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**MULTIPLE-PARTY, MULTI-CLAIM LITIGATION AND
PERMISSIVE JOINDER – PERSPECTIVES ON THE CONSUMER
LAW**

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Abstract:

This study examines various forms of permissive joinder, multiple claims and non-compulsory counterclaim mechanisms available under Consumer Law, especially from the perspective of multi-party strict liability or multiple-party claims against professionals using unfair commercial terms or unfair commercial practices. The study underlines the voluntary aspects characterising the joinder of consumers as plaintiffs, as well as the admissibility of the opting-in – opting-out dichotomy depends on the type of redress sought by the consumer as a pursuant litigating party. The litigant consumers may be represented in pursuing the avoidance of unfair contractual terms by legal entities, which are not mentioned by Law no. 193/2000, on unfair terms in consumer contracts between the qualified entities. In these hypotheses, the permissive joinder system is characterized as an opting-in system, based on the features of the common interest mandate agreement described in the Civil Code general provisions on the mandate contract provisions are dealing with the problematic of multiple-claim redress actions in which several consumers plaintiffs are represented by the attorneys, based on the same source of litigation against the professionals. Another reason for using the third-party intervention mechanism in consumer complaints is that of allowing a third party or a subsequent party to join a lawsuit engaged between the originating parties (consumer vs professional); where the claim emanates from the express assent of the intervenient, the procedural intervention will be voluntary, and it has been used in jurisprudence in litigious procedures involving consumers and credit professionals and also in actions in avoidance of unfair contractual provisions. Consumer associations who

fulfil the legal representative requirements may introduce judicial claims supporting collective interests of consumers in the opting-out injunctive relief procedure, for instance in the field of unfair terms in consumer contracts; subsequently, after the judge had finally decided on the existence of unfair terms and ordered the professional to eliminate those unfair terms from the existing contracts, the pursuant consumers, who intend to compensate reciprocal payment obligations or to obtain redress for the past payments collected by the professional based on those unfair terms, may resort to individual actions in compensatory relief or to a voluntary joinder in the action introduced by other prejudiced consumers against the professionals.

Another aim of this study is to trace the metrical features of the consumer's right to procedural impleading; the consumer who justifies a legitimate interest may implead a third person, against the party could have introduced a separate claim on indemnity or warranty." (2) At its turn, the impleader may implead another person for the breach of warranty. Fundamentally, the impleader's claim and the main claim will be discussed simultaneously. Nevertheless, should the discussions on the impleader's claim unjustifiably delay the judgement on the main claim, the judge may decide on its disjunction in order to have the impleader's claim judged separately.

Key words: multiple claims, permissive joinder, collective claims, consumer, joint intervenor.

1 Introductory notes

The subject of permissive joinder of defendants and multi-claim litigation under the provisions of Consumer Law continues to represent a significant topic in the attention of legal practitioners, especially from the angle of aggregate litigation. The Romanian legal system currently has some procedural mechanisms available to multiple claimants; only some of those operate on an opt-in basis, the claimants electing to join the proceedings in order to be considered a member of the class and to be entitled to any damages awarded. This mechanism is in clear contrast to the multiple claim redress mechanism which has been used in practice by plaintiffs such as non-profit consumer organisations or the National Authority for Consumer

Protection for unfair contractual terms claims, introducing an opt-out class action system based on unfair terms in consumers' contracts.

One of the main features of the subject of permissive joinder under Consumer Law is that, in what concerns the representative actions by qualified entities, articles 12-13 of Law no. 193/2000, on unfair terms in consumer contracts, enabled qualified entities designated by legal provisions to bring representative actions in the general interest of consumers, strictly in the field of unfair terms in consumer contracts. Under the modified legal text, these qualified entities would have to satisfy minimum reputational criteria set by articles 30 and 32 of the Governmental Ordinance no. 21/1992, modified by Law no. 157/2015 and by the Governmental Ordinance no. 37/2015 for the revise of certain provisions on consumer protection, lately modified by Law no. 51/2016 on consumer legal protection.¹ These associations must be legally established, pursuing non-profit purposes and having a legitimate interest in ensuring compliance with the relevant consumer protection law;² that approach can help to solve the doctrine's longstanding riddles. There are no express legal provisions in the Romanian legislation, in the field of compensatory redress actions,³ imposing on qualified entities the legal obligation to disclose to the courts or administrative authorities their financial capacity and the origin of their funds supporting the action.

This study encompasses practical perspectives on the provisions of article 12, paragraph (3) of Law no. 193/2000, on unfair terms in consumer contracts,⁴ which introduced an opting-out redress action for injunctive relief of consumers, stating that the associations for consumer protection that fulfil the requirements set by articles 30 and 32 of the Governmental Ordinance no. 21/1992 on consumer legal protection, modified and

republished, have the right of judicial claim against any professional whose unilaterally elaborated contracts contain unfair terms, in order for the judge to deliberate on the existence of unfair terms and to order the professional to eliminate those unfair terms from all existing contracts containing obligations the pursuance of which is not completed.

As it results, from the following sections of the study, the admissibility of the opting-in – opting-out dichotomy depends on the type of redress sought by the consumer as a plaintiff; while it can be described as an opting-out mechanism regarding the injunctive relief instrument, it is describable an opting-in type of action when it comes to consumers' compensation actions. For instance, according to the provisions of article 12, paragraph (3) of Law no. 193/2000, on unfair terms in consumer contracts, the national legislator introduced an opting-out action, based on which, in the first stage, the 'qualified entities', e.g. associations for consumer protection that fulfil the requirements set by the Governmental Ordinance no. 21/1992, respectively or the Romanian National Authority for Consumer Protection, have the right to introduce judicial claims against unfair terms in consumer contracts. The study is structured in several sections absorbing some of the substantial issues of the multi-party litigation theme. In the second section, the emphasis is on the manner in which permissive joinder of consumer complaints treated under the provisions of domestic Consumer Law, while the third section addresses the problematic of the binding effects of judicial decisions in multi-claim litigation. More importantly, it tries to reflect a more pragmatic understanding of the permissive joinder and voluntary forms of third-party intervention in consumers' litigation, which hopefully would surreptitiously contribute to a better understanding of the multiple-claim problematic under Consumer Law provisions.

2 Two-stages mechanisms and the requirements of consumers' fair representation

2.1 The treatment of permissive joinder for consumer complaints under positive Consumer Law

Pursuant to the provisions of article 12, paragraph (3) of Law no. 193/2000, on unfair terms in consumer contracts, consumers are enabled to use an opting-out redress action, based on which in the first stage, the qualified entities, e.g. associations for consumer protection that fulfil the requirements set by the modified Governmental Ordinance no. 21/1992, respectively or the domestic National Authority for Consumer Protection, have the right to introduce judicial claims against unfair terms in consumer contracts.

It should be noticed that, in the second procedural stage, after the professional has been requested by the judge's final decision to remove certain clauses as being found to contain unfair terms from all contracts pending to be executed, all consumers who are interested in recovering the payments made on the bases of the unfair terms may use either an individual action in redress or compensation, either an opting-in action, as mentioned above. However, the two-stages mechanism is based on an opting-out system only in cases in which the consumers are represented by the qualified entities described by the cited legal provisions, such as associations for consumer protection or the National Authority for Consumer Protection.

Conversely, the litigant consumers may be represented in pursuing the avoidance of unfair contractual terms by legal entities, which are not mentioned by Law no. 193/2000, on unfair terms in consumer contracts⁵

between the qualified entities; in these hypotheses, the permissive joinder system is characterized as an opting-in system, based on the features of the common interest mandate agreement described in the Civil Code general provisions on the mandate contract provisions are dealing with the problematic of multiple-claim redress actions in which several consumers plaintiffs are represented by the attorneys, based on the same source of litigation against the professionals. Also, it is clear that the peremptory exceptions, which are touching the merits at the core of the professional's demand, if they are admitted by the court, are designed to block the admisal of the plaintiff's request against consumers. The qualification as a 'common interest mandate agreement' between the principal (attorney) and the represented plaintiffs generates, as usual, the applicability of specific rules on the revocability of the mandate agreement.⁶ For instance, in redress actions in compensation against banking creditors, based on the use of unfair banking terms in consumer credit contracts, consumers used common mandate contracts based on an opting-in system. The common interest mandate agreement remains revocable *ad nutum* by the principal, although the intemperate revocation generated the principal's duty to compensate the legal representative. Similarly, since the parties concluded a common interest mandate contract, the legal representative shares with the represented consumers a common interest in the action success, by stipulating a compensation clause, the amount of which is censurable by the court.

Among the other problems immediately apparent to an observer at the present state of consumer contracts law is the fact that, according to article 37 of the Code of Civil Procedure, 'In the cases and under the conditions set by legal provisions, the right of action is also available to

natural persons or the legal persons, organisations, institutions or authorities who, without having a personal interest in the success or dismissal of a claim, represent the legitimate interests of other persons or, upon the case, represent collective or general legitimate interests.’ Apart from that, article 59 of the Code of Civil Procedure mentions that ‘several persons may be jointly plaintiffs or defendants, should the rights or obligations subject to litigation have a common origin or be strongly connected by source.’

It is also worth noting that, according to articles 61-63 of the Romanian Civil Procedure Code, the natural or legal persons, other than the parties of the litigious procedures, may use the ‘voluntary intervention in civil litigation’. Another reason for using the third-party intervention mechanism in consumer complaints is that of allowing a third party or a subsequent party to join a lawsuit engaged between the originating parties (consumer vs professional); where the claim emanates from the express assent of the intervenient, the procedural intervention will be voluntary, and it has been used in jurisprudence in litigious procedures involving consumers and credit professionals and also in actions in avoidance of unfair contractual provisions.

Similarly, it is clear that the different legal mechanisms for consumers’ intervention have not always been appropriately adjusted to each other and that the repeated revisions of these legal texts have not always improved their quality. Gaps have opened up between different procedural mechanisms and thus new inconsistencies have arisen. In terms of voluntary intervention in pending litigation, also applicable to consumers and professionals as litigating parties, the text of article 61 of the Code of Civil Procedure states that other persons justifying a legitimate interest may

intervene in a lawsuit engaged between the originating parties; therefore, the main intervention implies that the intervenient pretends to have direct or accessory rights connected to the rights which form the object of the lawsuit between the originating parties, while the accessory intervention implies that the intervener intends to sustain the defence of one litigating parties.

This juxtaposition of two procedural mechanisms has its source in the text of article 62 of the Romanian Code of Civil Procedure, which mentions that the main intervention claims must be conceived in the form requested by the Civil Procedure Code provisions on the ordinary civil judicial claims. Another legal requirement is that the consumer's main intervention claim must be introduced before the closing of the substantial debates in first instance. Nonetheless, if the originating litigating parties give their consent, the main intervention claim is also admissible during the appeal proceedings. On the subject of accessory interventions, article 63 of the Romanian Code of Civil Procedure states that the claim for an accessory intervention must be introduced in writing, also stating that the claim for an accessory intervention may be introduced no later than the closing of the substantial debates, in front of the first instance, as well as during the ordinary and extraordinary procedures of revision (including the appeal in cassation procedures).

In our opinion, the admissibility of the opting-in – opting-out dichotomy depends on the type of redress sought by the consumer as a plaintiff; while it can be described as an opting-out mechanism regarding the injunctive relief instrument, it is describable an opting-in type of action when it comes to consumers' compensation actions. For instance, according to the provisions of article 12, paragraph (3) of Law no. 193/2000, on unfair terms in consumer contracts, the national legislator introduced an opting-out type

of action, based on which in the first stage, the 'qualified entities', e.g. associations for consumer protection that fulfil the requirements set by the cited legal provisions, respectively or the representatives of the National Authority for Consumer Protection, have the right to introduce judicial claims against unfair terms⁷ in consumer contracts.

2.2 Binding effects of judicial decisions in multi-claim litigation

According to article 60, paragraph (1) of the Romanian Civil Procedure Code on the multiple participation in civil litigation, where the claim is made by or against several persons with a common interest, 'the procedural acts performed by or against one of the persons with a common interest will neither benefit nor prejudice the others' subject to the provisions of article 60, paragraph (2), stating that 'Nevertheless, should the effects of the judicial redress, by virtue of the nature of the judicial relationship or the existence of certain express legal provisions, be opposable to all the plaintiffs or the defendants in that particular action, the procedural acts performed by some of these persons will benefit the others. In the cases in which the effects of some procedural acts are contrasting or incompatible to the procedural acts made by other participants, only the most favourable acts will be opposable to the other participants.'

In consequential terms, as stated in article 139 of the Romanian Civil Procedure Code on joinder and disjoinder of proceedings, '(1) The judge may, order the joinder of several proceedings pending before the court where there is a close relationship between the disputes such that it would be in the interest of justice to examine them together. (2) The judge's decision of joinder may be taken *sua sponte* or upon the request of the parties made no later than on the first term of appearance in from of the invested court. (3)

Should the several courts had different degrees of material competence; the joinder will fall under the competence of the one court, the degree of competence of which is superior to the others.’

The multiple participants in civil litigation may also resort to a common mandate of procedural representation. According to article 202, of the Romanian Civil Procedure Code, on the legal representation and assistance in court of multiple co-participation in civil litigation, during the proceedings implying multiple plaintiffs or multiple defendants, under the provisions of article 59, the judge may decide by resolution on the empowering of a common representative, at the domicile or premises of which will be done the notification of all further procedural acts. The representatives may be selected from the natural or legal persons who fulfil the legal conditions for judicial representation. Quasi-exogenously regulated, according to article 72 of the Romanian Civil Procedure Code on the impleader procedures, in cases in which a third-party is partly responsible for the plaintiff’s injuries in a manner that fundamentals the impleader on mechanisms such as indemnity, subrogation or breach of warranty, ‘(1) The party who justifies a legitimate interest may implead a third person, against the party could have introduced a separate claim on indemnity or warranty. (2) At its turn, the impleader may implead another person for the breach of warranty’. As a general rule, also mentioned in article 74, paragraph (4) of the Civil Procedure Code, the impleader’s claim and the main claim will be discussed simultaneously. Nevertheless, should the discussions on the impleader’s claim unjustifiably delay the judgement on the main claim, the judge may decide on its disjunction in order to have the impleader’s claim judged separately? In my views, the answer is

affirmative; in the latter case, the judgement on the impleader will usually be suspended until the judge decides on the main claim.

2.3 Cross-claim procedure in consumers vs professionals' litigation

Litigating parties may also resort on the cross-claim procedure, as a demand for relief made in civil litigation by one or several plaintiffs against another plaintiff or by one defendant against another defendant, in a personal injury or similar tort cases opposing consumers and professionals. As opposed to the counter-claims, in which a defendant demands relief from the plaintiff or, for instance, a compensation claim (each of the parties being simultaneously the debtor and the creditor of the other party), cross-claims imply the existence of multiple obligations of payment between the members of the group constituted as plaintiff (or having the procedural position of the defendant⁸). Should the parties disagree on the common representative nominalisation; the judge will appoint a special representative, who, under the provisions of article 58, paragraph (3), will represent the multiple participants, at the domicile or premises of which will be done the notification of all further procedural acts. The represented participants will remunerate the representative.⁹

It should be noticed that compulsory intervention in civil litigation is also possible in litigious procedures between consumers and professionals; for instance, according to article 75 of the Civil Procedure Code, the defendant who possesses movable or immovable goods, on behalf of the legal owner, may resort to the nominalisation of the legal owner, in the cases in the plaintiff pretend concurrent rights on those objects, no later than up to the first term of discussions in first instance. In the cases expressly nominated by legal provisions, as well as in the non-contentious procedures,

the judge may decide *sua sponte* on the compulsory intervention of third persons, despite the eventual oppositions of these interveners. It should be noted that in contentious litigation, the judge will address the parties the necessity of compulsory intervening of third persons. Neither party would formulate objections, the judge will draw up the resolution on the third person's intervention.

3 The judge's *sua sponte* decision on the compulsory intervention of third persons in consumers' complaints

Manifold procedural effects are pending from the above-mentioned legal texts on procedural conditions applicable to interveners. Thus, according to paragraph (4) of article 12, of Law no. 193/2000, on unfair terms in consumer contracts, modified, 'The provisions of the above paragraphs (1)-(3) have no effect on individual consumer's right to introduce a judicial claim in voidance or nullity against any professional whose unilaterally elaborated contracts contain unfair terms.' In my opinion, the opting-out mechanism is also supported by the provisions of article 14 of Law no. 193/2000, on unfair terms in consumer contracts, modified, stating that the consumers, who can justify a right to compensation based on the existence of a prejudice generated by the use of unfair contractual terms under the conditions set by the above legal provisions, have the right to introduce judicial actions in accordance with the provisions of the Civil Procedure Code.

Thus, it can be argued that, for the compensatory relief actions, there are no express legal provisions allowing qualified entities to obtain financial compensation for their members or for individual consumers, only

individual actions being admissible according to the cited article 14 of Law no. 193/2000.

Are consumers associations entitled to procedural intervention or are voluntary intervention in pending litigation only opened to individual consumers? Consumer associations who fulfil the legal representative requirements may introduce judicial claims supporting collective interests of consumers in the opting-out injunctive relief procedure, for instance in the field of unfair terms in consumer contracts;¹⁰ subsequently, after the judge had finally decided on the existence of unfair terms and ordered the defendant/professional to eliminate those unfair terms from all existing contracts, individual consumers, who intend to compensate reciprocal payment obligations or to obtain redress for the past payments collected by the professional based on those unfair terms, must resort to individual actions in compensatory relief. Therefore, the judge may decide, in a multiple-party injunctive action introduced by a qualified entity such as an association for consumer protection, that the professional creditor has a duty to eliminate a certain clause in all banking credit contracts (requesting the debtor consumer to pay a fee based on non-transparent contractual terms). Should an individual consumer intend to obtain refund for the amount of payments made as an effect of that particular clause, the individuals must introduce a judicial claim for compensatory relief, since the judge's decision, when admitting the consumer association's action, had only effects on the professional's duty to eliminate further use of certain unfair contractual terms.

In my views, it is crucial to underline that, in order for the qualified entities/consumer associations to be admitted as representatives, or as interveners in an injunctive relief action based on article 12(3) of Law no.

193/2000, on unfair terms in consumer contracts, they must fulfil, on the one hand, the conditions mentioned in article 30 of the Governmental Ordinance no. 21/1992, modified, on consumer legal protection, referring to the non-profit purpose and the legal prohibition of simultaneously pursuing interests other than their members or the general interest of consumers. On the other hand, each consumer association qualifies for being a representative in a litigious procedure based on the provisions of Law no. 193/2000, on unfair terms in consumer contracts, should have at least 3000 members, at national level, and local branches in at least 10 territorial divisions; at local or regional level, to have activated for at least 3 years in the field of consumer protection (as resulting from the text of article 32 of the Governmental Ordinance no. 21/1992, on consumer legal protection, re-published after being revised).

Curiously, the collective impact of provisions which are dealing with the problematic of multiple-claim redress actions is described in article 13 of Law no. 193/2000, on unfair terms in consumer contracts, as follows: 'Should the judge decide affirmatively on the existence of the alleged unfair terms, the court will order the defendant to eliminate the unfair terms respectively from all pending contracts concluded by consumers and to refrain from the further use of the contractual terms which have been found to be unfair.' The court's decision will benefit to all consumers having a contractual relationship with the defendant which implied the use of those unfair terms, regardless of the consumers expressed or unexpressed will to have their interests represented unless individual consumers decide to pursue separate individual requests, by exercising the opting-out rights.

Why, then, the main existing mechanisms which most closely resemble a class action mechanism, according to the above description (such

as multiple representative actions, cross-claim procedures, impleader procedures, joinder procedures, voluntary and compulsory intervention as forms of multiple participation on civil litigation), are not used more often in consumers vs professionals' litigation? One reason, for this state of facts, might be that the cross-claim procedures, impleader procedures and joinder procedures are not currently conceived as voluntary or compulsory forms of participation between litigating professionals and consumers. On the one hand, the national legislation contains no provisions on specific certification criteria for class actions, while in terms of the certifying of qualified entities, such as the representation through consumer associations, express legal provisions are incident in the field of collective injunctive relief actions based on article 12(3) of Law no. 193/2000, on unfair terms in consumer contracts. In my views, there is a need for express legal provisions requirements on the testing the efficiency and representational quality of class actions in consumers vs professionals' litigation, regarding ascertainable criteria, cohesiveness and representational matters.

It should also be mentioned that ancillary matters, in opting-in actions against professionals, would depend on the ascertainable character of class actions, in terms of notification of individual consumers on the procedural acts, e.g. preclusion of procedures. Nevertheless, in opting-in actions, proof of impracticability of joinder would be far easier having identified those who expressly intended to be part of the multiple-claim litigation.

4 The Achille's tendon: multiple claimants and the use of procedural opting-out rights in consumers' litigation

There is widespread consensus that the provisions of article 12, paragraph (3) of Law no. 193/2000, on unfair terms in consumer contracts, introduced an opting-out action in avoidance of contractual unfair terms in non-negotiated agreements between consumers and professionals.¹¹ In the first stage, the qualified entities, e.g. associations for consumer protection that fulfil the requirements set by articles 30 and 32 of the Governmental Ordinance no. 21/1992, modified, have the right to introduce judicial claims against a professional whose unilaterally elaborated contracts contain unfair terms. The judge's decision ordering the professional to eliminate those unfair terms from all existing contracts will benefit all current customers of the respective professional unless there are individual consumers who exercise their right to auto-exclusion from proceedings and who expressly prefer the remaining under the incidence of the original, unmodified contract.

The multi-claim consumer procedure is as sharply depicted, as it is ubiquitous in litigation pertaining to the avoidance of unfair contractual stipulations. After the professional has been requested by the judge's final decision to remove certain clauses as being found to contain unfair terms in consumers contracts, any consumer who wishes to recover the payments made on the bases of the unfair clauses may use either an individual action in redress or compensation, either an opting-in action in cases in which numerous consumers, who initially benefited from the admission of the opting-out collective action on voidance of unfair clauses, agree to a common mandate of representativeness. Let us note, however, that, as opposed to the

opting-out collective action on unfair terms, which is expressly regulated in terms of articles 12-13 of Law no. 193/2000, on unfair terms in consumer contracts, there are no specific provisions on the subsequent opting-out action in compensatory relief, such as re-imbursalment of previously paid sums based on unfair contractual clause). As mentioned above, the latter have been admitted by jurisprudence based on the use of consecrated, general procedural mechanisms such as the reciprocal mandate of procedural representation as mentioned in article 60, paragraph (1) of the Civil Procedure Code.¹²

Yet for all its practical importance and for its incidence in jurisprudential contexts, the admissibility of class actions against professionals remains a surprisingly mysterious topic. Especially in the field of strict liability, non-pending on the professionals' proved fault, an opt-in mechanism can approach satisfaction of certification requirements more easily than an opt-out group action.¹³ As an opt-out group, the personal-injury claimants could have difficulty meeting the ascertain requirements. Secondly, an opt-in option positively affects notice requirements in two essential ways: first, in order to apprise group members of their rights and the opportunity to participate in collective litigation, an opting-in mechanism¹⁴ makes notification of potential group members more reliable, taking into account that the opt-in process permits consumers to identify themselves as parties to the class action against the professionals and permit future communication to offspring.

Furthermore, pertaining to the preclusive effects of the court's decision in multi-claim consumers' litigation, in my views, the court's decision is preclusive of all claims that were or could have been asserted in the first proceeding, in terms of inadmissibility of future claims between the

same parties, on the same objective factual grounds; nevertheless, preclusion should operate only against consumers and interveners who were formal parties to the first proceedings. By contrast to an opting-out mechanism, an affirmative expression to opt-in to group membership is a much clearer manifestation of informed consent, in terms of accepting the potential preclusive effects of introducing the class action. At the same time, this approach guides procedural settlement between consumers plaintiffs and professionals' defendants in litigious circumstances, such as the opting-in mechanisms, mainly since opt-in procedural mechanism suffers less from a representativeness deficit than opt-out systemic approaches to third-party interventions in civil and commercial litigation.

Perhaps more troubling is the aspect of voluntary joinder of complaints, in the cases of multiple consumers' claims against the effects of unfair contractual terms, in injunctive procedures; the qualified entities, such as consumer associations may use an opting-out mechanism in order to obtain an injunction decision imposing the professional to cease the use of the respective unfair terms and to remove the respective clauses from all contracts, including those signed by consumers who did not express an explicit consent to be included, nor excluded (opting-out system). Subsequently, after the emission of the judge's decision in the opting-out injunctive procedure, individual consumers may use an opting-in collective mechanism for compensatory relief⁴⁵ (not specifically regulated) aiming to obtain reimbursement of the payments made as an effect of the unfair contractual terms. The use of an opting-in compensatory relief mechanism is not necessarily subsequent to the admission of qualified entities' opting-out action. Therefore, in my views, opting-out mechanisms are more compatible with the injunctive procedures (the professional being ordered to

cease the use of unfair terms in all future and present contracts, all consumers automatically benefiting from that measure, unless an auto-exclusion act is emitted); opting-in mechanisms are also useful in compensatory relief collective claims (the necessity of establishing individual/total amount of mass prejudice).¹⁶

Recognising that class actions are inexorably tied up with an opting-in class action in compensation is based on consumers' voluntarily consenting to be part of litigation and aiming to obtain reimbursement of the payments previously made as an effect of the unfair contractual terms the avoidance of which has been previously obtained in court. The material/substantial sphere of incidence, for such class actions, would be limited, in my views, to consumer claims based on the avoidance of unfair contractual terms, while its subjective or personal sphere of incidence is limited to qualified entities representing the legitimate interests of consumers, such as associations for consumer protection. In my opinion, the judicial appeal in consumers' class actions should be expressly regulated,¹⁷ in terms of establishing who can be the appellant (e.g. reciprocal representatives, qualified consumer associations, compulsory interveners such as insurance companies), as well as the procedural terms of notification (for example, up to 45 days from the notification of intervening consumers on the judge's decision in first instance). Let us note, however, that there are no punitive effects of the mentioned procedural mechanism; thus, the professional defendant would not face an obligation to reimburse certain sums exceeding those effectively paid by the consumers' plaintiffs, as consequential effects of the avoidance of the unfair contractual terms. Obviously, between consumers and third-party interveners, the pre-

litigation agreements and settlements are admissible in injunctive redress, as well as in compensatory class action.

Although it may seem counterintuitive at first, the joinder mechanism regulated by the revised version of articles 12-13 of Law no. 193/2000, on unfair terms in consumer contracts, is limited to injunctive relief, while compensatory relief of consumers' complaints is available by means of individual actions or by common mandate of procedural representation¹⁸ under the general provisions on multiple participation in civil and commercial litigation.

5 Problematic of multiple compensatory claims

It should be emphasised that the injunctive relief mechanism (on collective basis) available to consumer organisations is not limited to the sphere of actions in avoidance of unfair contractual provisions; instead, it is also applicable in the case of competitors whose legitimate interests have been affected by an unfair commercial practice of a concurrent professional, followed by a subsequent compensatory relief (on individual basis). The mentioned mechanisms are described in article 64, paragraphs (5) and (6) of Law no. 21/1996, re-published in February 29th, 2016 on fair competition,¹⁹ stating that '(5) Natural or legal persons who consider themselves to have been prejudiced by a commercial practice forbidden by legal provisions on competition, may introduce a subsidiary claim in compensation during the next two years from the date on which the decision of the Competition Committee remained final or has been confirmed by a court decision. (6) The compensatory claim may also be introduced by an organisation for consumer protection legally registered, as well as by a professional organisation

representing the competitors whose legitimate interests have been affected by the anti-competition practice, based on their specific mandate of representation.’

When permissive joinder of professional defenders is concerned, if one or more consumers, as plaintiffs, have a pecuniary claim against multiple professional defendant, who are jointly liable for the prejudice caused,²⁰ either in terms of strict liability on objective premises, either in the form of liability based on professional’s fault, these defendants may be jointly held as litigating parties. In my opinion, for this effect to be taken into account, the consumer’s claims against the professional co-defendants must arise from a series of similar circumstances or be based on a common causal act/omission to act imputable to the professionals.

Alternatively, the opting-out collective mechanism for qualified entities regulated by articles 12-13 of Law no. 193/2000, on unfair terms in consumer contracts is limited to injunctive relief. Subsequently, after the emission of the judge’s decision in the opting-out injunctive procedure, individual consumers may introduce claims for compensatory relief aiming to obtain reimbursement of the payments made as effect of the unfair contractual clauses.²¹ Amongst the intricacies of having compensatory mechanisms, it should be emphasised that the courts must respect, in our opinion, the principle that prejudice must be fully redressed and may not grant punitive damages; therefore, compensatory multi-party claims are likely to be more compatible with an opting-in system, especially in cases of multiple consumers being affected by the same culpable act or omission to act, as well as in the case of patrimonial loss recoverable on strict liability, in which case there is compulsory the establishing of the individual amount of prejudice based on individual claims of consumers.²² Nonetheless, the

recovery of expenses in injunctive procedures for qualified entities regulated by articles 12-13 of Law no. 193/2000, on unfair terms in consumer contracts, allow the qualified entities, such as consumer associations, to recover all costs of publicity in respect of the class action; horizontally, a compensatory opting-in mechanism is necessary in order to permit multiple consumers to give their consent to a litigious procedure on compensatory grounds.²³

6 Distinguishing 'necessary' from 'indispensable' interveners in consumers' complaints

According to the above-mentioned legal provisions on voluntary intervention in civil and commercial litigation, the consumer associations can apply for an injunctive infringement,²⁴ yet not for compensation for individual damages on the ground of Law. 193/2000 on unfair terms in consumer contracts). Prejudiced consumers have a choice of introducing separate or joint claims in avoidance of unfair terms in non-negotiated contracts.²⁵ As a result, it might be virtually impossible to conclude settlements in injunctive proceedings initiated by qualified entities, such as associations of consumer protection.²⁶ To emphasise the consumer's prerogative of introducing, on an individual basis, a direct action in avoidance of unfair clauses, it should be mentioned the use of the reciprocal mandate of representation in the common interest of the multiple plaintiffs.²⁷

One notable feature, in what concerns the notification of the proceedings, is the problematic of formal procedural sequences of notification of parties; several requirements are worth mentioning, such as

the obligation to adequately inform the intervening consumers on the stages of the proceedings on injunction orders, final decisions on measures eliminating continuing effects of the infringements, including final redress orders.²⁸ Legal practitioners experienced certain difficulties relying on the proper criteria for class action admissibility, such as the common cause, mass damage, similitude of members' prejudices,²⁹ non-sustainability of procedural joinder of claims or third parties as interveners in mass litigation.³⁰

The next landmark or specific difficulty lies with the facts that the criteria of compensating mass injury on are not legally set out, or the fact that possible future legal provisions on consumers' class action should separate compensation for damages to identified prejudiced parties, under the general terms of strict liability and the determination of compensation for compulsory interveners, on the other hand.³¹ The quantum of the procedural deposit would be set by the court, taking into account the probable total costs to be incurred by the litigating party in multiple-claim litigation.³² However, the cited legal provisions establish no strict criteria for sharing global compensation between injured parties in class actions, nor does it set out the possibility of payment of *moratoria* damages³³ (for the professional defendant who was causing deliberate or negligent delay in the payment of compensatory sums as stated in the judge's decision) in line with the general rules of strict liability compensation.³⁴

7 Concluding remarks

The use of the third-party intervention mechanism in consumer complaints is based on the rationale of allowing a third party or a subsequent

party to join a lawsuit engaged between the originating parties (consumer vs professional); where the claim emanates from the express assent of the intervenient, the procedural intervention will be voluntary, and it has been used in jurisprudence in litigious procedures involving consumers and credit professionals and also in actions in avoidance of unfair contractual provisions. Perhaps more significant is one of the main features of the subject of permissive joinder under Consumer Law that, in what concerns the representative actions by qualified entities, articles 12-13 of Law no. 193/2000, on unfair terms in consumer contracts, enabled qualified entities designated by legal provisions to bring representative actions in the general interest of consumers, strictly in the field of unfair terms in consumer contracts. As results from the previous sections of the study, the admissibility of the voluntary joinder depends on the type of redress sought by the consumer as a plaintiff; while it can be described as an opting-out mechanism regarding the injunctive relief instrument, it is describable an opting-in type of action when it comes to consumers' compensation actions.

The following conclusions may be pointed out, based on the assertions made in the preceding sections of this study:

(a) under the provisions of article 12, paragraph (3) of Law no. 193/2000, on unfair terms in consumer contracts, consumers are enabled to rely on the opting-out collective redress action, based on which the qualified entities, e.g. associations for consumer protection that fulfil the requirements set by the Governmental Ordinance no. 21/1992, respectively or the representatives of the National Authority for Consumer Protection, have the right to introduce judicial claims against unfair terms in consumer contracts;

(b) each consumer represented as litigant has the right to exclude himself/herself from the class action, if the consumer notifies the court prior to the date specified in the notice received; the consumer who, based on the mentioned opting-out mechanism, excludes himself or herself from the litigious action in compensation for the sums collected by the professionals based on void unfair terms, will not be bound by an adverse judgement and conversely, the consumer may not assert collateral peremptory exceptions;

(c) the prerequisites of typical litigious reasons in multiple-party litigation from the perspective of litigating consumers vs professionals would raise supplementary procedural obstacles, since not all incidental claims could have had the same proximate cause, nor would the same affirmative defences be applicable (e.g. assumption of contractual risk, strict liability and breaches of contractual warranties);

(d) the inter-pleader procedural mechanism may be used in cases in which the professional, whose strict liability or liability based on professional fault is discussed by the court, may request the pursuant/the consumer, acting as plaintiff, to argue out the claims against a third party who is also jointly liable;

(e) in the cases in which the effects of some procedural acts are contrasting or incompatible to the procedural acts made by other participants, only the most favourable acts will be opposable to the other litigating consumers;

(f) the court's decision requesting the professional to eliminate certain unfair terms from all existing contracts will benefit multiple consumers in relation to the respective professional unless there are individual consumers who exercise their right to auto-exclusion from

proceedings and who expressly prefer the remaining under the incidence of the original, unmodified contract;

(g) concerning the voluntary interveners in consumer vs professional litigation, the reciprocal mandates refer to the empowering of representatives with the conclusion of all procedural acts necessary for the discussing of the joint claims; similarly, the specific mandate should specify that it includes the mandate to agree to settlements or to introduce an action in revise of the court's decision.

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¹The Governmental Ordinance no. 21/1992 on consumer protection was republished in the Official Monitor no. 1018 from December 21st, 2006 and was modified by Law no. 157/2015 (published in the Official Monitor no. 449 from June 23rd 2015) and by the Governmental Ordinance no. 37/2015 for the revise of certain provisions on consumer protection (published in the Official Monitor no. 654 from August 28, 2015), lately modified by Law no. 51/2016 on the revise of certain legal provisions on consumer protection (Published in the Official Monitor no. 257 from April 6th, 2016).

² The problematics of minimum safeguards that might be inserted, touches the core of the debates on permissive joinder under the provisions of Consumer Law, concerning: (i) postulating the principle that no punitive damages may be inflicted upon the defendant, other than the compensatory damages for effective loss; (ii) setting the objective criteria for third party funding of collective actions; (iii) setting out adequate criteria for group/entities certification.

³ In recent jurisprudence, legal practitioners witnessed a trend towards a growing use of multiple-party redress mechanisms in the field of collective actions in avoidance of unfair banking terms in consumer credit contracts, favoured by the large number of consumer credit contracts in which the allegedly unfair terms were inserted; e.g., up to 400 clients of the same bank creditor opted in for a multiple compensatory claim and requesting the refund of the sums previously paid as the effect of unfair terms on onerous banking services. See our comment on actions in avoidance of unfair contractual terms, Juanita GOICOVICI, 'Elementele constitutive ale practicilor comerciale neloiale în relațiile cu consumatorii', *Studia Universitatis Babeş-Bolyai. Jurisprudentia*, 3/2016, note 12.

⁴ It should be mentioned that Law no. 193/2000, on unfair terms in consumer contracts, was republished in the Official Monitor no. 543 from August 3rd, 2012 and it has been modified by the Extraordinary Governmental Ordinance no. 34/2014

on consumers' rights in contracts concluded between consumers and professionals and for the revise of certain legal provisions on consumer protection (published in the Official Monitor no. 427 from June 11, 2014).

⁵ Romanian jurisprudence only made random usage of the mechanism of judicial avoidance of abusive clauses in the case of bank general provisions; a two-fold approach would appear to be emerging with regard to contractual obligations generated by general banking clauses, separating those which result from a referential clause and those terms which arise out of an express agreement between the creditor and the debtor/consumer.

⁶ For further details on common interest mandates, see Dan CHIRICĂ, *Contracte speciale*, 1st volume, C. H. Beck, Bucharest, 2015, pp. 211-214. For the topics of avoidance of unfair terms, see Lucian BERCEA, *Contractul de credit bancar*, Universul Juridic, Bucharest, 2014, pp. 96-104; Cristiana Dana ENACHE, *Clauzele abuzive în contractele încheiate între profesioniști și consumatori. Practică judiciară*, Hamangiu, Bucharest, 2012, pp. 54-77; Dumitru FLORESCU, Adrian BORDEA, Roxana POPA, *Contractul de credit bancar*, Universul Juridic, Bucharest, 2013, pp. 44-71; Juanita GOICOVICI, *Dicționar de Dreptul consumului*, C. H. Beck, Bucharest, 2010, pp. 81-94; Juanita GOICOVICI, *Creditele pentru consum și de investiții imobiliare*, C. H. Beck, Bucharest, 2014, pp. 67-89; Andrei PAP, *Clauzele abuzive și drepturile consumatorilor în legislația Uniunii Europene*, Universul Juridic, Bucharest, 2017, pp. 112-116; Adriana PENA, *Clauzele abuzive în contractele de credit. Practică judiciară*, Hamangiu, Bucharest, 2017, pp. 37-49; Gheorghe PIPEREA, *Protecția consumatorilor în contractele comerciale*, C. H. Beck, Bucharest, 2018, pp. 96-103; Viorel TERZEA, *Protecția consumatorilor – Jurisprudența Curții de Justiție a Uniunii Europene*, Universul Juridic, Bucharest, 2016, pp. 29-71; Felix TUDORIU, Cristina Aurora POPIRȚAC, *Drepturile consumatorului. O provocare pentru afaceri*, Universul Juridic, Bucharest, 2013, pp. 79-83.

⁷ See Jean CALAIS-AULOY, Henri TEMPLE, *Droit de la consommation*, 9e édition, Dalloz, Paris, 2015, pp. 185-208 ; Yves PICOD, *Droit de la consommation*, 5e édition, Sirey, Paris, 2018, pp. 139-156; Delphine BAZIN-BEUST, *Droit de la consommation*, Gualino, Paris, 2018, pp. 78-112; Jerome JULIEN, *Droit de la consommation*, L. G. D. J. , Paris, 2018, pp. 56-64; Sophie le GAC-PECH, *Droit de la consommation*, Dalloz, Paris, 2017, pp. 96-111; Guy RAYMOND, *Droit de la consommation*, LexisNexis, Paris, 2017, pp. 1118-134; Stephane PIEDELIEVRE, *Droit de la consommation*, Economica, Paris, 2014, pp. 342-36.

⁸ See Jean CALAIS-AULOY, Henri TEMPLE, *op. cit.*, pp. 133-141.

⁹ Avoiding the artificial character of numerical standards for group admission is also crucial; for instance, requesting consumer groups to overpass a fixed number of consumers joining, up to a minimum of 600 members, might deter smaller groups to use collective redress mechanisms; nevertheless, the existence of a group would be considered starting from at least two persons the legitimate interests of whom have been prejudiced by a common event.

- ¹⁰ See Yves PICOD, *Droit de la consommation*, cit. supra, pp. 109-110.
- ¹¹ See Dumitru DOBREV, 'Examen de practică neunitară a instanțelor în materia clauzelor abuzive din unele contracte bancare', *Revista Română de Drept al Afacerilor*, 8/2015, pp. 105-110.
- ¹² Idem, p. 106.
- ¹³ Idem, p. 109.
- ¹⁴ Ibidem.
- ¹⁵ See Sophie le GAC-PECH, op. cit., pp. 97-102.
- ¹⁶ See Jerome JULIEN, op. cit., pp. 59-64.
- ¹⁷ See, for further details, Ioan ILIEȘ NEAMȚ, *Acțiunea colectivă ca mijloc de reparare a prejudiciilor în masă*, Universul Juridic, Bucharest, 2017, pp. 532-536; Elisabeta ROȘU, *Acțiunea civilă. Condiții de exercitare. Abuzul de drept*, C. H. Beck, Bucharest, 2010, pp. 214-217; Mihaela TĂBĂRCĂ, *Drept procesual civil*, 1st volume, Universul Juridic, Bucharest, 2013, pp. 278-281; Lucian BERCEA, 'Acțiunile colective în eliminarea clauzelor abuzive din contractele standard de consum. Cui prodest?', *Revista Română de Drept Privat*, 3/2013, pp. 24-36; Dumitru DOBREV, op. cit., pp. 105-110.
- ¹⁸ See Elisabeta ROȘU, op. cit., pp. 119-121.
- ¹⁹ Law no. 21/1996 on competition was republished in the Official Monitor no. 153/February 29th, 2016.
- ²⁰ See Ioan ILIEȘ NEAMȚ, op. cit., pp. 79-82.
- ²¹ See Jean-Denis PELLIER, *Droit de la consommation*, Dalloz, Paris, 2016, pp. 93-108 for comments on avoidance of unfair contractual terms in contracts concluded between consumers and professionals.
- ²² See Delphine BAZIN-BEUST, op. cit., pp. 112-114.
- ²³ See Ioan ILIEȘ NEAMȚ, op. cit., pp. 96-98.
- ²⁴ See Dumitru DOBREV, op. cit., pp. 108-109.
- ²⁵ See Jean CALAIS-AULOY, Henri TEMPLE, op. cit., pp. 207-209.
- ²⁶ See Felix TUDORIU, Cristina Aurora POPIRȚAC, op. cit., pp. 84-85.
- ²⁷ See Ioan ILIEȘ NEAMȚ, op. cit., pp. 96-101.
- ²⁸ The revised article 51, paragraph (5) of the Governmental Ordinance no. 21/1992 on consumer legal protection is incidental in these hypotheses.
- ²⁹ See, for further comments, Rachael MULHERON, *The class action in Common Law legal systems – A comparative perspective*, Hart Publishing, Oxford, 2004, pp. 86-91; Robert KLONOFF, *Class Actions and other multi-party litigation in a nutshell*, West Academic Press, Minnesota, 2012, pp. 56-72.
- ³⁰ See, for details, Elisabeta ROȘU, op. cit., pp. 226-232; Florin MANGU, *Răspunderea civilă delictuală obiectivă*, Universul Juridic, Bucharest, 2015, pp. 78-83; Lucian BERCEA, 'Efectele erga omnes ale hotărârilor judecătorești pronunțate în acțiunile în eliminarea clauzelor abuzive din contractele standard de consum', *Revista Română de Drept al Afacerilor*, 7/2013, pp. 41-50; Bordan ȚENE, 'Clauze abuzive în

contractele de credit, așa cum rezultă din practica judiciară’, *Revista Română de Drept al Afacerilor*, 3/2016, pp. 26-32.

³¹ See Ioan ILIEȘ NEAMȚ, *op. cit.*, pp. 81-95.

³² See Cyril NOBLOT, *Droit de la consommation*, L. G. D. J. , Paris, 2012, pp. 113-119, on the subject of professionals’ strict liability.

³³ See Vincent THOMAS, *La médiation de la consommation*, LexisNexis, Paris, 2018, pp. 67-83, on the problematic of punitive and compensatory damages in consumers’ complaints.

³⁴ See Lucian BERCEA, ‘Acțiunile colective în eliminarea clauzelor abuzive din contractele standard de consum. Cui prodest?’, *cit. supra*, pp. 26-27.