LEGAL VALENCES OF GOOD FAITH IN THE CONTEXT OF CONSUMERIST RELATIONS WITHIN THE EUROPEAN UNION

Gheorghe, Bonciu[1]

Abstract:
The study aims a critical examination of the concept of good faith in relation to unfair terms in consumer contracts present in terms of legal regulations specific to the European Union. Addressing on all matters relating to the origin, meaning and evolution of good faith in the present dependence on unfair terms in consumer contracts, I have followed the extent to which good faith is a universal remedy apparently resorting equally to justice and litigants, being nothing but a measure of morality into the legal. At the same time, the good faith standard acts as valence ethical behavior of the persons, being able to remove unfair terms in contracts concluded between consumers and professionals, its content is influenced by social factors and is emphasized both of moral doctrine and the law.

Keywords: *good faith, unfair terms, equity, consumer contracts, professionals, consumers.*

JEL Classification: K12, K22

1. Preliminaries. Consumerism represents a veritable spearhead used in the new doctrines belonging to the contractual moralism, in order to break the monopoly of the will autonomy. The ontological imbalance between the parties of the consumption contract imposed the necessity to resort to instruments which would reinstate stability and harmony. Good –faith represented one of them. Therefore, we shall encounter the usage of good faith as an apparent universal remedy to which resort to the same extend both the litigants and justice itself, thus fulfilling the role of a scale with ethical values regarding the behaviour of the law subjects (Poillot, E., 2006, p.198 and foll.).

Presently, the consumer in his capacity of bearer of the requests for goods, has become a real market partner, whose positions occupied within the market are consolidated at the same with the evolution of the society. The behaviour of consumers when buying goods has started to gravely affect companies, organisations, bodies and institutions; that is why, the consumer is enjoying an increasing attention. (Apan, R. D., 2008).

The United Nations Organization has established by the resolution 39/248 from April 1985 a series of "directing principles" in order to protect consumers, created as to ensure the governments and all countries a framework in which the elaboration and the foundation of a policy and legislation for the protection of consumers is to be applied.

In these last decades, the issues related to consumer protection have grown to be the center of attention for economic and legal theories and practices all over the world. These problems, which are more and more complex, in their content and mainly by the solutions demanded, ensure the fact that this theory of consumer protection be more studied at the level of various international and world-wide communities, governmental or non-governmental, in view of establishing the measures necessary to create the appropriate legislative and institutional framework as to ensure a proper protection for the consumers.

The role and of course, the achievements of the European union in defending the rights and ensuring the protection of the consumers may be structured in three main domains: introducing a minimum set of rules, of directing principles, of obligatory norms, both for each member state, as for the other European states, if the later integrated itself within the Unique European Market, principles which are inscribed in an important supporting document for establishing the objectives specific to the consumer protection; for the creation at the level of the European union of a proper institutional framework for

[1] PhD Associate Professor, "Constantin Brâncoveanu" University, Piteşti

the consumer protection, of bodies with attributions in this essential domain, and with these methods, to create premises that, each and every state will contain governmental or non-governmental bodies that are functioning in favour of consumer protection; the continuous interest for harmonizing the legislation and the institutional framework in the domain of consumer protection, interest which is encountered both in the overall activity of the bodies belonging to the European Union, as well as each and every country. .

2. Consumption contract and autonomy of the will. In conformity with the volunteer theory, the contract represents an agreement of will and not an exchange in patrimony. Generally, a contract embodies the concept of contractual freedom, of autonomy of will, which means that it must also express the will of the parties which are equal before the law. Unfortunately, this autonomy of will is fragile and even false in the framework of the consumption contracts, since it is confusedly concretised both in public law mechanisms, as well as in private law mechanisms.

Liberty simultaneously represents both the origin and the objective of the contract and implicitly, the legal equality of the parties. Moreover, the consumption reports stipulate that one of the participants will have an advantage, and, as a direct consequence, the other party will be in a clear disadvantage (Vasilescu, P., 2006, p. 22). Any contract is an agreement of wills, however not any agreement of wills represents a contract. The legislator framed the consumption contracts in the category of contracts, evidencing their essence by explaining the elements of public law or the elements of a special and extraordinary legislation, resulting in the gradual loss of the legal value of the contractual freedom, thus its consequence being not the agreement of the parties, but the understanding of the legislator related to the will of the parties (Ruen, A., 2011, p.34).

In reality, the consumption legal document is situated right at the limit between the public law and the private law, being accompanied by sanctions from the public law as to perfect it, but simultaneously resorts to purely civil means, such as good-faith as to appreciate the abusive character of the clauses it involves and which also invoke the simple adhesion of the consumer to the claims of the other party. (Ruen, A., 2011, p.34).

The directive 93/13/CEE of the Council referring to the abusive clauses from the contracts concluded with the consumers[1], by art. 4 paragraph 2, excluded from its space of incidence the clauses which generate a significant contractual imbalance, caused by the inadequacy „between price and remuneration, on the one hand, and the services or goods provided in counter-performance, on the other hand", meaning the injurious agreements[2].

3. Good faith in consumerism contracts. Good faith, along with the concept of equity represent two cardinal notions which are omnipresent in the civil law. The search for the balance necessary for equity is subordinated to the privilege of the legislator, under an objective form, as in the *common law*, or under a subjective form, in the case of the continental system. On the contrary, good faith complements the contractual obligations with the social expectations which are imposed on a contract from the perspective of the different sides of the legal existence (Sourioux , J.-L., 2000, p.517 and foll.). The notion of good faith, intensely emphasised at the level of jurisprudence, as well as at a doctrine level, appears to be regulated in art. 1170 Romanian civil code from 2009 in conformity to which

[1] Published in the „Official Gazette of the European Union" L 95/29 from 21.04.1993. This directive was amended by the Directive 2011/83/UE of the European Parliament and Council, published in JO L 304/64 from 22.11.2011.

[2] The Romanian legislator in the Law no. 193/2000 regarding the abusive clauses from the contracts concluded between the traders and the consumers (published in the O. G., no. 560 from the 10th of November 2000), by which the directive was transposed in the internal legal order, omitted this provision.

„The parties are to act with good faith both when negotiating and concluding the contract, as well as during its execution"[1].

The phenomenon of the adhesion contracts represented the echo of economic evolution for the Occidental civilisations founded on the principle l *„laisser-faire, laisser-aller*" which also imposed an even increased contractual liberty and a discrete intervention of the state in the contractual relations (Jaluzot, B., 2001, p. 226 and foll.).

The development of the post-war world could not lead, except in an indirect manner, to a limitation of the principle of autonomy of will by the intervention of the state authorities in favour of certain law subjects susceptible of being easily submitted to the economic vicissitudes. In the consumption reports, the contractual liberty of a consumer is crushed by the economic power of the professional and, as a result, the liberty of the latter may not be total, as it is enclosed by the legal norms meant to protect the consumer.

In the space of the European Union, the arguments established against good faith may be grouped in two categories and, namely the impossibility of adapting to the notion of good-faith in the context of abusive clauses, respectively its superfluous character.

The incompatibility of the notion of good faith with the control mechanism of the abusive clauses is supported by the German and Swiss jurists.

The Swiss doctrine considers that good faith could permit the completion of the contract, its interpretation, but not its correction, a domain which is reserved for the abuse of the law (Jaluzot, B., 2001, p.231-232). In its turn, the German doctrine pronounced itself in the sense of rejecting the good faith from the category of appropriate criteria as to achieve such control, affirming that the limits of contractual liberty is firstly determined in conformity with the general interest, that all the lawful subjects have the obligation to observe equally, and that, secondly, the particular interest of the two parties is the one imposed as a determinant factor. (Jaluzot, B., 2001, p. 231-232).

The European Directive referring to the abusive clauses also stipulates, except the breach of good faith, the existence of a significant imbalance between the performances of the parties, which determined the French jurists to renounce to the defining of the abusive clauses, as the notion of imbalance would be sufficient and the abusive clauses required a review, from case to case, by the court.

In the system of *common law*, specific to the British space, the Crown Courts constantly and intensely rejected the doctrine of good faith, qualifying it as "inherently repugnant regarding the adversarial position of the parties" and „non-functional in practice" (Teubner, G., 1968, p.11). The British legal doctrine expressed two points of view and namely: concern towards the negative effects that the good faith might produce, if it would be carelessly implanted in the British law, respectively the enthusiastic welcoming of good faith being considered as an opportune infusion of the community values, a possible remedy of the contractual formalism, which would interact positively with other essential elements of the British law of contracts. In reality, as it was legally demonstrated (Ruen, A., 2011, p.37), it is not the attitude of rejection or integration of the doctrine of good faith by the British authors from the contract domain which proved to be crucially essential in all this process, but the mass of consecutive transformations to which the concept of good faith has been submitted, its role in the legal British context being that of filter of appreciation of the abusive clauses in the consumption contracts.

The British jurists preferred, as a consequence of the specificity of the *common law* system, to distinguish and to elaborate diverse factual contractual situations, thus mending

[1] In the system of the Romanian Civil Code from 1864, art. 970 par. 1 is was expressly stipulated „ The Conventions must be executed with good faith", however the jurisprudence applied these provisions for pre-contractual breaches of the good faith. The situation is also similar is the other European states, whose civil legislation was inspired from the French Civil Code from, (Benabent, A., 2001, p.137 and foll.).

the very essence of the *common law*, the existence of the legal precedent, with the introduction of a continental element, good faith, succeeding to create a forced adaptation of the profoundly European good faith in the British legal space.

During the period subsequent to the industrial revolution, the abusive clauses had a constant presence in the German law due to the frequency with which they could be encountered. The German courts reacted by a variety of methods, either using the concept of *contra proferentem* in order to solve the ambiguities from the standard contracts, which assumed that the interpretation had to be performed against the party which had edited and introduced the respective clauses in the contract, either discussing that in the framework of a standard contract, the clauses were considered as not being an integrated part of that contract if they "surprised" the consent of the other party (Zimmermann, R., 2010, p. 175 and foll.).

Along with the passing of time, the rationale and the arguments of the courts evolved, thus applying the in Imperial period, the concept of *contra bonos mores* contained by the dispositions of art. 138 from the Civil Code, being appreciated as a reason sufficiently strong enough since one of the parties, after benefiting of the respective abusive clause, managed to create a type of monopoly, by transforming the act of consumption in an indispensible act for the other party (Zimmermann, R., 2010, p. 175 and foll.). After the year 1956, the jurisprudence replaced the concept *contra bonos mores* with the dispositions of art. 242 Civil Code referring to good faith. Thus, a clause was considered as being abusive, and as a consequence invalidated, if, contrary, to the requests of good faith, conferred the other party an unreasonable advantage[1].

From a legal point of view, good faith, as developed by the German jurisprudence is conferred three functions: permits the establishment of the existence of contractual obligations and their extent (*officium iudicis*)[2]; makes possible a virtual limitation of the contractual rights (*prater legem*)[3]; permits a possible transformation of the contract (*contra legem*)[4].

However, considering the special context in which the abusive clauses are formed, developed and in course of being repressed, a global control norm at the hand of the jurist appears as being necessary, being appreciated that this necessity can not be ensured except by the legal qualities comprised by the good faith[5]. Along with the Directive 93/13/CEE, a test in introduced in the conscience of the member States, which is to be applicable irrespective of the pre-existent law, respectively good faith as an appreciation factor of certain abusive clauses from the contracts concluded between professionals and consumers. The breach of good faith represents the main impulse of launching the mechanism of abusive clauses.

Thus, the affirmation of Domat that „there is no convention where the idea that each parties owes to the other contractual party the concept of good faith, with all the effects imposed by the equity, both regarding the execution, as well as the formation and interpretation of all conventions is not implied" is still valid (Romain, J.-F., 2000, p.27). As a result, at a general level, the notion of good faith plays the role of a qualitative in appreciating the formation, interpretation and execution of conflicts within the continental systems, the obligations encumbered to the parties being subjected to a general criteria of honesty. The regulation of equity must prevail in all contracts, for if one of the parties

---

[1] There is an unreasonable advantage if the respective clause is not compatible with the essential notions of justice and justness, as they were statuated in the non-imperative dispositions from the German Civil Code.

[2] The establishment of an extensive approach of the contractual relations is found divided in a series of obligations statuated at a doctrinaire level such as the obligation to inform, protect and to cooperate within the framework of a consumption contract.

[3] Sanctions the non-fulfilment of their own obligations resulted from a consumption contract when there is a situation of abuse of the contractual rights.

[4] There is an expansion of the judicial power to reconsider the contract in the light of events which occur in its conclusion as a result of producing an imbalance between the contracting parties. (Teubner, G., 1968, p. 20 and foll.).

[5] It is the solution chosen by the Romanian legislator by adopting the Law no. 193/2000.

which does not have the intention to make a donation to the other party, that party will not ultimately be forced to give anything except the equivalent of that which the other party had given or had undertaken to give (Fin-Langer, L., 2002, p.10).

The fact that continental good faith is routed in morality, does not imply that this is reduced to moral, even if from an ideological point of view, it descends from the ethical maxim of love and mutual respect between people, respectively among subjects of law, from which result the notions of fidelity and trust (Romain, J.-F., 2000, p.107 and 113).

To support the idea that under the exigencies of the equity of the judge, situated outside the contractual report, might intervene as to appreciate the good execution of the contract in the scope considered by the parties and for adapting it in view of ensuring a balance between the contracting parties is unfair taking in to consideration the role of good faith in our system of law. The Civil Code from 1864 grants priority to the good faith in report of equity and thus, the concept of good faith is the one which could justify the right of the judge in appreciating the abusive character of the consumerism clauses, this being the moral axe around which the contractual reports gravitate (Deleanu, I.; Deleanu, S., 2003, p.128).

Moreover, in our doctrine, it has been supported that good faith embodies the meaning of an objective behaviour norm and that the breach of the obligation of good faith would represent an abuse of the law, considering the fact that the abuse of law is but a subdivision of ill faith. (Popa, I.-F., 2004, p.208).

4. *The abusive clauses in the consumerism contracts.* The European directive 93/13 from the 5th of April 1993 also embodies the concept of good faith as a decisive criteria to determine the abusive character of certain contractual clauses. The regulation from art. 3 pct. 1 disposes that „ A clause of a contract which does not represent the object of an individual negotiation is considered as being abusive if, taking into consideration the demands of good faith, it created in the detriment of the consumer a significant imbalance between the rights and obligations of the contracting parties". This principle was transposed in the internal legislation by the majority of member states of the European union which constituted a control of the abusive clauses also justified by the demands of the good faith[1].

The repression of the abusive clauses constitutes one of the essential elements chosen by the legislator for the protection of the economic interest belonging to the consumers every time there is a significant imbalance between the right and obligations of the parties due to the undermining of the concept of good faith. In other words, the legal act of consumption appeals to the notion of good faith in order to sanction an objective norm of behaviour . (Popa, I.-F., 2004, p.195). In the space of the European Union, the good faith related to consumption remains the privilege of the legislator, the role of the court being resumed to identifying its presence in a context of consumption by using means of public law.

Including in the national law of the concept of abusive clause was achieved by the Law no. 193/2000 which by defining the abusive clause appeals to the concept of good faith and by receiving the regulations from the Directive 93/13/CEE. Art. 4 par. 1 disposes that „a contractual clause which was not negotiated directly with the consumer will be considered abusive if, by itself, or along with other provisions from the contract, create a significant imbalance between the obligations and the rights of the parties in the detriment of the consumer and contrary to the requests of good faith".

The notion of consumer is defined by art. 2 par. 2 from the law that „any natural person of group of natural persons constituted in associations, which conclude a contract outside their authorised, professional or commercial activity" (text identical with art. 2 let. b from the Directive).

[1] Austria did not adopt a general definition of the notion of abusive clause; however the law anticipated the possibility of an appeal to the criteria of good morals. Switzerland, Belgium, and France are also include in the states where good faith has been contested, the later also amending the definition o the abusive clause in 1995 (Popa, I.-F., 2004, p. 227-228).

Thus, the consumer is a natural person or a group of natural persons constituted in associations, the normative protectionist domain referring expressly to the consumer which are natural persons, aspect which has been constantly acquired by the jurisprudence of the Court of Justice of the European Communities[1].

The contracts concluded with the professional trader by the consumer must present a non-professional character from the perspective of the cause which animates the latter, the law establishes a formal criteria of choosing the consumption documents.

In the doctrine (Calais-Auloy, J.; Steinmetz, F., 2000, p. 183-184), the abusive clause was defined as a contractual provision by the consumer trader and as to produce a significant imbalance between the obligations and rights of the parties, in the sense of promoting a more advantageous positions for the trader, thus contrary to the concept of good faith.

In order for a clause to be abusive, the following conditions must be fulfilled consecutively: the lack of contractual negotiation; the breach of the concept of good faith and the imbalance between the rights and obligations of the parties.

The economy of consumption created reports which, generally, exclude communication and implicitly, the negotiation of the terms of agreements of will. The expression specific to the right of consumption is the adhesion contract, in whose sphere enter the contracts standard type (pre- edited by the trader), obligatory or forced contracts (which are also, generally, contract types) and any other contracts which exclude the idea of pre-contractual negotiation (Popa, I.-F., 2004, p. 205; Ripert, G., 1946, p.99; O. Rădulescu, O.; Rădulescu, M. A., 1999, p.63-66).

Generally, only the individual clauses of the contract are void, and the legal effects of the invalidity stipulated by the legislator of the Union operate only in favour of the consumers, the obligations of the professionals (traders) compared to the provisions of the abusive clauses is regular. As only the invalidity of this clause and the continuation of the contract which, after eliminating the imbalance created in detriment of the consumer continues to engage both parties. The objective pursued by the legislator is exclusively represented by the establishment of the balance, and not in eliminating the contract itself. The continuation of the existence of the contract is the rule and its suppression is the exception.

The Law no. 193/2000, after the model of the Directive 93/13/CEE, stipulates that the clear and unequivocal editing of the clauses is obligatory; hence the fact that specialised knowledge is not necessary for its understanding. If there are doubts on the interpretation of the clause, it will be interpreted in favour of the consumer, with the specification that the regulations of the abusive clauses will be also applied when the consumer understood the clauses of the contract.

Justifying the notion of the abusive clause was mainly, explained, on a general presumption of lack of experience of the consumer facing the technical "perversions" of the professional, but also on the contractual balance. The protection of the consent of the consumer is ensured by instituting the obligation to inform, prohibiting the lying advertising, the right to unilateral termination etc., however, the notion of abusive clause remains attached to the concept of good faith (Stoffel-Munck, Ph., 2000, p. 316 and foll.).

Regarding it imbalance, it is reported to the state if the parties from the moment of concluding the contract and must be of an objective nature, irrespective of the fact that it produced or not effects on the patrimony of the consumer. As evaluation criteria, the evaluation *in abstracto*, *global* evaluation or the evaluation *in concreto* can be used, without excluding each other, but, on the contrary, completing each other.

[1] CJCE, room 3, *„Cape"* decision from the 22nd of November din 22 *„Oceano"* from the 27th of June 2000 in „Revue trimestrielle de droit civil, 2001, p. 878.

However, the Directive 93/13/CEE expressly mentions that the appreciation of the abusive clause may not be achieved by reporting to the main object of the contract[1], meaning that establishing the price in a consumption contract may not be the object of the protective norms. The variety of abusive clause is infinite, for which reason the appreciation must be performed in practice from case to case depending on the provisions of the contract and the situational circumstances of its resiliation.

5. Sanctions applicable to abusive clause. The sanctions applicable to abusive clauses are both of a civil and conventional nature. Firstly, in a civil plan, the sanction specified applicable to the abusive clause consists in the fact that it will not produce effects on the consumer and, secondly, under the aspect of the inefficacies of a legal act, the invalidity is the adequate sanction as it eliminates the effects contrary to the imperative norms which must be observed related to its valid conclusion from the legal document.

The invalidity as a sanction of the legal document is absolute. (Popa, I.-F., 2004, p.205; Bălan, I. I., 2001, p.36 and foll.) as it focuses on the non-observance of an imperative norm, which may be total or partial, as the cancellation of the abusive clause determines the annulment of the whole contract as an effect of the essential character for one of the parties, thus eliminating the contract from the cause, or after the elimination of the abusive clause, which is not essential, the contract will continue to be in force.

In case the contract will not continue, the sanction is not the resiliation, as stipulated in the Romanian legislator, but the total invalidity which results from the provisions of the Directive, which may be invoked directly and with the possibility of requesting damages – interests. These will be requested in combination with any of the sanctions described above according to the norms of tort liability, related not to the non-performance of a contractual obligation, but a legal obligation prior to the contract and independent of its execution without a cancelled clause. It is not illegal that the damage interests be requested separately (individually) subsequent to the observance of the abusive cause.

6. The procedure of observing the abusive character of a clause. In conformity to a jurisprudence of CJUE, the protection system applied by the Directive 93/13/CEE is founded on the idea in conformity to which the consumer is in a situation of inferiority compared to the sellers of the providers regarding both the power to negotiate, as well as the level of information, situation which determines him to adhere to the conditions priory formulated by the sellers or the providers, without exerting an influence on their content [2].

The main means with which the legal practices are confronted are related to the difficulty of creating efficient means that will act as to ensure a balance of forces within the relation offerer - consumer. Ensuring the contractual balance, when it is possible, or the resiliation of the contract, if the balance can not be achieved, is fulfilled by the so-called commutative justice which can be performed by extrajudiciary means, administrative-jurisdictional means and legal means.

***6.1. Extrajudicial means*[3].** The paralegal means are organised by the state or private institutions and are situated outside the jurisdictional order. These are divided into: legal

---

[1] The Romanian law did not assume this dispositions, however the jurisprudence replaced this lacuna by choosing an interpretation in the sense of the regulations in the Directive.

[2] See the Decision from the 27th of June 2000, Oceano Grupo Editorial and Salvat Editores (C-240/98-C-244/98, App., p. I-4941, pct.25) and the decision from the 26th of October 2006, Mostaza Claro C-168/05, App., p. I-10421, pct.25).

[3] Extrajudicial procedure: any method which permits the solving of a conflict due to the intervention of a third party which proposes or which imposes a solution. In truth, the extrajudicial instruments may be established by the public authorities, by the professionals from the legal sector, by the professional groups or the organisations of the civil societies (arbitral tribunal, centers of private arbitral, mediators etc.). Under a normative aspect, it presents importance Directive 2008/52/CE of the European Parliament and the Council from the 21st of May 2008 regarding certain aspects of the mediation in civil and commercial domains; the

consultations provided to the consumer freely or at reduced prices, exercising pressure on the offerers and solving litigations as to bring the consumers and offerers face to face.

The European Commission encourages the amicable settlement of the consumption conflicts. As to consolidate the trust of the consumers and the companies in the extrajudicial procedures of the conflicts, the Commission establishes principles which focus on facilitating the access of the consumers to the procedures of extrajudicial settlement of the conflicts and the consolidation of the quality of these procedures[1].

Indeed, consumers may confront themselves with obstacles in valuing their rights, due to the high costs of the legal assistance, of the duration and the complexity of the legal procedures, and especially in case of transboundery conflicts.

Thus, the Commission aims at promoting the extrajudicial procedures of solving conflicts, such as the mediation, conciliation or arbitration. These procedures may help consumers and companies to solve their conflicts in a simple, rapid and low-cost manner.

In this sense, the Commission requests the observance of the following principles: independence and expertise of the body; transparency of the procedure and the functioning of the body; effectiveness, rapidity, gratuity or low cost of the procedure[2]; legality of the decisions, which shall observe the laws regarding the protection of the consumers; the fairness of the procedure, for each party involved.

This recommendation is subsequent to the conclusions of the Green card regarding the access of consumers to justice and amicable settlements regarding the consumption in the unique market.

6.2. Administrative – jurisdictional means. The bodies authorised in the domain of consumer protection (agents of the ANPC and of other bodies of the public administration with attributions in this sense) to inform the consumers or ex officio may perform verifications of the contracts that professionals (traders) conclude and who have the obligation of bringing to its disposal.

If the authorised bodies ascertain the existence of certain abusive clauses, a minutes is concluded in which they mention their conclusions and which is sent to the court situated in the territory of the domicile or headquarters belonging to the professional (trader) In case the court decides the existence of an abusive clause, it will apply contraventional sanctions and disposes the amendment of the contractual clauses under the sanction (if the contract is maintained) or the resolution of the contracts with damages –interests. The decision of the court is submitted to an appeal (in the system of the Code of civil procedure from 1865) or the appeal (in the system of the Code of civil procedure from 2010).

Recommendation of the Commission from the 4th of April 2001 regarding the principles applicable to the extrajudicial bodies charged with the consensual solving of the consumption litigations non-included in the Recommendation 98/257/CE [Official Gazette L 109 from 19.4.2001]. This recommendation is applied to the bodies responsible with the procedures of extrajudicial settlement of the consumption litigations, who are trying to find solutions to a litigation by bringing the parties together in order to reach a common agreement. Moreover, these bodies should take into consideration the following principles: impartiality, transparency, effectiveness and equity of the procedure.

[1] In this sense, the following were adopted: Communication from the Commission on the out-of-court settlement of consumer disputes [**COM(1998) 198** final – Not published in the Official Journal] (Communication of the Commission from the 30th of March 1998 regarding the extrajudicial solving of the consumption conflicts [COM(1998) 198 final – Not published in the Official Gazette]).
Commission Recommendation **98/257/EC** of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes [OJ L 115 of 17.4.1998] (Recommendation 98/257/CE of the Commission from the 30th of March 1998 regarding the principles applicable to the bodies responsible with the extrajudicial solving of the litigations referring to consumption).

[2] Resorting to a lawyer or a legal representative must be optional, although each party has the right of defending his point of view.

6.3. Judicial means. In the opinion of the Court, the possibility of the court of examining ex office the abusive character of a clause represents an adequate means both for achieving the result stipulated by art. 7 from this directive. The right of the court thus recognised was considered necessary as to ensure an effective protection of the consumer, especially taking into consideration the important risk that the consumer is not aware of its rights or to encounter difficulties in exercising them [1].

All the member states dispose of legal procedures in order to prohibit the abusive clauses (Ebers, M., 2009, p.422 and foll.). In certain member states, the focus is on instruments of administrative law, while in all the member states the initiation of a collective action is possible.

The judicial means include the notion of appealing to a court of civil or administrative nature, which represents numerous inconvenient for the consumers: the very high costs of the court, psychological obstacles etc.

The patent versatility of the professional creates a simple presumption of abuse, as a smaller or larger dose of injustice does exist, which has to be corrected in view of establishing the contractual balance (Thibierge-Guelfucci, C., 1997, p.381-382). Although the action in declaring the absolute nullity is imprescriptible, the action in damages remains prescriptible. The action is exempted from the payment of a stamp duty. (art. 29 par. 1 let. f from OUG no. 80/2013).

Almost every time when we deal with the vices of consent which are the result of the attitude of a contracting party, the jurisprudence founds its sanction by an implicit reporting to good faith, as well as the fraud is implicitly reported to a general obligation of good faith as the fraud in justice also involves the intention of the parties (thus ill faith) of a legal document for breaching the law (Stoffel-Munck, Ph., 2000, p.58 and foll.). One must remember the constant effort of the European jurisdiction of imposing to the member states the application of the community directives, sometime, even with the risk of a retroactivity and of completing and ameliorating the data base CLAB[2].

These are also adjacent means to the common law which permit the same correction of the contractual imbalance, such as using the law of competition in order to obtain the nullity of the contractual clauses which are reported to the anti-competition practices. However, the simple lack of professionalism in business may not be invoked as an excuse for the losses caused by the inattentive conclusion of a contract.

A general characteristic of the procedural law from the majority of the member states is the fact that a decision of the court pronounced in the concrete situation of a litigation of contractual law related to the abusive character of a clause does not automatically prevent the usage of the clause, as the work authority of this type of decision has no effect except between the parties of the trial (Ebers, M., 2009, p.432). Some member states have adopted measures as to prevent the usage by the sellers or suppliers of similar clauses, which eventually would not be covered by the work authority regarding the decision of the court (for example the United Kingdom, Cyprus, Romania etc.).

7. Conclusions. The configuration of an essential leverage for the protection of the consumers in the law of the European Union and, implicitly, in the national law, is the expression of the idea of honesty and loyalty which directs the consumption contracts in view of ensuring the contractual balance which is based on the good faith.

---

[1] The decision from the 26th of October 2006, Mostaza Claro C-168/05, App., p. I-10421, pct.25.

[2] CLAB represents a data base, administered by the Commission, with an open character, which contains solutions related to the internal law (of the courts of law and of other institutions with attributions in the domain) in the domain of abusive clauses.

In the consumption society, the existence of means for protecting the rights of the consumers remains a remarkable plus for civilisation, and the general necessity of good faith implies the generality of applying the notion of abusive clause and implicitly a common approach: concern for life, the continuity of the contract, as to ensure, along with an equitable and balanced contractual report, of the legal security and social peace.

From this observation, the following were formed: the obligation of pre-contractual information, the appeal to unpredictability, concessions made to the injurious as vices of consent when they recognise the right of the consumer to invoke the abusive clauses since they were not directly negotiated, by defeating the requests of good faith and creating a significant imbalance between the rights and obligations of the parties.

As a result to this fact, the entire Europe, in the space of the national law systems, witnessed the tendency to reinvent the general theory of contracts, by consecrating the principles of equality, balance and contractual fraternity, along with the principles of security and freedom. The useful and the just were the notions which founded the new contractual paradigm.

The protection system applied by the Directive 93/13/CEE is founded on the idea in conformity to which the consumer is facing a situation of inferiority related to the sellers and the providers regarding the power to negotiate, as well as the level of information, situation which determines him to adhere to the conditions priory formulated by the sellers or the providers, without having the possibility of exerting an influence on their content. At a general level, good faith plays the role of a qualitative element in appreciating the formation, interpretation and execution of contracts, the obligations encumbered on the parties, these being subjected to a general criteria of honesty within the continental systems.

References:

1. Apan, R.-D., 2008, *Protecţia juridică a consumatorilor. Creditul destinat consumului şi domeniile conexe*, Ed. Sfera Juridică, Cluj-Napoca;
2. Bălan, I. I., 2001, *Clauzele abuzive din contractele încheiate între comercianţi şi consumatori*, în „Dreptul", nr. 6, p. 36-40;
3. Benabent, A., 2001, *Droit civil. les contracts spaciale commerciaux*, Ed. Montchrestien, Paris;
4. Calais-Auloy, J.; Steinmetz, F., 2000, *Droit de la consommation*, Ed. Dalloz, Paris;
5. Deleanu, I, Deleanu, S., 2003, *Consideraţii cu privire la clauza penală*, în "Supliment la Pandectele Române", nr. 1, p. 128-138.
6. Ebers, M., 2009, *Unfair Contract Terms Directive (93/13),* în „EC Consumer Law Compendium – Comparative Analysis" (editat de Hans Schulte-Nolke, Cristian Twigg-Flesner, Martin Ebers), p. 422-438;
7. Fin-Langer, L., 2002, *L'equilibre contractual, Ed. Libraire Generale de Droit et de Jurisprudence*, Paris;
8. Jaluzot, B., 2001, *La bonne foi dans les contracts. Etude comparative de droit francais, allemande et japonais,* Ed. Dalloz, Paris;
9. „JurisClasseur Periodique. La Semaine Juridique", 2002, nr. 12, p. 555-556;
10. Poillot E., 2006, *Droit europeen de la consummation et uniformisation du droit des contracts*, Ed. Libraire Generale de Droit et de Jurisprudence, Paris;
11. Popa, I.-F., 2004, *Reprimarea clauzelor abuzive*, în "Pandectele Române", nr. 2, p. 194-219;.
12. G. Ripert, 1946, *La regle morale dans les obligations civiles*, Ed. L.G.D.J, Paris;
13. Rădulescu, O.; Rădulescu, M. A., 1999, *Aspecte actuale în contractele de adeziune,* în „Revista de drept comercial", nr. 12, p. 63-66.
14. Romain, J.-F., 2000, *Theorie critique du principe general de bonne foi en droit prive. Des atteintes a la bonne foi, en general, et de la fraude, en particulier* (*Fraus omnia corrumpit*), teză de doctorat, Ed. Bruylant, Bruxelles;

15. Ruen, Anca, 2011, *Paradoxurile juridice ale bunei-credințe în contractele de consum. Privire comparativă între sistemul continental ți sistemul american*, în „Studia Universitatis Babeş-Bolyai, Iurisprudentia", nr. 3, p. 34-41;
16. Sourioux, J. J., 2000, *Introduction au cours de droit des obligations*, în „Cles pour le siecle. Droit et science politique, information et communication, sciences economiques et de gestion (Universite Pantheon-Assas)", Ed. Dalloz, Paris;
17. Stoffel-Munck, Ph., 2000, *L'abus dans le contract. Essai d'une theorie*, Ed. L.G.D.J.-Bibliotheque de droit prive, Paris;
18. G. Teubner, 1968, *Legal Irritants: Good faith in British Law or How Unifying Law ends up in new divergencies*, în „Modern Law Review", nr. 61, p. 11-19;
19. Thibierge-Guelfucci, C., 1997, *Libres propos sur la transformation des contracts*, în „Revue trimestrielle de droit civil", nr. 2, p. 371-388.
20. Vasilescu, P., 2006, *Un chip al postmodernismului: dreptul consumatorului*, în P. Vasilescu (coord.), „Consumerismul contractual. Repere pentru o teorie generală a contractelor de consum", Ed. Sfera Juridică, Cluj-Napoca;
21. R. Zimmermann, 2010, *The New German Law of Obligations. Historical and Comparative Perspectives*, Ed. Oxford University Press, New York;