Jurnalul de Studii Juridice

Year XV, No. 3-4, December, 2020, pp. 30-42

THE LEGAL NATURE OF "PRE-CONTRACTUAL OBLIGATIONS": CONDITIONS OF VALIDITY IN THE CONSUMER CONTRACT

Georgeta CRETU, Camelia SPASICI

DOI: <https://doi.org/10.18662/jls/15.3-4/73>

Covered in:

CEEOL, CrossRef, CrossCheck,
Index Copernicus, Ideas RePeC,
EconPapers, Socionet,
HeinOnline

©2020 The Authors & LUMEN Publishing House

How to cite: Cretu, G., & Spasici, C. (2020). The Legal Nature of "Pre-Contractual Obligations": Conditions of Validity in the Consumer Contract. *Jurnalul de Studii Juridice*, XV (3-4), 30-42. <https://doi.org/10.18662/jls/15.3-4/73>

THE LEGAL NATURE OF "PRE-CONTRACTUAL OBLIGATIONS": CONDITIONS OF VALIDITY IN THE CONSUMER CONTRACT

Georgeta CRETU¹
Camelia SPASICI²

Abstract

This paper aims to briefly analyze the legal nature of "the pre-contractual obligations" regarding the information, counselling and safety elements that are specific to the consumer legislation.

From the perspective of consumerist regulations, "the pre-contractual obligations" occur during the formation of the contract stage although in the civil contract the obligations of the parties designate the effects of the contract.

In these circumstances, the following question arises: are "the pre-contractual obligations" laid down in the Consumer Code conditions of validity or effects (obligations) of the contract?

This dispute is a part of the harmonization process of the institutions that are specific to the legislation of consumption with those of the contract as laid down in the Civil Code (the ordinary law in the matter).

The paper is structured in four parts: "Introduction", "The Stages of the Civil Contract: the Conditions of Validity, Conclusion, Effects and Termination", "The Pre-Contractual Obligations as Laid Down in the Consumer Code" and "The Legal Character of the Pre-Contractual Obligations." This legal undertaking ends with conclusions.

Keywords:

Relevant Legislation: Civil Code art. 1166-1323; Law no. 296/2004 on the Consumer Code, Government's Ordinance no. 21/1992 on consumer protection.

¹ PhD Univ. lect.. Georgeta CRETU, Ph. D, University ."Ștefan cel Mare" of Suceava Faculty of Law and Administrative Sciences

² Camelia SPASICI, Ph. D., University of Bucharest Faculty of Public Administration and Business

1. Introduction

The parties' consent is the essential element in the formation of the contract.

According to the ordinary law, the contracting parties, in order to validly express their consent, must be, among other elements, informed about all the aspects of the contract.

This requirement derives from the provisions of art. 1214 of the Civil Code (providing on willing fraud) according to which: "The consent is vitiated through dishonest fault if the party committed an error caused by the fraudulent manoeuvre of the other party or when the latter failed, fraudulently, to inform the other party about the circumstances which should have been revealed to the former" (authors' note).

From the text of the law it results that *the object* of "the obligation to provide information" (corresponding to the pre-contractual stage) is represented by "a series of information concerning the contract to be signed and that is considered important for its conclusion." (L., Pop, I., F., Popa, S., I., Vidu, (2012):92-93)

Therefore, according to art. 1166 and the following to the Civil Code, the conclusion of the contract implies the manifestation of free and unvitiated consent. To this end, each party must know all the circumstances related to the contract.

However, in the relations that are specific to *the consumer contract*, through its particularities, the so called "pre-contractual obligations" acquire new and important characteristics.

According to article 38 of the Consumer Code, the state has to encourage the use of programmes whose objectives *are to ensure the appropriate information and educations for consumers* in order to make optimal decisions based on adequate information about goods and services and to have good knowledge and to be more aware of the rights and responsibilities they have.

The general aim in the matter, is *to protect consumers* when they purchase goods and services as well as to protect the general public interest against misleading advertising, the negative consequences of advertising and it lays down the conditions under which comparative advertising is permitted (art. 39 of the Consumer Code).

In the context mentioned above, this paper aims to briefly analyze the legal nature of "the pre-contractual obligations"

regarding the information, counseling and safety laid down in the consumer legislation.

More exactly, within the harmonization process of the institutions that are specific to the consumer legislation with those of the contract as it is laid down in the Civil Code (the ordinary law in the matter) one question arises: are "the pre-contractual obligations" laid down in the Consumer Code *conditions of validity or effects (obligations)* of the contract?

Mention must be made that the answer to the question above does not involve exclusively a simple theoretical discussion, but it also lead to practical consequences, for instance, concerning the penalties applicable in the matter.

2. The Stages of the Civil Contract : the Conditions of Validity, Conclusion, Effects and Termination

According to article 1166 of the Civil Code: "A contract is a concordance of the willingness of two or more persons intended to create, modify or extinguish a legal relation".

Thus, *the contract* is a bilateral legal act in which materialize the concordant deliberate wish of two or more natural or legal persons who are pursuing different scopes.

In its unfolded form, a contract involves the following stages: *the formation* of the concordant willingness according to the law, *the conclusion* of the contract, *the effects* and *its termination*.

a). To be validly concluded, the contract must comply with the *essential conditions* laid down for all the civil legal acts (article 1179 of the Civil Code).

The essential conditions for the valid conclusion of a contract are: the capacity to enter into a contract; the consent of the parties; a determined and lawful object and a lawful and moral cause.

In addition to the element above, the law also stipulates for the compliance with a certain *form* of the contract.

According to the principle of *the contractual freedom* any natural or legal person (who neither lacks the capacity to contract under the law nor is forbidden to conclude certain contracts) is free to enter into a contract.

As an exception, the minor child who has not turned 14 and the person judged to lack legal capacity cannot enter into contracts (article 43 (1) of the Civil Code).

Similarly, the non-profit legal entities may have “exclusively civil rights and obligations that are required to the fulfillment of the scope laid down by the law, the articles of incorporation or their charter” (article 206 (2) of the Civil Code).

The main element of the validity conditions is *the consent* (the concordance of the willingness of the parties).

The consent of the parties must be honest, free and must be an informed consent (article 1204 of the Civil Code).

The consent is vitiated when is given erroneously, taken through dishonest fault or in case of duress. What is more, the consent is also vitiated in case of lesion.

According to article 1225 (1) of the Civil Code, the object of the contract is the legal transaction such as selling, leasing, loaning and other similar agreed by the parties as it emerges from the totality of the contractual rights and obligations.

However, the law discriminated between “the objects of the contract” and “the object of the obligation”, respectively the deliverables the provider undertook to complete (C.,T., Ungureanu, (2016):p. 155).

The object of the contract must be determined and lawful, under the penalty of absolute nullity.

The object is unlawful when it is prohibited by law or it violates public order and morality regulations.

The cause is the reason that determined each party to enter into the contract (article 1235 of the Civil Code).

The cause must exist, must be lawful and moral.

The form of the contract consists in the externalization of the concordant willingness of the parties.

According to article 1240 (1) of the Civil Code, “The willingness to enter into a contract may be expressed orally or in writing.”

Willingness may be expressed through a behaviour which, according to the law, to the agreement between the parties, or the practices between them or customs, is beyond any doubt as to the intention to produce the appropriate legal effects.

As a rule, contracts are validly concluded by *consensus*. Thus, a contract may be concluded “through the concordance of the willingness of the parties” unless the law stipulates a certain procedure for it valid conclusion (article 1178 of the Civil Code that is marginally called “Freedom of form”).

As an exception, any agreement that alienates or establishes real estate rights must be *notarized* and, to be enforceable must be registered in *the land registry* (article 1244 of the Civil Code).

The provisions above reflect the two equally important and yet contrary principles: *the principle of consensus* and *the principle of the contractual formalism*.

The penalty for the noncompliance with the essential conditions of validity, approached above, is nullity. Thus, according to article 1246 (1) of the Civil Code: "Any contract concluded in breach of the conditions stipulated by law for its valid conclusion is a nullity, unless other penalty is stipulated by law."

As an effect of nullity, the contract "is considered to have never been concluded" (terminated, authors' note).

Nullity could be either absolute or relative.

The nullity of the contract should not be mistakenly considered as *nonexistence* of the contract or *ineffectiveness*. *The non-existence* of the contract means the conclusion of a *completely void contract*, respectively that does not observe the essential validity elements. Thus, the contract that does not exist "is more than void". On the other hand, the contract *is ineffective* when, although it has been validly concluded does not produce any effects (due to some posterior causes).

We mention that sanctioning the contract by nullity is *an exceptional measure*, the general interest being to keep the contract (even when it presents flaws related to its validity).

b). Article 1186 of the Civil Code stipulates: "The contract is concluded at the moment and in the place where the acceptance reaches the offeror even it has not been brought to the latter's attention for reasons not attributable to him".

From the text of the law it results that, in principle, the concordant willingness of the parties become "a contract" when the offer of one party meets the acceptance of the other party.

In practice, determining the moment of the conclusion of the contract is controversial when the bilateral act is concluded *between absent persons* and, as a consequence, two moments of consent are discussed (the offeror and the acceptor's consent).

c). The validly concluded contract produces *legal effects*.

"Through the effects of a contract is understood *the obligations* the contract creates for the contracting parties" (Fr., Deak, St., Cărpănu,

(1993):47). For example, in the case of sale, the main obligation of the seller is to hand in the goods and of the buyer to pay the price.

It follows that, according to the ordinary law, *the parties' obligations* are always *subsequent to the conclusion* of the contract (as effects).

The contract has the force of a law between contracting parties (article 1280 of the Civil Code).

The contract is opposable to third parties who may not prejudice the rights and obligations arising from the contract. The third parties may avail themselves of the effects of the contract, without having the right to request its execution (except the cases stipulated by the law).

d). The contract terminates, under the provisions of the law, through performance, the consent of the parties, unilateral termination, the expiration of the term, the fulfillment or, as the case may be, the non-fulfillment of conditions, the fortuitous impossibility to execute the contract, as well as in any other circumstances as provided by law.

As an effect of the termination of the contract, the parties are *released of their obligations*.

As an exception, after the termination of the contract, the parties “may be obliged to repair the damage caused and, if applicable, to compensate, in kind or in equivalent, the deliverables received as a result of the conclusion of the contract” (article 1322 of the Civil Code).

3. ”The Pre-Contractual Obligations as Laid Down in the Consumer Code”

The process of regulating the field of consumption at the level of the European Union was initiated by adopting Directive 97/7/EC of the European Parliament and of the Council of the 20 May 1997 (followed by other regulations).

The French literature in the legal field argued that the regulation of consumerism is based on the fact that the provisions of the competition regulations do not succeed in balancing the product market and therefore, additional consumer protection is needed (J., Calais-Auloy, H., Temple, (2015):p. 2-4).

According to article 1 of Law no. 296/2004 on the Consumer Code “the legal relations established between economic operators and consumers having as a scope the purchase of goods and services” have a *contractual character*.

According to article 1177 of the Civil Code “The contract concluded with consumers is subject to special laws and, additionally, to

the provisions of this code". Thus, the consumer contract was acknowledged.

The consumer contract is concluded between the consumer and a professional, during the business activity and its object is a good or a service N., L., Hereaux, (2000):27).

The consumer contract includes three "pre-contractual obligations" regarding the obligation to provide information, to counsel and to ensure safety that we will analyze.

a). *The obligation to provide information to the consumers.*

According to the regulations in the matter, consumers must be provided with all the information necessary for the proper use, according to the intended use of the goods.

The most important provisions in the matter are included in the Consumer Code and Government's Ordinance no. 21/1992 on consumer protection.

The obligation to provide information to the consumer implies the communication of all the information related to the product and which are necessary to express the valid consent on the *conclusion* of the contract.

The obligation to provide information continues after the moment of the conclusion of the legal act. Thus, it extends during the execution of the contract. (A., Gheorghe, C., Spasici; D., S., Arjoca, (2012):64).

The information must include: information related to the identity of the supplier, the clauses of the contract, the characteristics of the goods or the services, the associated risks and the possible malfunctioning, their usages. According to article 3 (b) of the Government's Ordinance no. 21/1992 consumers have the right to be completely, correctly and precisely informed about the essential characteristics of products and services so that the decision they make concernig these goods and services meets to the greatest extent their needs.

According to article 18 of the ordinance, *the consumers* have the right to be informed completely, correctly and precisely about the essential characteristics of the products and services provided by the economic operators, so that they could make a rational choice, in line with their interests, from the products and services offered and to be able to use them according to their intended use and in safe conditions.

The consumers must also be provided information about *the risks* they are exposed to during the normal and foreseeable use of the goods (article 48 of the Consumer Code).

The information is obligatorily provided to the consumers through *identification* and *characterization* elements that are inscribed visibly, legibly, easily to understand, in a form that does not allow deletion etc. (article 19 of the Ordinance).

The information on the protection of life, health and the safety of consumers must be communicated to them, as far as possible, through easy to understand *international graphic symbols* (article 46 of the Consumer Code).

We mention that the professional's obligation to provide information *must be complete, correct, precise and clear*. (I., Pop, (2017):61-63).

Unless there are other special provisions, the non-compliance with the obligation to provide information is subject to penalties according to the ordinary law (depending on its legal characteristics).

The contract between the professional and the consumer could be *cancelled* if there is a defect in consent. For example, on the grounds of *an error* the lack of understanding of the information leads to the misrepresentation of the object or of the identity of the professional (or through dishonest fault (I., F., Popa, (2002):70).

b). *The obligation to counsel the consumers.*

Besides information, the consumer needs advice, guidance or an opinion from a specialist.

According to article 5 of the Consumer Code, the professional must provide consumers other elements so that their decision concerning the purchase of a product could "meet their needs to the greatest extent"

The obligation to counsel and advice is a *supplement* (a variety) of the obligation to provide information (and not an accessory of it).

The obligation to counsel involves a certain conduct and behaviour of the professional who should *guide and assist correctly* the consumer in his choice.

However, the professional's obligation to guide and assist the consumer is not limitless.

In the literature in the domain (J., Goicovici,(2006): 44, the relation between the professional and the consumer in the matter resulted in *four rules*.

The consumer must *collaborate* with the professional in the counseling activity.

The professional's obligation to offer guidance and advice ceases when the consumer *wilfully conceals the usage* of the product.

Counseling the consumer aims at preparing him to give his *valid consent* (knowingly).

The consumer could be *assisted by a professional counselor* (for example a business agent, a layer, an expert etc.).

c). *The obligation to provide safe products.*

The consumerist legislation protects the consumer's safety.

Article 9 of the Consumer Code prohibits the import, manufacturing, distribution as well as the marketing of fake or counterfeit or dangerous products that have non-compliant safety parameters that could endanger the consumers' life, health or safety.

The professional is obliged to market *exclusively products that are safe* for the consumers' life, health and safety (article 36 (1) of the Consumer Code).

It is also prohibited to sell unsafe products, as well as products that *are not accompanied* by the compulsory documents provided by law (article 37 of the Consumer Code).

It is considered safe any product that, in normal or reasonable usage conditions, including of duration and, if applicable, of commissioning, installation and maintenance requirements, *presents no risk* or only minimum risks (compatible with the use of the product).

Manufacturers must ensure the consumer's access *to useful information* that allow the latter to assess the inherent risks of a product when these are not immediately perceptible to the consumer, without an appropriate warning (article 4 (1) of the law).

The obligation to ensure the safety of the products operates from the moment the products are *released* and continues after the conclusion of the contract (article 4 (1) of the law).

It follows that the professional's obligation to ensure the safety of the products is *continuous* (before selling the product and it lasts for the duration of the execution of the contract).

4. The Legal Character of the Pre-Contractual Obligations

In general the civil obligation has the meaning of a *civil law relationship* in which one party, referred to as creditor, has the legal possibility to claim that the other party, called debtor, to provide positive or negative deliverables or a series of deliverable, under the penalty of the forced reinforcement by the state (L., Pop, I., F., Popa, S., I., Vidu, (2002):13).

Stricto sensu, in the matter of contract, the term “obligation” has the meaning of *an assumed debt* of the contracting debtor.

From the elements above it follows that the term contractual obligation (in the current sense) is a part of the stage of *the effects of the contract* (and not of the formation phase when we can speak only of negotiation, offers, acceptance, validity conditions etc.).

All the above elements considered, in the current doctrine and practice the term “pre-contractual obligations” is frequently used (D., Chirică, (1999):50), in the particular in the case of the consumer contract (when it comes to the obligations to provide information, counseling and safety).

For example, according to article 18 of the Ordinance “The consumers have the right to be informed completely, correctly and precisely about the essential characteristic of the products and services offered by economic operators so that they have the possibility to make a rational choice, according to their own interest, between the products and services provided and to be able to use them, according to their intended use, in completely safe conditions. ”

According to the special legal provisions (Law no. 296/2004, Government’s Ordinance no. 21/1992 etc.) and also to the ordinary law according to which in the synallagmatic contract the obligations of the parties are reciprocal and interdependent (article 1171 of the Civil Code), we conclude that to the consumer’s rights to be provided with information correspond the economic operator’s “obligations” (to provide information, counseling and ensure safety).

Under the circumstances when “The contract concluded with consumers is subject to special laws and, additionally, to the provisions of this the Civil Code” (article 1177) we notice that the three so called “pre-contractual obligations” are in legal terms and in fact *conditions, special requests imposed to the professional* to form knowingly the consumer’s consent and implicitly to validly conclude the consumer contract.

Consequently, the so called "obligations" to provide information, counseling and ensure safety superpose those related to validity (special) that, besides those provisioned in article 1179 of the Civil Code are necessary to validly conclude a consumer contract.

To comply with the meanings given to the institution of the civil law, we consider that in the matter of the consumer contract the terms to be used should be "pre-contractual requirements", respectively, "the requirement to provide information", "the requirement to counsel" and "the requirement to ensure safety".

The aspects analyzed above derive from the fact that the consumer laws include specific, new institutions, that should be *harmonized* with those already established and provided in the national legislation.

Conclusions

Through its regulations, the consumer contract includes three so called "pre-contractual obligations" namely the obligation to provide information, to counsel and to ensure safety.

Although the consumerist regulations have been only recently established, in the legal doctrine and practice the phrase "pre-contractual obligations" has been adopted on a large scale.

We consider that the phrase "pre-contractual obligation" in the consumerist contract is not appropriate and it might lead to confusions (because, in the contractual matter, the term "obligations" means *the effects* of the contract).

We remark that, in substance, the three so called consumerist "pre-contractual obligations" are lawful *conditions, special requirements imposed to the professional* to ensure the formation of the consumer's consent knowingly.

The positioning of the three "obligations" within the *validity conditions* of the consumer contract is a part of the *harmonization institutions in the consumer legislation* with those that have been established for a long time in the civil law.

Bibliography

- J., Calais-Auloy; H., Temple, (2015), *Droit de la consommation*, Dalloz, Paris, 2015;
D., Chirică, *Obligația de informare și efectele ei în fața precontractuală a vânzării-cumpărării*, In R.D.C. No. 7-8/1999;

- N., L., Hereaux, (2000), *Droit de la consommation*, Yvon Blais Inc., Quebec, 2000;
- Fr., Deak, St. Cărpenu, (1993), *Contracte civile și comerciale*, Lumina Lex Publishing, Bucharest;
- A., Gheorghe, C., Spasici, D.S., Arjoca, (2012), *Dreptul consumației*, Hamangiu Publishing, Bucharest;
- J., Goicovici, (2006), *Dreptul consumației*, Sfera Juridică Publishing, Cluj-Napoca;
- L., Pop, *Obligația de informare – mijloc juridic de protecție a consimțământului la încheierea contractelor*, in *Dreptul* no. 6/2017;
- L., Pop, I., F., Popa, S., I., Vidu, (2012), *Tratat elementar de drept civil. Obligațiile*, Universul Juridic Publishing, Bucharest;
- I., F., Popa, *Dolul și obligația de informare în contractele sinalagmatice*, in *Dreptul* no. 7/2002;
- L., Stănciulescu, (2017), *Dreptul contractelor civile. Doctrină și jurisprudență*, Hamangiu Publishing, Bucharest;
- C., T., Ungureanu, (2016), *Drept civil. Partea generală. Persoanele*, Hamangiu Publishing, Bucharest;