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# THE CONSUMER CONCEPT IN G.O. NO. 107/1999 AND G.O. NO. 21/1992. COMPARATIVE APPROACH

**K**

**Keywords**

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## Abstract

Government Ordinance no. 107/1999 is a normative act with relevance in the field of consumer protection. Thus, according to Article 30, the ordinance is supplemented by GO no. 21/1992 on consumer protection. In this context, it should be noted that the notion of consumer as defined by GO no. 107/1999 is not identical to that used in consumer protection regulations. Thus, contracts for the sale of package travels may be contracts concluded with consumers from the perspective of GO no. 107/1999, but not from the point of view of consumer protection regulations. This study will identify the features of the consumer concept in GO no. 107/1999 and in GO no. 21/1992, as a normative act comprising the common law in the field of consumer protection. By identifying the differences between concepts, this study will exemplify their legal relevance in terms of consumer protection against the introduction of unfair contract terms.

**JEL Classification:** K12, K20

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## INTRODUCTORY CONSIDERATIONS

### Background and purpose of research

Government Ordinance (GO) no. 107/1999 regarding the marketing of package travels is a normative act with relevance in the field of consumer protection. It defines the term of consumer and characterizes the contract for the marketing of the tourist package travels as a consumer contract.

Consumer contracts are also governed by the Government Ordinance no. 21/1992, which, in turn, defines the consumer concept and regulates consumer rights, some of which are dealing with rights related to the conclusion of service contracts, including contracts for the marketing of tourist services.

This study aims to analyze whether a *consumer-person*, as defined by GO no. 107/1999, *who concludes a contract for the marketing of a package travel acquires at the same time all the rights granted to consumers under GO no. 21/1992.*

A particular attention is given in this study to examining one of the consumer rights as regulated by GO No. 21/1992, namely *the right to object to including unfair terms in the contracts.* The ordinance enshrines this above mentioned right, with the legal status of the protection of the law being regulated by Law no. 193/2000.

In Romanian legislation, the framework regulation governing the subject matter of this study is the GO no. 107/1999 on the marketing of tourist package travels (republished in the Official Gazette No. 448 of 16 June 2008) transposing the provisions of the Council Directive 90/314 / EEC of 13 June 1990 on package travel, package holidays and package tours (published in OJ L 158 of 23 June 1990). In addition, the Order no. 1387/2015 issued by the Minister of Economy, Trade and Tourism (published in the Official Gazette No. 122 of February 17, 2016) has approved the contract for the marketing of the tourist package travels.

## METHODOLOGICAL ISSUES

Having regard to the purpose of this research as first mentioned herein, this study applies the comparative method to analyze the consumer concepts as regulated by GO no. 107/1999 and GO no. 21/1992.

### The consumer concept as regulated by GO no. 107/1999

### The legal definition of the consumer concept according to GO no. 107/1999

According to Article 2 (2) of GO no. 107/1999, *a consumer is any natural person or group of associated natural persons, who purchase or undertake to purchase tourist package travels – the main contractor - or any person on behalf of whom the main contractor undertakes to purchase the package travel - the other beneficiaries - or any person in whose favour the main contractor or the other beneficiaries transfers / transfer the package travel - the transferee.*

### The features of the consumer concept as regulated under GO no. 107/1999

As it results from GO no. 107/1999, there are *three types of consumers:*

- the *main contractor consumer*
- the *other beneficiary consumer*
- the *transferee consumer*

*The main contractor-consumer is any natural person or group of associated natural persons, who purchase or undertake to purchase the package travel. It follows that the typical features of the main contractor-consumer are:*

➤ The main contractor consumer is any *natural person or a group of associated natural persons.* It follows that the regulation concerned places natural persons within the scope of the main contractor consumer concept, regarded as an individual subject, namely as "a person", or as an associative subject, namely as a "a group of persons".

➤ The main contractor consumer is any *person who concludes or undertakes to conclude a contract for the purchase of a package travel ("undertakes to buy the package").* Seen in comparison with the definition of the term *other beneficiary consumer* (referring to the situation where the main contractor acts on behalf of another person), it follows that the conclusion as such or the undertaking to conclude the contract for the purchase of the package travel can occur on one's own behalf or on behalf of another person.

*The other beneficiary consumer is any person on behalf of whom the main contractor undertakes to purchase the package travel.* It follows that the typical features of the *other beneficiary consumer* are:

➤ **The other beneficiary consumer is a person.** It is noticed that the term "persons", is included within the scope of the definition of the term *other beneficiary consumer, with no*

*distinction being made between natural or legal persons.*

➤ **The other beneficiary consumer** is any person *on behalf of whom the main contractor undertakes to purchase the package travel*. It follows that the other beneficiary consumer does not conclude the contract for the purchase of package travel nor does he undertake to conclude it personally, but through a representative, provided that the representative meets, in turn, conditions qualifying him as a main contractor.

*The transferee-consumer* is any person in whose favour the main contractor or other beneficiaries transfers/transfer the travel package. That means that the typical features of the transferee consumer are:

➤ The transferee consumer *is a person*. It is noted that the definition of the transferee consumer encompasses all "persons", *without any distinction between natural or legal persons*.

➤ The transferee consumer *is any person in whose favour the main contractor or other beneficiaries transfers/transfer the package travel*. It follows that a transferee consumer does not conclude himself or through a representative the contract for the purchase of a package travel. However, the transferee consumer acquires the rights and obligations deriving from the contract for the purchase of a package travel, as a result of the assignment of the contract by a main contractor or by other beneficiary in his or her favour.

**Summarizing, the consumer, as defined under GO no. 107/1999, is any person who:**

➤ *Acquires rights and obligations deriving from a contract for the purchase of a package travel or from any legal document under which the person undertakes to purchase a package travel.*

➤ *The contract for the purchase of a package travel or the legal document under which a person undertakes to purchase a package travel is executed by a natural person or a group of associated natural persons or through such a person*. In other words, *this condition extends the scope of the consumer concept, to include the legal persons as well*. As such, consumers may also be any legal persons acquiring the specific rights and obligations born under a contract for the purchase of a package travel or under a legal document under which they are undertake to purchase such a package through representation (if the representative is a natural person or a group of associated natural persons) or through contract assignment (where the assigned contract was concluded by a natural person or a group of associated natural persons).

**The consumer concept as regulated by GO no. 21/1992**

**The legal definition of the consumer concept according to GO no. 21/1992**

Article 2 (4) of GO no. 21/1992 defines *the consumer* as any natural person or group of associated natural persons acting for purposes which are outside the scope of their trade, business, craft or profession.

**The features of the consumer concept according to GO no. 21/1992.**

According to GO no. 21/1992, there is **one single type of consumer**, whose features are:

➤ The consumer is *any natural person or a group of associated natural persons*. It follows that this ordinance places within the scope of the consumer concept the natural persons, who are regarded as an individual subject, i.e. "a person" or as an associative subject, i.e. "a group of people".

➤ The consumer is a person *acting for purposes which are outside his trade, business, craft or profession*. Thus, the status of consumer can be acquired both by persons carrying out a business, provided they act outside the scope of their business (a hypothesis expressly referred to by the regulatory text) and by persons who carry out no business whatsoever (a hypothesis resulting from the a *fortiori* interpretation of the text of the law).

## CONCLUSIONS

**Configuration differences of consumer concept in GO no. 107/1999 versus GO no. 21/1992**

A comparative examination of the two ordinances under consideration reveals a partial overlapping of the consumer concepts analysed here. Thus, while the GO no. 107/1999 specifies that a consumer may also be a legal person, this possibility is absent from the GO no. 21/1992. Consequently, a consumer who is a legal person for the purpose of GO no. 107/1999 may not enjoy the legal protection deriving from GO no. 21/1992.

The legal consequences of this state of affairs are quite many. By way of example, one such consequence is its impact on the interdiction to include unfair terms in contracts.

A consumer who is a legal person for the purpose of GO no. 107/1999 will not be able to rely on the legal status of unfair contract terms as regulated by GO no. 21/1992 and Law no. 193/2000. In this respect, it should be noted that the concept of "consumer" as defined by the Council Directive 93/13 / EEC of 5 April 1993 on unfair terms in consumer contracts, transposed in Romania by Law no. 193/2000, has been reviewed by the Court of Justice of the European Union, which has held that

the concept should be interpreted as referring exclusively to natural persons (*see the judgment of the Court (Third Chamber) of 22 November 2001 in the case Cape Snc v Idealservice Srl (C 541/99) and Idealservice MN RE Sas v OMAI Srl (C 542/99)*, published in the Reports of Cases before the European Court of Justice, 2001, p. I 09049).

GO no. 21/1992 grants consumers, **apart from other rights and freedoms, the freedom to decide to purchase services without being required to accept inclusion of unfair terms in their contracts.** Such freedom of choice, which is regulated by Article 10 (a), must be corroborated with Article 2, paragraph 16, according to which "a contractual term which has not been individually negotiated with the consumer shall be regarded as unfair if, the term itself or along with other contract terms, causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer and contrary to the requirement of good faith." The Government Ordinance no. 21/1992 should be interpreted, with respect to the prohibition to include unfair terms in contracts, in conjunction with Law no. 193/2000. This latter piece of legislation regulates the concept of unfair terms in consumer contracts. The definitions in this law of the "consumer" and the "unfair term" are identical with those regulated by GO no. 21/1992.

According to Article 2 (1) of the Law no. 193/2000, "consumer means any natural person or group of associated natural persons, who, by virtue of a contract falling within the scope of this law, acts for purposes which are outside their trade, business, craft or profession. As we have shown above, Article 2 (2) of GO no. 21/1992 defines the consumer as any natural person or group of associated natural persons acting for purposes which are outside their trade, business, craft or profession (*see the consumer concept as defined by Gheorghe AN, Spasici C., Arjoca DS (2012), p. 46, Goicovici J. (2000), p. 15 - 28, Vasilescu P. (coord.) P. 63 83, Stănescu AT (2016) 44 et seq.*)

According to Article 2 (1) of the Law no. 193/2000, a contractual term which has not been individually negotiated with the consumer shall be regarded as unfair if, the term itself or along with other contract terms causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer and contrary to the requirement of good faith. As we have shown already, according to Article 2 (16), a contractual term which has not been individually negotiated with the consumer shall be regarded as unfair if, the term itself or along with other contract terms causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer and contrary to the requirement of good faith. (*for further details on unfair terms in contracts concluded between*

*consumers and professionals, see Stănescu AT (2016), p. 42 et seq.*)

In summary, a legal person that is a consumer according to GO no. 107/1999 will not be able to rely on the legal status of unfair terms as regulated by Law no. 193/2000. In other words, if the contract for the marketing of travel packages contains a provision that meets the three criteria defining the unfair term, i.e. the absence of negotiation, the creation of a significant imbalance between the parties' rights and obligations and the absence of good faith, may not be sanctioned as such. *Regarding the negotiated character of a contractual term*, Article 4 (2) of the Law no. 193/2000 stipulates that a contractual term is deemed to have been negotiated individually with the consumer, if it has been established in circumstances where the consumer has been able to influence its nature. The negotiation of several contractual terms or of any portion of a contractual term does not preclude the application of Law no. 193/2000 with regard to the other terms of the contract or to the non-negotiated portion of a contractual term [Article 4 (3) of the Law no. 193/2000]. However, Law no. 193/2000 establishes a presumption in favour of consumers: according to Article 4. (2) of the Law no. 193/2000, a contractual term is deemed not to have been individually negotiated with the consumer, if it has been included in the predefined standard contracts or in the general terms of sale established by sellers. However, this presumption is relative. Regarding the concept of *significant imbalance*, CJEU stated on the interpretation of this notion and has outlined the criterion based on which the existence of a significant imbalance may be assessed. Thus, CJEU has stated that the concept of 'significant imbalance' to the detriment of the consumer must be assessed in the light of an analysis of the rules of national law applicable in the absence of any agreement between the parties, in order to determine whether, and if so to what extent, the contract places the consumer in a less favourable legal situation than that provided for by the national law in force (*see the judgment of the Court (first chamber) of 14 March 2013 in the case of Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona and Manresa (Catalunyacaixa) (C 415/11)*, to be published in the Reports of Cases before the European Court of Justice 2013). Regarding the *concept of contrary to the requirement of good faith*, CJEU has stated and outlined the criterion to assess the existence or the absence of good faith at the time of inclusion of the likely unfair term in the contract. Thus, *good faith is considered to exist if the contracting partner of the consumer, dealing fairly and equitably with the consumer in individual contract negotiations, could reasonably assume that the consumer would have agreed to the term concerned* (*see, Court Judgment*

(First Chamber) of 14 March 2013 in the case of *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona and Manresa (Catalunyacaixa)* (C 415/11), to be published in Reports of Cases before the European Court of Justice 2013). According to Article 12 (4) of the Law no. 193/2000, the sanctioning of unfair terms consists in the annulment thereof. The doctrine has shown that the sanction of absolute nullity applies in this case (see Stănescu A. T. (2016), p. 44 et seq.)

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