

How the consumers can be protected in case of contracts signed remotely in terms of the OUG provisions no. 34/2014

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Abstract

The article is written in the spirit of presenting the benefits offered to the consumers, parties of remote contracts, following the harmonization of the consumer protection national legislation with the European standards. The Ordinance no. 34/2014 is the one transposing internally the Directive 2011/83/EU of the European Parliament and of the Council, on the consumer rights, published in the European Union Official Journal, series L, no. 304 of 22.11.2011.

The OUG no. 34/2014 revokes the OG no. 130/2000 on the remote contracts and creates a coherent framework designed to regulate certain aspects of the relationship between the consumers and the professionals when signing this type of contract and is aimed at protecting the consumers' rights.

Key words: OUG no. 34/2014, Directive 2011/83/UE, remote contracts, information obligation, consumers protection.

JEL codes: K12, K33, K39

We remind that Romania, from 1 January 2007, is a member with full rights of the European Union² and is therefore obliged to transpose the European legislation that has no

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² Membership treaty of Bulgaria and Romania, signed on 17.05.2005, ratified by the Law 157/2005 of the Romanian Parliament, published in the Official Journal no. 465/1.06.2005, valid from 1.01.2007; For further details on the matter, see Fuerea, Augustin, „Manualul Uniunii Europene”, V-th Edition, Universul Juridic Publishing house, Bucharest, 2011;

direct internal application, in order to build a unified legislative framework. We welcome the creation receptivity of a common framework, resulting in the Romanian citizens benefiting from the high European standards in almost all the social areas.

Unlike the regulations that have direct effects on the national level, the directive is a document destined for the Member States and it must be transposed by these into their national legislations (Von Bar, C., Clive, E., Schulte Nolke, 2009). However, in certain cases, the Justice Court recognizes them a direct effect in order to protect the rights of individuals. Thus, the Court has established in its case law that a directive has a direct effect if its provisions are unconditional and sufficiently clear and precise (decision of 4 December 1974, Van Duyn)³. The directives are a harmonization tool of the member states legislations⁴.

In its current drafting, OUG no. 34/2014, the normative document which transposes internally the Directive 2011/83/EU on the consumer rights, is the mainstay in the field of remote contracts and contributes to strengthen the confidence in cross-border acquisitions, establishing a common set of minimum rules valid regardless of place, space and time.

What does the remote contract in the acceptance of the OUG 34/2014 mean?

The remote contract is seen as any contract signed between professionals and consumers in some organized remote sales or services systems, without the simultaneous physical presence of the professional and the consumer, with the exclusive use of one or more means of remote communication, up to and including the moment of signing the contract⁵. We consider remote contracts all those contracts signed by post, phone, fax, internet or any other means of remote communication where the parties do not meet physically.

We note that the recipients of the ordinance are represented by *consumers* and *professionals*.

The emergency ordinance gives its own⁶ definition for *professionals* – “it can be any individual or company, public or private, acting in his commercial, industrial or production, craft or liberal activity in relation to the contracts that fall within the scope of its application”⁷.

A consumer can be any individual or group of individuals constituted in associations as defined by the article 2 point 2 of the Government Ordinance no. 21/1992, on the condition to not engage in commercial activities. On the market, the consumer is the weak part in the relation with the professional. In this respect, Prof. Univ. Dr. Dumitru Mazilu believes that “the consumer’s governing establishment is more of an optimistic vision, but in practice, often the consumer itself is put into question, being the victim of some misleading and aggressive commercial practices” (2008).

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http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/114547_ro.htm; CJCE, decision of 04.12.1974, Yvonne Van Duyn v. Home Office, C-41/74;

⁴ CJCE, decision of 22.02.1984, Kloppenburg, C-70/83;

⁵ Article 2 line 7 of the OUG no. 34/2014;

⁶ According to the article 3, line 2 of the Civil Code 2009 “Are considered professionals all those exploiting a company.”

⁷ Article 2 point 2 of the OUG no. 34/2014;

In principle, OUG no. 34/2014, in its accessibility, supports the consumers; they benefit from a wider range of rights, thus from a comprehensive legal and economic protection.

In addition, the ordinance is applicable to any contract between a professional and a consumer, the scope being clearly stated therein⁸. In the view of the ordinance provisions, the water, gas, electricity and heat supply contracts also fall under the ordinance, but only when these utilities have as legal basis the contract. The legislation also provides limitations of the scope; we mention in particular the financial services, the gambling, the health services, etc.⁹.

Benefits granted to the consumers by the OUG no. 34/2014

First of all, we consider that the main usefulness concerning the remote contracts is distinguished by conducting transactions in a simplified manner, at any time, in any place. Thus the consumer may obtain goods or services without having to travel to the professional's commercial space.

1. The professional's information obligation

One of the legislation pillars on the remote contracts is the *general obligation of the professional to inform the consumer* about the essential features of the required product/service. Broadly, the information obligation appears in the pre-contractual stage and also remains during the contract execution (Piperea Gheorghe, 2008).

The professional must inform the consumer "*clearly and intelligible*" on the main features of the good or services, its identity, business address, phone number, fax, e-mail, total price of the goods and services with the taxes included, cost of using the remote communication means, payment methods, delivery date, performance, guarantees, etc.¹⁰. The information will be clearly, understandable communicated to the consumer, by any means adapted to the used remote communication technique, taking into account the principles of good business practice, of good morals and of "respecting the loyalty principles in the scope of commercial transactions" (Toader Camelia, 2002).

The normative document, by the provisions of the article 6 line 5, allows the *change*, by agreement of the parties, of the information stipulated in the article 6, line 1 to be provided to the consumer. Considering that the ordinance is intended to ensure a minimum standard of rights granted to the consumer, we believe he can give them up, the professional being able to benefit from a more favorable treatment, with the agreement of the co-contractor, of course.

2. The consumer's withdrawal right from the contract

We want to emphasize the use of the phrase "*withdrawal right*" and not "unilateral termination of the contract" because the right to withdraw - as additional benefit granted to the consumer - does not have the same legal significance as the right to unilaterally terminate the contract, because it operates on different stages of the legal act, the first on formation, the conclusion of the legal act, and the second on its effects, being a means of termination specific only to indefinite lease contracts. We appreciate, thus', that the consumer's withdrawal right

⁸ Article 3 of the OUG no. 34/2014;

⁹ Article 3 line 3 of the OUG no. 34/2014;

¹⁰ Article 6 line 1 points a-t of the OUG no. 34/2014;

legally translates in the consumer's possibility to return (retrospectively) on the consent given to concluding the contract¹¹.

From a legal perspective, the consumer has a right of withdrawal within *14 calendar days*, and it shall be exercised in accordance with the legal provisions of the ordinance¹². This is a limitation period, equitable withdrawal solution from the contract.

It should be noted that the ordinance revoked OG no. 130/2000 provided this term as being shorter, respectively of 10 days¹³; however, it is ensured a higher standard towards the provisions of the article 6 line 1 of the Directive 97/7/EC granting a term of 7 days. Practically and procedurally, the consumer will notify in writing his intention to waive the products / services, without penalties and without invoking any reason.

We find in the normative document *two ways* to exercise the withdrawal right: 1. completing by the consumer of the *standard form B* of the ordinance Appendix, or 2. exposing the intention to withdraw by *any other unequivocal statement*.

According to the regulations, the withdrawal period will expire within 14 days from:

- *The conclusion of the contract*, in case of contracts for services;
- The day on which the consumer or a third party, other than the transporter and indicated by the consumer, acquires *physical possession of the products*, in case of contracts for sale.

We emphasize the case in which the professional omitted the information about the withdrawal right of the order; we have provided a *12 months* term flowing after the expiry of the 14 days. Subsequently, if he transmitted the information before the expiry of this term, the 14 days term begins to flow from the receipt of the information¹⁴.

In terms of *costs*, the professional must reimburse all the expenses provided in the ordinance related to the products / services, and the customer obviously returns the products. The law requires payment of the direct costs related to the return by the consumer, but there is the possibility of their payment by a professional, if he agreed in advance or if he did not inform the consumer regarding the payment of the direct costs. The failure to deliver the order within the period specified (usually *30 days* from signing the contract) draws the possibility of the consumer to terminate or to request the contract to be rescinded. As for expenses, we focus the discussion around the restitution of the necessary expenses, not covering voluptuous costs. In other words, if the consumer opts for a delivery type other than the standard, the professional is not required of the return its cost, but only within the limits of the standard one, but the parties may derogate from this rule.

3. *Form conditions for remote contracts*

By casting our gaze on the form conditions for remote contracts, we observe again the care to protect the consumer interests.

The conditions refer to the transmission by a professional, in an affordable manner, clearly, readable of the information (if found on a durable support) based on which the

¹¹Substantiation Note - OUG no. 34/2014;

¹²Article 9 line 1 of the OUG no. 34/2014;

¹³Article 7 line 1 of the OG no. 130/2000;

¹⁴Article 10 line 1 and line 2 of the OUG no. 34/2014;

consumer will order the products or services. Online, we often have difficulties such as the inability to find the link buttons (links), their non-functionality, confusing, unclear text, web pages not translated into the international languages, the failure to mention certain fees, extra transport costs, delivery etc. (Alexe Marius, 2003). In the case of a *phone call* the professional has the obligation to decline his identity at the beginning of the conversation, stating the purpose of the call. By correlating the ideas, the main segment is the clear, concise, understandable, legible, simple information on all the details based on which the consumer will make the decision adequate to his needs.

The contract signing is the confirmation by the professional of the acceptance of the consumer's order. It must be emphasized that there is no tacit acceptance of the offer, the professional must *explicitly confirm* the order otherwise we will not have met the condition of the contract validity. The consumer's engagement must be expressed in *writing*.

The *confirmation* institution appears as *evidence* in any litigation, and an essential validity element of the contract. The confirmation fulfills the purpose for which it was created by the legislator, to provide the consumer with the evidence in the event of a possible litigation, and the penalties for failure by the professional is the extension of the period within which the consumer may terminate the contract at his discretion (Bercea Raluca, 2004).

In terms of the *legal liability*, the contract will terminate and will not be executed by any party, being free from any obligations, after they have returned the benefits. The sanctions are contraventions and fines between certain thresholds. The Directive 2011/83/EU has imposed the use of the phrase "right to terminate" not that of "right to cancel", because the cancellation involves failure to fulfill the obligations by one of the parties.

By way of *example*, Orange Romania was sanctioned contraveniently with a fine because it did not inform its customers about the withdrawal right from the contracts¹⁵. We add that in Romania there are more and more disputes and complaints in connection with the remotely signed contracts. There are disagreements on the contracts implementation, execution and termination, particularly in the fixed and mobile phone services (66% of the complaints), and television services (68% of the complaints). The National Authority for Management and Regulation in Communications (ANCOM) is the competent authority in the phone and broadcasting services in Romania, recording in 2013 three times more complaints than the previous year¹⁶.

Conclusions

Amid the consumer's risk of being harmed by the information needed, but not offered, in the pre-contractual stage by the professionals, also taking into account the contractual

¹⁵For details follow: <http://www.mediafax.ro/economic/orange-a-fost-amendata-pentru-ca-nu-si-a-informat-abonatii-ca-pot-renunta-la-contracte-11179203>

¹⁶ Press release ANCOM: Remote contracts, denounced more and more often by the communications users - valid online article at the address: <http://www.ancom.org.ro/contractele-la-distanta-reclamate-tot-mai-des-de-utilizatorii-de-comunicatii-electronice-5174>

information which the latter must provide to the consumers, reported to the current realities, it was felt the need to reconsider and readjust the European and internal normative provisions so as to ensure an extension of the consumer protection.

Therefore, we conclude that the three aspects analyzed: the professional's information obligation, the consumer's withdrawal right from the contract, as well as the form conditions for remote contracts, do stand as real advantages offered by the OUG no. 34/2014 and they contribute effectively to protect consumer rights.

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