

# THE LEGAL REGIME OF TRADERS' LIABILITY, REGULATED BY THE LAWS ON CONSUMER PROTECTION - A NEW PARADIGM

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## Abstract

The traders are assigned *ex lege* a number of acknowledged professional obligations, like the obligation of registering in the Trade Register. Besides these traditional obligations, new and complex obligations have been regulated for traders, obligations that are specific to the traders-consumers relation. These regulations are subordinated to the Consumer Law domain, which in Romania represents a contemporary creation, a result of the process of transposing the *communautaire acquis*.

Consumer protection is regulated by general and specific rules, the latter ones referring to the following sub domains: advertising; informing about the prices of the products offered to the consumers for sale; unfair clauses from the contracts concluded between the traders and the consumers; the contracts negotiated away from business premises; concluding and executing distant contracts related to financial services; consumer credit; packages of tourism services; protection of the contracts related to the right to use some immovable goods for a limited period- timeshare; selling of the products and warranties associated; general safety of the products; responsibility of the producers for the damages generated by the defective products; unfair commercial practices and ways to cease the unlawful practices in respect of the protection of consumers' collective interests.

New obligations for the traders are established through the content of both general and specific regulations, obligations that are effected in imperatives and especially in interdictions. The legal regime of the obligations that resulted this way transcend the regime of the traders' traditional obligations, making up the new paradigm of the traders' activity and it represents the theme of this paper.

Our research focused on determining the obligations set-up for the traders through both categories of rules and through their legal regime. As a result of the research carried on this theme, we conclude that setting-up this new category of obligations for the traders represents an actual means of achieving the aim of ensuring the consumer protection, adding-up to other legal means set-up in this regard.

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## 1. Introduction

In a previous research on the origins and evolution of the regulations that ensure the consumer protection in Romania, in order to step into the atmosphere of researching this subject, we turned to the Greek mythology that offers models through its characters and its plots, and we chose Hermes to be the god of commerce, because of the dual nature of the “actors” that are under his ruling, and due to the ambivalence, that is reunited under the patronage of this god, as he is the protector of the traders as well as of the thieves.

This time, however, to achieve continuity, our research focuses on the same category of regulations, the regulations which ensure consumer protection, but as seen from a new point of view. Therefore, the question that became famous in this domain, *illo tempore*, from a consumerist point of view, was whether the physiognomy of this category of regulations is plentiful to protect the consumers.

However, the general question for which this research is trying to provide an answer follows a business law point of view which is: What is the impact of the consumer protection regulations on the traders? Are the obligations stipulated in the consumer protection regulations, materialized in imperatives and interdictions which are sometimes redundant? Do the traders become more responsible or are they held responsible more than before? Are the enforceable sanctions dissuasive?

Consequently, concerning the object of the current research, from the Greek mythology we consider it most representative to relate to Sisif who in Hades was put to an eternal torture, that of pushing a giant rock up the hill and once he got to the top, the rock would roll back down and he would have to start all over again. Similarly, due to the obligations comprised in the consumer protection regulations and due to their perspectives, the traders are subject to repeated burdens every commercial cycle. The traders perform their role successfully only if they respect the obligations comprised in these regulations.

## 2. Doctrinaire and regulatory premises

The doctrinaire premise of this study is that besides these traditional obligations, new and complex obligations have been regulated for traders. The classical Romanian doctrine in the domain of Commercial law identifies the trader’s traditional obligations, like the obligation of registering in the Trade Register, financial and revenue obligations. The modern doctrine (Apan, 2007,p.130) in this domain has the role to complete them with obligations that are specific to the traders-consumers relation, regulated by the Consumer Law domain, “a contemporary creation”, in Romania.

Between December 1990 until today, but especially between 2004 - 2007, a significant number of normative documents which transposed the *communautaire acquis* were adopted in the national legislation, the consumer protection being thus put into value regularly, as a fundamental component of the economic and social environment. The consumers' protection is a central objective of the policy of the European Union, of which Romania is a member since 1 January 2008.

Taking into consideration that an exhaustive analysis of all the regulations on consumer protection would be an extremely wide one, we will focus on the general regulations in the field of combating the traders' unfair practices in relation with the consumers and subsidiary on advertising the consumer credit.

A preliminary mentioning is that because the analyzed regulations are recent the jurisprudence is very poor and consequently, we will mainly focus our research on the doctrine and on landmarks of legislative text.

### **3. Regulations in the field of combating the unfair practices of the traders in relation with the consumers**

*Sedes materiae* is the Romanian Law 363/2007 related to combating the unfair practices of the traders in relation with the consumers, and harmonizing the regulations with the European legislation concerning the consumer, hereinafter called Law 363/2007, transposes Directive 2005/29/EC on unfair business-to-consumer commercial practices in the internal market.

The development of fair commercial practices on the common market is essential for facilitating the extent of cross-border activities, but the legislations of the Member States had essential differences, which entailed distortions of competition, therefore it was necessary to establish general rules to protect the consumers. Law 363/2007 aims at a better functioning of the market and represents an effective regulatory guide of the marketing activity of the traders in relation to the consumers and interdicts the unfair commercial practices.

The notion of „business-to-consumer commercial practices” is defined as any action, commission, behavior, measure or commercial presentation including advertising and selling, carried out in strict connection with promoting, selling or supplying a product to the consumers. The unfair commercial practices that are under the jurisdiction of this law are the ones used before, during and after a commercial transaction in relation to a product.

A commercial practice is unfair if:

- it is contrary to the requirements of the professional diligence, which designates the care and competence a consumer reasonably expects from the traders, in conformity with the fair market practices and/or with the general principle of *bona fide* in their field of activity;
- it alters or is likely to essentially alter the economic behavior of the average consumer to whom it reaches or to whom it addresses, or to any average member of the group, when a commercial practice addresses a certain group of

consumers. Substantial alteration can be achieved by using a commercial practice that considerably affects the consumer's capacity of making a decision with full knowledge of the facts.

The unfair commercial practices are, especially *the misleading and aggressive* ones, and their character can be established by reporting it to the average consumer which is considered to be a standard, being reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors.

By using the judicial technique of the annex list, the law includes the "List of the commercial practices which, in any circumstances, are considered unfair", which include misleading commercial practices and aggressive commercial practices. Misleading commercial practices are grouped into two categories: *actions and omissions*.

*a. Misleading omission*

A commercial practice shall be regarded as misleading omission if:

- the trader omits essential information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.
- considering the previously mentioned aspects, a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information or fails to identify the commercial intent of the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

Law 363/2007 also establishes through a non-limitative enumeration *the essential information* about the products, in the case of an *invitation to purchase*, that is the commercial presentation through which the main characteristics and the price of the product are mentioned to an extent appropriate to the medium and the product and which consequently allows the consumer to purchase products. The essential non-limitative information is: the characteristics of the product, the price and methods of calculating it, additional costs, means of payment, the right to withdrawal.

The law also establishes that *the essential information*, is the information stipulated by other laws, that refer to the commercial presentations, including the advertising and selling of the products. A non-limitative "List of the laws settling the regulation related to advertising and informing" is included in the annex. The list includes a law on consumer credit and advertising the consumer credit.

*b. The regime of the traders' liability for the misleading commercial practices.*

The trader's use of misleading commercial practices constitutes a contravention and is sanctioned with a civil penalty between 3.000 and 30.000 lei,

approximately 730 and 7.300 Euros. When enforcing the civil penalty the fact finder disposes the cessation of the unfair commercial practices and may propose as complementary measure the suspension of the activity until the cessation of the unfair commercial practice.

The court of law or National Authority for Consumer Protection will apply the cessation or institute the appropriate legal procedures to cease the unfair commercial practices, by emergency procedure. If the court decision is final and irrevocable, its publishing may be disposed as well as publishing a corrective statement regarding the misleading practice that was used and the measures that were disposed, both in a widely circulated newspaper, on the trader's expense.

#### **4. Regulations on advertising consumer credit**

*Sedes materiae* of consumer credit is the Romanian Law 289/2004 related to the juridical regime of the consumer credit contracts, that has come into force on 06.01.2005. The Norm of application of the Law 289/2004, hereinafter called the Norm of application, details the aspects connected with the Law 289/2004 (Apan, 2007, p.199).

Through the Government Ordinance 174/2008 on the amendment of normative acts on consumer protection, in force since January 2009, hereinafter called the Government Ordinance 174/2008, the protection framework of consumers in different domains among which the consumer credit contract is reformed on aspects like advertising.

Advertising versus informing;

Having an extended object, which includes several essential elements, of which informing the consumers is the keystone of the protection in the consumer credit landscape, ever since the moment of advertising the credit because the protecting rules apply not only to the actual contract but also to its preliminaries (Calais-Auloy & Steinmetz, 2000, p 49).

The traders make use of advertising with the purpose of selling goods or providing services, inciting the public in general and particularly the potential consumers to purchase them, as advertising represents the most active intervention in the process of making the decision to buy (Blythe, 1998, p. 163). Advertising that misleads consumers is detrimental to their economic interests as it determines them to decide on purchasing a product or service that later will not correspond to their legitimate expectations.

A means of protecting the consumers of financial services, services that have a high level of complexity, is constituted by the regulations on the determined elements contained by the advertisements for consumer credit, taking into consideration the case where they indicate an interest rate or any other figures referring to the cost of the credit. Having in view such situation, informing the consumers on the consumer credit contract through advertisements is necessary in order to allow the consumer to compare

several offers in order to make an informed decision about the conclusion of a credit contract.

The regulations on advertising the consumer credit comprise the following thesis, chronologically presented:

a. *Thesis I* covered by Law 289/2004 and in the Norm of application:

- the mandatory element in the content of advertising is the annual percentage rate of charge-APR, in Romanian, *dobânda anuală efectivă-DAE*, hereinafter called DAE, that shall be clearly and understandable mentioned, and the commercial aim of the informations shall be very clearly stated, by using common language.
- measures on advertising the consumer credit: the numbers and letters that express DAE shall have the same size, font and colour and the same background colour as the numbers/letters used for writing the price of the good; the amount and period of time for which DAE is calculated shall be mentioned too;
- measures for the legibility of the advertisement: the background colour must enable the displayed information to be legible;
- details on the notion of “common language”: the information on consumer credit must not mislead the consumers through the usage of specific and technical terms of a certain financial or bank domain, through the usage of abbreviations or initials of names, excepting those provided by the law or by the common language.

b. *Thesis II* covered by the new regulations comprised in the Government Ordinance 174/2008 that completes Thesis I, provides that the mandatory element in the content of an advertisement is *the standard information*, presented through a representative example: the borrowing rate, fixed or variable together with particulars of any charges included in the total cost of the consumer credit; the total amount of credit; the DAE in accordance with the specific legal provisions; the duration of the credit agreement; the total amount payable by the consumer; mentions about the insurance contract, in the cases in which the consumer is granted the credit provided he signs an insurance contract.

We come to the conclusion that *Thesis II* is much more extended compared to the initial one and absorbs some provisions of the new Directive 2008/48 on consumer credit. Also, by analyzing the elements comprised in the *standard information* we establish that they represent *de facto, essential information* that leads to the consumer comparing the launched offers and making the decision to conclude a consumer credit contract with full knowledge of the facts.

The *standard information* has a mandatory nature for the traders, on the assumption that the advertisement indicates an interest rate or any other figures referring to the cost of the credit. Not including any of the mandatory elements of the standard information provided by the regulations constitutes a misleading practice.

*Eccum modo*, the consumer credit practices acquire the valences of the financial services provider's responsibility as a major objective in the domain of the consumers' protection is combating over indebtedness.

## 5. Conclusions

The legal regime of the traders' obligations in their relations with the consumers transcend the regime of the traders' traditional obligations, making up the new paradigm of the traders' activity. We conclude that setting-up this new category of obligations for the traders represents an actual means of achieving the aim of ensuring the consumer protection, adding-up to other legal means set-up in this regard.

We consider that every step taken for regulating the commercial operations, for establishing a coherent framework, ensures the fluidization of operations, making aware and redering responsible all the "actors" and at the same time guarantees social justice. Therefore we have enough reasons to persevere in this direction.

On condition the regulations on unfair practices will be enforced, adopting them constitutes a significant moment in the process of modernization of the Romanian commercial framework and in the community process as well, through creating the basis for fair, unitary, and beneficial practices for the consumers as well as for the traders. But changing the traders' principles about their behavior in relation with the consumers is anywhere in the world, a process that takes time.

Moreover, if in Romania, regulating the advertising of consumer credit was successful from the legal point of view, in other domains however, the lawmaker's inconsistency may lead to lack of coherence of the regulations which results in the diminution of their applicability and consequently the diminution of the legal protection of consumers.

We consider that the current period of recession caused more awareness of the consumption, situation which encourages the finding of the necessary basis for reestablishing the contingency between the traders and the consumers, this also being the purpose of this research.

But it is obvious that this demonstration does not have an isolated nature, but it only completes other categories of manifestations of which some have acquired a social dimension. This is the case of the activity carried out by European Coalition for Responsible Credit that launched in 2008 the Declaration and Principles for Responsible Credit that we signed and the activity of the National Community Reinvestment Coalition - USA; Debt On Our Doorstep- UK and Global Coalition for Responsible Credit.

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