one of regulations encompassed by the Annex to the Governmental Decision no. 1553/2004.

In terms of legal theory, a consumer association is solicited to play a triple role: (a) informing the consumers; (b) representing the consumers in court, in order to promote the collective interests of consumers; (c) participating, in their quality of social partners, in various organs of the Public Administration. In terms of legal practice, however, it is not often that a consumer association successfully finalizes its mission, probably due to their lack of experience in the field of informative champagnes, consultancy and legal actions in a court of law. The consultative role of consumer associations, while modest in practice, is thoroughly regulated in article 31 of the Consumption Code, whose text mentions that "non governmental organizations of consumers have the right to be consulted by the Public Administration' representatives, in the process of elaborating legal norms and procedures related to consumers' protection. Unfortunately, however, the law does not describe the concrete procedure by which the Public Administration authorities are compelled to make effective or to implement the consultative role of consumer associations. Therefore, the legislative blank does not facilitate, for consumer associations, the finalization of their mission, while the legislator's indifference in terms of thoroughly regulating consumer associations' modalities of intervention in the process of elaborating legal norms and procedures related to consumers' protection is announcing a cloudy future.

References

1. Apan, R.D., *Protecția juridică a consumatorilor. Creditul destinat consumului și domeniile conexe*, Cluj-Napoca: Sfera juridică, 2007.
2. Bateur, A., 'La protection illusoire du consommateur', 1996, *Le Dalloz. Recueil*, pp. 82-84.
3. Bureau, D., 'Remarques sur la codification du droit de la consommation', 1994, *Le Dalloz. Recueil, Chroniques*, pp. 291-292.
4. Beauchard J., *Droit de la distribution et de la consommation*, Paris: Presses Universitaires de France, 1996.
5. Calais-Auloy, J. and Steinmetz, F., *Droit de la consommation*, Paris: Dalloz, 2000.
6. Calais-Auloy J., 'L'influence du droit de la consommation sur le droit civil des contrats', 1994, *Revue trimestrielle de droit civil*, 2, pp. 239-240.

7. Fauvarque-Cosson. B., 'Quelle protection des consommateurs pour demain?', 2007, *Recueil Dalloz*, 14, pp. 956-960.
8. Guyon Y., *Droit des affaires*, tome 1, *Droit commercial général et Sociétés*, 9e édition, Paris : Economica, 1996.
9. de Matos A.-M., *Les contrats transfrontalieres conclus par les consommateurs au sein de l'Union Europeenne*, Presses Universitaires d' Aix-Marseille, 2001.
10. Paisant G., 'Essai sur la notion du consommateur en droit positif', *La Semaine juridique* 1993, I., 3655.
11. Picod Y. and Davo H., *Droit de la consommation*, Paris Armand Colin, 2005.
12. Piedelièvre S., *Droit de la consommation*, Paris: Economica, 2008.
13. Raymond, G., *Droit de la consommation*, Paris: Litec, 2008.
14. Reghini I., Diaconescu Ș. and Vasilescu P., *Introducere în dreptul civil*, ediția a 2-a, Cluj-Napoca: Sfera juridică, 2008.
15. Ripert G. and Roblot R., *Traité de droit commercial*, par Ph. Delebecque, M. Germain, tome 2, 16e édition, L.G.D.J., Paris, 2000
16. Scoditti E., 'Regole di efficacia e principio di correttezza nei contratti del consumatore', 2006, *Rivista di diritto civile* (Padova), 1, pp. 119-126.
17. Teleagă C., *Armonizarea legislativă cu dreptul comunitar în domeniul dreptului civil. Cazul răspunderii pentru produsele defectuoase*, București: Rosetti, 2004.
18. Trochou M., 'La protection des consommateurs', 1999, in *Le Dalloz. Recueil*, 1999, Chroniques, pp. 81-82.
19. le Tourneau, Ph. and Cadiet, L., *Droit de la responsabilité et des contrats*, Paris: Dalloz, 2000.
20. Vasilescu, P., (ed.), *Consumerismul contractual. Repere pentru o teorie generală a contractelor de consum*, Cluj-Napoca: Sfera juridică, 2006.
21. Zana M., 'La tutelle du consommateur dans le droit italien des contrats', *Studia Universitatis Babeș-Bolyai. Jurisprudentia*, 2005, 2, pp. 168-170.