GENERAL LAW NOTIONS INVOLVED IN THE REGULATION OF UNFAIR TERMS

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ABSTRACT: *Law no. 193/2000 on unfair terms in contracts concluded between traders and consumers transposes into the Romanian legislation the Council Directive no. 93/13/EEC of 5 April 1993. The law aims at restoring the contractual balance significantly altered by the provision of unfair terms within consumer contracts.*

In this postmodern approach of the Romanian legislator, we recognize the recurrence of some general fundamental legal notions, points of co-incidence between the domestic legal order and the European, supranational one: lesion, cause, good faith.

KEY WORDS: *unfair terms; significant imbalance; lesion; cause; good faith*
JEL CLASSIFICATION: *K 12, K 20*

1. UNFAIR TERMS AND CONTRACTUAL IMBALANCE

1.1. Definition of the notion of unfair terms

The explicit entering of the fight against unfair terms in the Romanian legislation has been made by means of Law no. 193/2000 on unfair terms in contracts concluded between traders and consumers[1], which took over the Council Directive 93/13/EEC of 5 April 1993[2] adopted in this field.

After Law no. 193/2000, by means of article 1 paragraph 3, prohibits traders to stipulate unfair term in the contracts concluded with consumers, by means of article 4, it describes that a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment

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[1] Of. J. no.560 of November 10, 2000; Law no. 193/2000 was modified by Law no. 65/2002 (Of. J. no. 52 of January 25, 2002) and republished (Of. J. no. 1014 of December 20, 2006). Articles 1 and 4 of the latter law were, subsequently, included in Law no. 295/2004 on the Consumer Code (art. 76-80), published in the Of. J. no. 593 of 01.07.2004.
[2] OJEC L 95 of April 21, 1993.

of the consumer[3]. We notice, from the perspective of our subject, that the terms which mark out the definition of unfair terms are *significant imbalance* between the rights and obligations of the parties and *good faith,* the significant imbalance being created through the infringement of its requirements, to the detriment of the consumer. The analysis of the notion of contractual imbalance is likely to reveal a genuine collaboration in the postmodern construction of unfair terms of some notions from the ordinary law, namely the lesion and the cause, otherwise highlighted through the explicit relationship with the notion of goof faith.

1.2. Contractual balance-imbalance

Law no. 193/2000 is, apparently, the first of the Romanian positive law to introduce in the equation of a definition the notion of contractual balance. However, just like its European source, it does not define it[4]. The difficulties of the definition seem to originate from fluid nature of the notion of contractual balance, difficult to pinpoint by means of precise criteria, modelled according to traditional thinking. Therefore, we agree with the proposal of an author[5] to use the systemic type of analysis. As a system, the content of the contract includes several elements, which interact with each other. On the one hand, the contract represents a set of rights and obligations that allow the achievement of the economic exchange[6], on the other hand, it represents the very economic exchange between provisions. Also, the more complex a contract is - and it is this very complexity which is specific, in general, to consumer contracts – to the simple exchange between provisions get added numerous other additional clauses that establish complementary relationships between the parties[7]. If we add the fact that a contract has, most of the time, a temporal existence, whose moments may affect the relations between the parties[8], we understand that its balance consists in a special quality of the content. We refer here to a certain match between the rights and obligations of the parties, a fair distribution of them, viewed globally, statically and diachronically, throughout the entire duration of its manifestation. Consequently, we can say that, from a static point of view, the contractual balance represents "*l'état d'harmonie du contenu du contrat apprécié dans sa globalité et caracterisé*

[3] The definition reproduces the one of article 3 paragraph 1 of the relevant European directive which, in the French version of the text, is the following: „Une clause d'un contrat n'ayant pas fait l'objet d'une négociation individuelle est considérée comme abusive lorsque, en dépit de l'exigence de bonne foi, elle crée au détriment du consommateur un déséquilibre significatif entre les droits et obligations des parties découlant du contrat." We add one comment referring to French law: taking advantage of the minimal character of the directive, the French legislator declares as unfair the term which has „pour objet ou pour effet de créer…un desequilibre significatif…", thus enlarging the scope of incidence of the law and strengthening the consumer protection. Also, within the phrasing „pour objet ou pour effet" we recognize a stylistic influence coming from competition law.

[4]We cannot overlook the fact that, even in the doctrine, the debates regarding the contractual balance are relatively new, because the very concept has just started to be researched upon.

[5] L. Fin-Langer, L'équilibre contractuel, LGDJ, 2002, pp. 157 – 160.

[6] Obviously, we have in mind the typical, synallagmatic contract.

[7] Methods of payment, optional insurances, exemptions or aggravation of liability, competence attributive terms, applicable rules of law, etc.

[8] "L'équilibre contractuel est une notion à multiples facettes en ce qu'elle peut revêtir différents aspects et couvre les différentes étapes de la vie du contrat" (S. Pech-Le-Gac, La proportionnalité en droit privé des contrats, LGDJ, 2000, no. 50).

par sa diversité"[9], and from a dynamic point of view, it designates "*la stabilité relative de ce męme contenu et se caractčrise alors par sa fragilité*"[10].

By way of contrast, the contractual imbalance means mismatch, discrepancy between the elements of the contract's content, namely the overall alteration of its harmony, the inclination of one or the other of the two scales of the contractual *fairness*, whether it affects the very birth of the contract or touches its execution.

3. What sort of imbalance? Which are the features of the contractual imbalance hinted at by Law no. 193/2000? Three explanations configure the answer to this question.

The *first* departs from the observation that, from the body of Law no. 193/2000, is missing an entire article of the Directive of unfair terms, namely article 4. Given the minimalistic nature of the directive, the absence of paragraph 2 from this text may be interpreted as a more stringent measure of consumer protection, which the European law explicitly allows[11]. However, the absence of paragraph 1 deprives the Romanian law of essential tools to discern its own meaning, thus forcing us to resort to an interpretation mediated by the European rule. According to the latter, the unfairness of a contractual term shall be assessed taking into account the nature of the goods or services for which the contract was concluded and by referring, *at the time of conclusion of the contract*, to *all the circumstances attending the conclusion of the contract* and to all the other terms of the contract or of another contract on which it is dependent[12]. Therefore, in the matter of unfair terms, what is intended is to remove the contractual imbalance from the static perspective, captured in the time sequence involving the conclusion of the contract and the circumstances preceding it[13].

The *second statement* means to identify the nature of the imbalance imputed to the term suspected as unfair. If the law sought to restore a balance understood as "equivalence in satisfying the present interests and the risks assumed"[14], it would mean that the balance in question is a subjective one. If, however, it considered only the balance seen as the equivalence of the provisions, then it would be objective. As both types of balance could constitute the objectives of the analysed normative act.

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[9] The translation of the text: "the state of harmony of the content of the contract, assessed in its entirety and characterized by means of its diversity" (L. Fin-Langer, op. cit., p. 194).

[10] The translation of the text: "the relative stability of the same content and characterizes itself through its frailty" (ibid.).

[11] Article 4 paragraph 2 of Directive no. 93/13/EEC excludes from the incidence of the law the terms which define the main object of the contract and the terms concerning the adequacy between the price or remuneration, on the one hand, and the services or goods to be supplied in return, on the other hand, provided that these terms be written in a clear and comprehensible manner. Since the text has not been taken over by the Romanian law, its protection against unfair terms is considerably extended (see infra no. 4).

[12] The French version of the text is the following: "… le caractčre abusif d'une clause contractuelle est apprecié en tenant compte de la nature des biens ou services qui font l'objet du contrat et en se référant, au moment de la conclusion du contrat, ŕ toutes les circonstances qui entourent sa conclusion, de męme qu' ŕ toutes les autres clauses du contrat, ou d'un autre contrat dont il dépend."

[13] From a dynamic point of view, the contractual balance is characterized by insecurity: it is vulnerable both under the impact of the parties' behaviour - and the rules of contractual liability or other special rules ensure its restoration, and under the development of the legal, economic, monetary and technical environment, its recovery in this situation being related to the admission of the unpredictability theory. (see for details L. Fin-Langer, op. cit., pp.183-194).

[14] L. Grynbaum, Le contrat contingent: l'adaptation du contrat par le juge sur habilitation du législateur, LGDJ, 2004, no. 43.

According to one author, the *subjective* balance is always reached, subject that "the quality of the parties' consent" be protected[15]: "the will once preserved, the contract will necessarily reach a certainly subjective and contingent balance"[16]. The thesis has an absolute value in the classic system of the free will, based on the fiction of equality and freedom of the parties. Yet, the consumer law departs from a different premise: the *de facto* inequality of the parties, having as consequent the general impossibility of the consumer's freedom of consent. The latter, a mere atom, isolated in the net of commercial relations, is, especially in the case of adhesion contracts, deprived of the power to negotiate, captive of long, complex contracts, difficult or even impossible to understand[17]. Consequently, the clue that article 4 of Law no. 193/2000 offers to us, namely that one can suspect of being unfair only "a contractual term that has not been negotiated directly with the consumer", in the sense that the latter was unable to "influence its nature", leads us to the idea that the type of imbalance sanctioned by the law is the subjective one.

But from the manner in which the European directive was transposed into national law, it cannot be ruled out the possibility of an *objective imbalance*, as absence of equivalence of the provisions, the one which "est uniquement l'affaire d'un tiers (le juge) ŕ qui il est demandé si, de *son* point de vue, le contrat est équitable dans les termes ou il a été formé"[18]. Only from this perspective can we understand the incidence of the law also on terms which involve the ratio between "price and remuneration, on the one hand, and the services or goods to be provided in return, on the other side"[19].

We could therefore conclude that the Romanian law provides the healing of the consumer contract through its rebalancing, both subjectively and objectively.

The *third statement* tries discerning the expression used by the law: *significant* imbalance. What is meant by this phrase, the same in the French version of the European directive? Since dictionaries are not very useful in this case[20], we consider as useful the invitation of an author[21] to also look at some other versions of the Directive 93/13/EEC. Out of these versions, the German version seems to be the most explicit, stating that a term can be regarded as unfair in case of "substantial and unjustifiable disparity between the rights and obligations of the parties"[22]. Therefore, according to the intention of the European legislator and, consequently, of the Romanian one, only a serious disharmony, a fracture of the contractual fairness, is able to impose the removal of all unfair terms. The imbalanced contract that requires the intervention of law is therefore, according to one view from the doctrine, the contract which has lost its social and personal utility: "*Le critère de l'utilité du contrat justifie donc l'appréciation in concreto du contrat, car seul le juge est en mesure d'estimer l'utilité réelle du contrat"*[23].

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[15] Ph. Stoffel-Munck, L'abus dans le contrat, essai d'une théorie, LGDJ, 2000, p. 308, no. 364.
[16] Ibid.
[17] The consumers „se voient ainsi imposer des clauses auxquelles ils n'ont pas vraiment consenti ou qu'ils n'ont pas eu le loisir de discuter." (J. Beauchard, Droit de la distribution et de la consommation, PUF, 1996, p. 348).
[18] Ph. Stoffel-Munck, op. cit., no. 364, p. 308.
[19] Directive 93/13/EEC, article 4 paragraph 2.
[20] The synonyms offered by DEI – important, significant, adequate, for instance – leave us in the same semantic incertitude.
[21] É. Poillot, Droit européen de la consommation et uniformisation du droit des contrats, LGDJ, 2006, p. 140.
[22] Ibid.
[23] L. Fin-Langer, op. cit., p. 319.

These features of the contractual imbalance aimed at through the sanctioning of unfair terms confess the permanence of some fundamental notions of ordinary law, points of co-incidence of the national legal order and the European, supranational one.

2. THE RELATIONSHIP BETWEEN UNJUST TERMS AND THE GENERAL PROVISIONS OF LAW

2.1. Unjust terms and lesion

The relationship between lesion and unfair terms within the Romanian consumer law is shaped by the use of European criterion of "significant imbalance", but also by the omission of the restriction contained in article 4 paragraph 2 of the Directive 93/13/EEC. Therefore, since the significant imbalance can regard, in Romanian law, even the adequacy between price/remuneration, on the one hand, and services/goods to be delivered in return, on the other hand, we can admit without any doubt that, under Law no. 1937/2000, operates - as a means to terminate the contractual terms, at the limit of the contract itself - the lesion[24].In order to have a proper representation of this genuine "revolution" in contract law, it is necessary to summarize a short biography of the lesion.

2.1.1. Lesion within the general provisions of contract law

The concept of lesion has crystallized in relation to the principle of the equivalence of provisions and, more specifically, to the theory of the "fair price", developed by canonists of the Western Middle Ages[25]. In particular, St. Thomas Aquinas, one of the founders of the theory, generalized Aristotle's arithmetical equality, "considering that the fair price exists when one can find a perfect equality between two provisions, taking into account all the circumstances of the contract"[26]. Since the Christian outlook rejected the idea of earnings and profit, considered as sins, the preservation of absolute justice, understood as commutative justice, required a perfect equivalence between the contractual exchanges. Consequently, the rescission for lesion was seen as a natural punishment for any exceeding of the fair price, regardless of the nature of the provision. The idea of fairness in contracts, in the sense of equivalence of provisions, has also been received in the secular doctrine[27],

[24] In the Civil Code, it is known, we will not encounter any special concern for ensuring the balance of provisions, with the exception of some special provisions which prohibit the terms which might lead to destabilization of the relationships between the parties (for example, in the partnership agreement, the leonine clause is declared null and void - art. 1513 of the Romanian Civil Code).

[25] The age was characterized by the action of the Catholic Church directed towards correcting the excesses of the Roman law, particularly careful to preserve the legal certainty, but insensitive to the moral foundations of human relations on the legal field (see L. Fine-Langer, op. cit., p. 10).

[26] D. Berthiau, Le principe d'égalité et le droit civil des contrats, LGDJ, 1999, no. 670.

[27] Later, Pothier wrote: "c'est une règle de l'équité qui doit régner dans tous les contrats, que l'une des parties qui n'a pas l'intention de faire une donation à l'autre, ne peut être obligée à lui donner que l'équivalent de ce que l'autre, de son côté, lui a donné, ou s'est obligée de lui donner. Si on l'oblige à donner plus, l'équité qui consiste dans l'égalité est blessée, et le contrat est inique" (Śvres de Pothier, T.V, Traité de l'usure, p. 414, no. 55, cf. L. Fin-Langer, op. cit., p. 13). The translation of the text: "the rule of equity should prevail in all contracts, so that one party who does not intend to make a donation to another, cannot be compelled to give the equivalent of what the other, in turn, gave him/her, or was obligated to give to him/her. If the party is forced to give more, equity which consists in equality, is injured and the contract is unconscionable".

but it was not able to conquer the whole positive law as well as the case-law because it came across the pragmatism of the principle of exchanges' safety. In addition, over time, the religion gaining ground was the Protestantism, which accepted as moral the obtaining of moderate profits and which, through the economic reasoning of Calvin, created, during the Middle Ages, the business man. Also, the doctrinal developments from within the Catholic Church itself led to a subjective conception of the fair price: all freely agreed upon price, in relation to the circumstances of the contract, is legitimate. From this point forward, until the Napoleonic Code[28], which enshrined the dogma of the free will and excommunicated the lesion from the causes capable of annulling a contract, passing through the philosophy of the Enlightenment and the French Revolution, the road was straight.

Indeed, according to the voluntarist theory, the contract is an agreement of wills and not an exchange between patrimonies. Or, since the agreement exists, the contract is not only valid, but also fair, regardless of its content and of the ratio value between the provisions. From this perspective, the lesion, as rupture of commutative justice, is nonsense. After all, the conclusion of a contract that is imbalanced from an objective point of view expresses the freedom of being harmed, and the equivalence of provisions is configured according to the will of the parties, not imposed upon them as a material relation. Just as if the freedom to contract would be affected, the contract becomes invalid according to one of the defects of consent enumerated at art. 953 of the Romanian Civil Code, which do not include the lesion[29].

The Romanian Civil Code has taken over, together with the provisions of the French Civil Code, a certain ambiguity in the treatment of lesion: although it is exclusively considered as an imbalance in values between the provisions, it preserves, however, a protective finality of the consent, involved in the recognition of the right of action for rescission, only in certain conditions, for the minor[30]. The very definition of the current doctrine stands as proof of this confusion: "The lesion is that particular *defect of consent* which is manifested in the *evident disproportion in value between the two provisions*"[31].

Notwithstanding the lack of logical consistency of the definition[32], it reveals the option of the Romanian legislator – otherwise inevitable - for the objective conception of

[28] Through art. 1118 C. civ. fr.

[29] Similarly, art. 1109 C. civ. fr.

[30] We exemplify by art. 951 C. civ. rom., 1157-1160 C. civ. rom., 1162-1164 C. civ. rom. This idea is confirmed by art. 1165 C. civ. rom., according to which "The person of age cannot, for cause of lesion, exercise the action in rescission". Keeping the same finality, the right for action in rescission was even further limited by means of the provisions of art. 25 of Decree no. 32/1954: "From the day of the entry into force of the decree regarding natural and legal persons, the enforcement of the legal provisions referring to the action in annulment for lesion (art. 951, art. 1157, art. 1159, art. 1164 C. civ.) gets limited to the minors who, being 14 years of age, conclude for themselves, without the consent of their parents or of their tutor, legal deeds for whose validity one does not demand the prior authorization of the tutelary authority, if these deeds cause them any harm."

[31] Gh. Beleiu, Drept civil român. Introducere în dreptul civil, Edit. Şansa, Bucureşti, 1995, p. 140. Even more appropriate to the legal text seems to us the following definition of the lesion: specific cause for annulment of legal deeds entered into by minors over 14 years of age, by themselves, without the consent of their legal representatives, deeds for whose validity one does not demand the prior consent of their tutelary authority, if by means of those deeds they suffer damages. Thus will be cut all possible correlation with any defect of consent, as well as with the extent of the disparity in value between the provisions. Lesion is, in fact, in the light of Romanian law, a particular means of protection of the minors lacking full capacity.

[32] Since the disproportion between the provisions involves a quantifiable economic, mathematical relation, it is clear that the definition is not part of the proximate genus.

the lesion. The appeal to the analysis of the circumstances of the conclusion of the contract is thus excluded, since it would be useless. Indeed, the identification of a defect of consent such as the error or the economic violence[33], presumed by Pothier[34] as sources of the lesion, would impose the incidence of other causes of annulment of the act: annulment for vitiation of the consent through error in the first case, annulment for moral violence or, possibly, absolute annulment for immoral or illegal cause, in the second one[35].

Thus, whereas on the one hand, the lesion means a deficit of economic balance in the content of the contract and, on the other hand, the contract is presumed to rely on the freely agreed upon balance, therefore a subjective balance, whose source is the free will, the lesion is not recognized as grounds for invalidity of the contract.

2.1.2. Lesion in the consumer contract

Council Directive 93/13/EEC was respectful with the legal tradition of the member states and, in paragraph 2 of article 4 excluded from the scope of the law the clauses that concern "the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other", namely, it excluded lesion. The derogation was transposed by the member states while implementing this directive. Still, the Romanian lawmaker overlooked it before Romania's accession to the European Union but, at the same time, retained the criterion of the "significant imbalance". As this omission has the significance of a more exigent protection of the consumers and as a *contra legem* interpretation is not allowed, we have to notice that the Law no. 193/2000 is the instrument which introduced in the Romanian legal order the principle of the contractual balance and lesion as a basis for the contract's inefficiency[36].

This statement ought to be circumstantiated. Indeed, the lack of equivalent value of the main benefits of a consumer contract for sale, for example, means lesion, but that does not automatically lead to the invalidation of the legal act. In the view of the law, the lack of equivalence of the benefits is not synonymous with imbalance, given the fact that equivalence is only one of the criteria for assessing the content of the contract. As I have stated, the spirit of article 4 paragraph 1 of the Directive 93/13/EEC[37] requires a comprehensive and a case-by-case analysis of the entire contract, and legal penalties only apply if the imbalance is "significant", and, therefore, likely to affect the very usefulness of the contract.

This solution goes beyond commutative justice, to join in what was called the doctrine of *contractual justice*[38]. But a contractual justice shaped by our age; although itself of

[33] This would consist in the state of need, of economic pressure in which a party might find itself, from which there is no escape, a state exploited by the contracting party, by setting a disproportionate price; in other words, by imposing an imbalanced, unfair contract.

[34] Pothier, Śuvres de Pothier, T. 3, pp. 222-223, no. 353, cf. L. Fin-Langer, op. cit., no. 207, p. 76.

[35] V. infra no. 5.[36] We believe, however, that not even the application of the criterion of effectiveness in the interpretation of the Romanian law, in the sense that it must serve the EU objective of strengthening the internal market, could not invalidate the finding we referred to. We believe with respect to this point that the determination of "significant imbalance" through the mechanism established by law does not involve the risk of affecting the legal certainty of economic exchange.

[37] See supra no. 3.

[38] L. Fin-Langer, op. cit., p. 444.

Aristotelian origin, it does not seek to (re)establish a perfect equivalence between benefits, doubtlessly utopian in real life, especially in the business world, but to impose a middle way, by which to reconcile the conflicting interests of the parties - professional and consumer. The consecration of the principle of contractual balance by the positive law - even in the limited area of consumer contracts - appears, therefore, to us, conceptually bound to the principle of contractual equality, from the perspective of a *distributive justice*. And both of these principles are important pawns in a legal *novo ordo*, alongside with the already prefigured, by a part of the legal literature, principle of contractual brotherhood, expressing the idea of *social justice*, according to which "each contracting party is obliged to take into account, beyond its own interest, the interest of the other contracting party, putting itself into its service, even accepting certain sacrifices, for the purpose of an understanding of the conclusion, performance and maintaining of the contract as the basis of collaboration"[39].

Returning to the issue of lesion, it appears obvious that the change of perspective from which this problem is now addressed, compared with medieval times, is involved in the shifting of the existential paradigm. We are witnessing in fact, in our opinion, the re-writing of the medieval and Christian principle of justice in a secularized Europe.

And, as the authority of the Supreme Judge from the theological thought system of St. Thomas Aquinas was not recognized by the Constitution of the united Europe, as the businessman and the consumer have become the role model of the contemporary humanity and the sins of trade and seeking profit are now considered virtues, it was natural that the recurring values of Christian morality - mercy and love of neighbour - would claim a different form and another source, none other than the (supra) national law itself.

2.2. Unfair terms and cause

To the extent to which the Law no. 193/2000 requires, for the determination of the existence and the intensity of a contractual imbalance, the verification of the mutual benefits of the parties, as far as the assessment of the contract contents involves the use of criteria such as reciprocity, commutativity, equivalence, proportionality and to the extent to which the "significant" imbalance consists in the loss of the utility of the contract, of its purpose at both the individual and social level, we can glimpse behind the regulation of unfair terms, the discrete notion of cause[40]. According to an already traditional distinction, legal cause may be an immediate and a mediated one. The immediate cause - *causa proxima* – consists in the benefit expected in exchange for the debtor's obligation[41]. It is always the same in contracts belonging to the same category. In this sense, we speak of *cause of the obligation*, whose absence is sanctioned according to art. 966 of the Romanian Civil Code by absolute nullity. The assessment from a quantitative point of view of the contractual balance, using the criteria of the symmetry of the benefits – the reciprocity and the commutativity - evokes precisely this meaning of the concept of cause. Unlike this, the quality control of the contractual balance does not seem likely to be ensured by using this

[39] C. Thibierge, Libres propos sur la transformation du droit des contrats, RDTciv., 1997, p. 383, no. 32.
[40] The interest in the analysis of the concept of cause in the context of consumer contracts exceeds the limits of their scope, as it could reveal a tool usable by the general theory of contract, in case of imbalanced contracts.
[41] In the bilateral contracts.

tool. Indeed, the notion of cause of the obligation refers to the *legal* consideration, rather than to the economic consideration. Therefore, it only allows to determine whether or not there are, on the two pans of the balance of the contract equilibrium, mutual benefits, but does not answer the question if the needle indicates the steady-state balance, in other words if those benefits are equivalent or proportionate[42]. Accordingly, *causa proxima* cannot be used to sanction partial contract imbalances[43], when, for example, the consumer's obligation supposes a corresponding consideration on the part of the professional, but this being insufficient. Besides, in consumer contracts, such an instrument would be redundant, since one can invoke their inefficiency on the ground of lesion.

The notion of *remote cause* is the product of a subjectivization of cause, to the point that it becomes a *cause of the contract,* allowing the integration of the reasons which led the parties to enter into a contract. The cause behind the consent "est un pourquoi, un but, une raison; elle est, pourrait-on dire encore, l'intérêt (en particulier l'intérêt économique) du contractant au contrat"[44]. With this meaning cause is likely to be unlawful or immoral, to the extent to which it is prohibited by law, contrary to morals, good customs, public order under art. 968 of the Romanian Civil Code. And, with the same meaning, it is a tool used for verifying the quality of contractual balance. For, as some authors have pointed out[45], cause, viewed as interest, as purpose, is the spindle that organizes the structure of the contract and ensures its consistency. The unbalanced contract suffers from a lack of coherence precisely because it lacks, more or less, interest. The "reasonable"[46] expectations of the consumer regarding the conclusion and the performance of the contracts cannot be met, the contract itself "lacks reason"[47]. That being so, it is natural that the

[42] „…la cause permet seulement de rechercher l'existence d'une contrepartie réelle mais non équivalente" (L. Fin-Langer, op. cit., p. 505).

[43] However, our case law sometimes used the term "cause" with this meaning to declare null and void lesionary contracts. Through a broad interpretation of art. 1303 of the Romanian Civil Code, we took into consideration the objective criterion, of the too large disparity, unsusceptible to a normal justification, between the price amount and the real value of the good. According to this text, the serious price is the price "which constitutes a sufficient cause of the obligation undertaken by the seller to transfer ownership over the good to be sold" (Supreme Tribunal, Civil S., dec. no. 1542 of June 16, 1973, unpublished, in I.G. Mihuţă, Repertoriu de practică judiciară în materie civilă a Tribunalului Suprem şi a altor instanţe judecătoreşti pe anii 1969-1975, Ed. Ştiinţifică şi Enciclopedică, Bucharest, 1976, p. 127). We note that the ineffectiveness for partial cause is allowed under the Romanian Civil Code only in a few specific cases (i. e. art. 1311, art. 1347).

[44] J. Carbonnier, Droit civil. Introduction, 25-ème édition, PUF, 1997, no. 58. Translation: …" is a "why", a goal, a reason; it is, we could say, the interest (in particular the economic interest) of the contracting parting to enter into a contract.

[45] J. Rochfeld, Cause et type de contrat, LGDJ, 1999, no. 197 et seq.

[46] One of the recitals of the Directive 93/13/EEC invites the professional "to take into account the legitimate interests" of his contracting party. The directive does not, however, directly refer to the legitimate or reasonable expectations of consumers. However, legal literature takes the view that the principle of the protection of legitimate expectations is inherent in the provisions of Community law (E. Poillot, op. cit., no. 604, p. 267).

[47] In the French case law there have been intense debates over a solution of the Court of Cassation which deemed abusive a clause limiting liability, inserted in a standardized express courier contract. In this case, the company Chronopost did not fulfill its obligation to deliver to destination within the period specified in the contract, an envelope with the required documentation for the participation in a tender, which led to the exclusion from competition of the sender. The court decided that "due to the failure to fulfil this essential obligation (the obligation to deliver the letters within a fixed term, reliably and promptly), the contractual clause limiting liability, which contradicted the strength of the assumed commitment was to be deemed unwritten". The reasons at the basis of the decision show that the judges have decided that the obligation assumed by Chronopost to forward quickly, in a specified agreed period, the letter which [should have] ensured the participation of the sender in a competitive tender, was the motive for the conclusion of the contract by the latter; that the failure to fulfil this requirement has caused a major damage

reference for assessing whether the cause exists or not, as well as for assessing the "significant" nature of the imbalance, should be the contract as a whole: the unfair clause "by itself or together with other contractual stipulations" deprives the contract of its cause – completely or in part -and thus severely compromises its balance[48].

Finally, the problems engendered by the notion of cause-purpose, as a tool serving the identification of unfair terms, are closely related to the reference in article 4 of the Law no. 193/2000 to "the requirements of good faith" disrupted by the imbalance in the contract to the detriment of the consumer.

2.3. Unfair terms and good faith

We propose to look at this issue starting from an observation: while the Romanian law has taken from the European directive the analysis of the significant imbalance by reference to the requirements of good faith[49], the French law transposing the directive omitted it. As the Romanian positive law system (and the spirit that animates it) is so akin to the French one, we ought to look for the explanation of the different attitudes of the two national laws, but not before clarifying the reason for the presence of the concept of good faith in the European definition.

2.3.1. The meaning of good faith in the European definition

Literature has shown that, apparently, reference to good faith merely adds another "clumsiness of style" to the already confusing nature of the text of the directive[50]. But ignoring, in fact, the usual language and legal inconsistencies of the European legislator, a first explanation becomes imperative: the Directive on the unfair contract terms has introduced and imposed the principle of good faith in the European law, under the circumstances in which it was unknown in the *common-law* system and in the Scandinavian countries[51]. Therefore, we can assume that the explanation concerning the content of the concept of good faith, offered by the 16th recital of the Directive[52], was mainly aimed at

(the loss of an opportunity), which cannot be fairly covered only by the value of the shipping costs, as foreseen in the contract (Cass. Com. October 22. 1996, cf. S. Le Gac-Pech, cit. wo., no. 259). This decision has resolved commercial contractual relationships between professionals, through a consumerist reading of the general provisions of law (art. 1131 of the French Civil Code, in the light of art. L. 132-1 C. Consom.). All the more the reasoning is applicable to consumer contracts.

[48] We must point out that a part of the French literature, finding support in the deficiencies of the objective conception of cause, proposes a monist theory of the cause of subjective inspiration. Cause is, according to this viewpoint, "the contractual purpose common to the parties or envisaged by one of them and taken into account by the other; the absence of cause would be the impossibility of the parties to achieve this contractual goal" (see É. Poillot, op. cit., p. 401).

[49] Article 3 which, in par. 1, defines the concept of unfair terms, states that such a contractual stipulation causes a significant damage to the detriment of the consumer, "en dépit de l'exigence de bonne foi".

[50] É. Poillot, op. cit., p. 146.

[51] M. Tenreiro, Les clauses abusives dans les contrats conclus avec les consommateurs (Directive nr. 93/13/CEE du Conseil du 5 avril 1993), Contrats, conc., consom., July 1993, no. 7, cf. É. Poillot, op. cit., p. 146.

[52] It must however be mentioned that English law, although not formally recognizing the concept of good faith, contains several solutions, diffuse and of variable content, relating to the issue of loyalty in contracts, such as good faith in the insurance law, estoppel and undue influence in Equity; implied terms, duress, reason and unconscionability in the Common law (see generally, É. Poillot, op. cit., p. 282-286).

them. According to it, in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer. It is further stated that the requirement of good faith may be satisfied by the supplier "where he deals fairly and equitably with the other party whose legitimate interests he has to take into account".However, the particular significance of the concept of good faith in the context of the Community law regarding unfair terms surpasses the level of a mere opportunity to propel and generalize in the European legal order a concept absent from some state legal systems, especially as in the systems that recognize it formally its content is not identical[53]. The clarification of the meaning of the phrase "good faith" used by the European legislator is allowed, complementary to the recital cited above, by another recital of the Directive, according to which the general criteria set by the law for assessing the unfairness of the terms are to be accompanied *"par un moyen d'évaluation globale des différents intérêts impliqués.."*[54]. This global criterion is none other than "*l'exigence de bonne foi*". Therefore, the good faith envisaged by the Directive 93/13/EEC, equated in legal literature with loyalty[55], is a pre-contractual good faith, "*a subjective instrument for the assessment of the quality of the relations between the parties during the pre-contractual phase..."*[56]. In particular, it enables direct control of the loyalty of the parties, primarily of the professional's loyalty[57], who can use his economic power abusively and exploit the weakness and lack of alternative of the consumer to obtain disproportionate benefits at his expense. This is, in our view, the plan where the concept of good faith, as a tool for the assessment of professional's loyalty overlaps the concept of mediated, subjective cause, as an instrument for a moral qualification of the aimed pursued by the same professional. Here also we can find the meeting point with the notion of mediated cause as a tool for the assessment of the consumer interest in the conclusion and performance of the contract, to cooperate in identifying the unfair terms and to determine the level of contractual imbalance[58].

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[53] Ibid, p. 274-282.

[54] Translation of the text: "by a comprehensive means of assessment of the various involved interests ..."

[55] The term is, in fact, used by some European regulations, such as the Directive 97/7/EC on consumer protection in the case of distance contracts.

[56] É. Poillot, op. cit., p. 148.

[57] Loyalty in Community law, it has been said, makes the principle of transparency complete, "while ensuring that none of the factors leading to such transparency is missing, which explains the essentially subjective conception of good faith in the European consumption law. In this law, the contract is binding because it was formed under the seal of the principle of transparency, which created a certain number of expectations on the part of the consumer" (E. Poillot, op. cit., p. 296). Indeed, the professional's the duty of good faith is a constant in the consumer law, appearing as a leitmotiv in the obligations of exhaustive and comprehensible information of the consumer, or, in other words, in the obligation of transparency imposed on the professional.

[58] It should be noted that the Romanian case law, concerning general contracts, has sometimes referred, in similar terms, to the subjective factors – taking advantage of the "unawareness", "ignorance", "state of constraint", "contrary to social rules" considered by the contractor, "in order to derive disproportionate benefits compared to the consideration he has given"- in order to deem immoral the cause and to declare null and void lesionary contracts (Supreme Tribunal, in the composition provided for by art. 39 para. 2 and 3 of the law on the court system, in the dec. no. 73 of 22 November 1969, in RRD no. 7 / 1971, p. 112, comment D. Cosma). Obviously, the same terms can justify the classification of the contractor as having bad faith.

2.3.2. The meaning of good faith in the Romanian law

Impregnated by the idea of good faith, French law did not transpose in the definition of the unfair clause the Community criterion based on this notion[59]. In contrast, the Romanian law integrated the reference to good faith, although, like the French law, the general provisions of contract law know applications of the principle of good faith. Thus, good faith as "fidelity in one's commitments and sincerity in his words"[60], thus as loyalty, is literally present in the Romanian Civil Code in art. 970, which requires the performance of agreements in good faith. The concept has not been defined by the drafters of the code, just as the authors of the Napoleonic Civil Code have not defined it in their turn, although they inserted it in art. 1134 Civil Code fr.[61]. Case law and legal literature have shaped this notion as a moral obligation in the performance of contracts, with the observance of the requirements of due care required of an ordinary, prudent, and reasonable person, according to article 1080 paragraph 1 of the Civil Code[62]. In the absence of a special text, the concept has been widely construed, as being also applicable in the pre-contractual phase, in the form of the parties' obligation to act "with the right intention, and no secret plan, no deliberate misrepresentation of fact and without reluctance on the essential elements of the contract"[63]. This being generally speaking the scope of the principle of good faith in the Romanian law of contracts, we realize the change of perspective occurred with the implementation of the EU directive. Domestic legal order therefore was not only enriched by a rule of principle concerning the conclusion of a contract but also by the specific meanings of that concept. Romanian law now has, even if, so far, in only one of its fields, an effective tool for the assessment of the pre-contractual conduct of the parties, the target being the professional, in terms of the duty of loyalty that he undertakes. And the duty of loyalty is essentially an obligation of transparency. In this context, article 1 of Law no. 193/2000 fully reveals its valences: "Any contract concluded between professionals and consumers ... will include clear, unequivocal terms for whose understanding no special expertise is required". Accordingly, good faith originally completes the "panoply" of arms used in the fight against unfair terms: proportionality, equivalence, lesion, immediate and mediated cause - serving to restore the contractual balance, all having their origin in the general provisions of the law. Still irrigated by the principles of the law of consumption, they are likely to return to the same general provisions of the law of contracts with their newly attached meanings. In the legal order of other countries, case law and legal literature have not remained indifferent to this impact[64].

[59] A part of the French literature criticizes this construction of the Community law, considered to be caused by a hasty assimilation of the concept of good faith used by Community law with the notion of good faith in the French law (E. Poillot, op. cit., p. 243). The omission of the French law later echoed in works of different authors, such as Ph. Stoffel-Munck, who could assert that the concept of unfair terms (in French law) is essentially objective, and not related to the principle of good faith (op. cit., p. 317).

[60] Cicero, quoted by Ph. Le Tourneau, Bonne foi in Répertoire civil Dalloz, no. 4.

[61] It is not a case of omission, but of a precise legislative technique, which, using flexible notions, impregnated by a certain moral value, allows the evolution in time of their content.

[62] V. D. Gherasim, Buna-credinţă în raporturile juridice civile, Edit. Academiei RSR, 1981, p. 78 et seq.

[63] Ibid, p. 63 – 77.

[64] For the French law, see generally N. Rzepecki, Droit de la consommation et théorie générale du contrat, Title II, „L'immixtion du droit de la consommation dans la théorie générale du contrat", PUAM, 2002, p. 517-583, or N. Sauphanor, L'influence du droit de la consommation sur le système juridique, LGDJ, 2000.