



**Directive 2011/7/EU on combating late payment in commercial transactions, as transposed into Romanian legislation by Law no. 72/2013. Theoretical and practical issues.**

**I. Foreword**

By enacting Directive 2011/7/EU on combating late payment in commercial transactions (hereinafter referred to as “*The Directive*”), the European Parliament and Council laid down comprehensive rules, meant to enhance the protection granted to creditors, particularly small and medium-sized enterprises (SMEs).

As such, the Directive aims, for reasons of clarity and rationalisation, to recast the provisions set out by the previous Directive 2000/35/EC, member states being bound to transpose the Directive by late March 16<sup>th</sup> 2013.

With a slight delay, Romania transposed the Directive on the 5<sup>th</sup> of April 2013, by adopting Law no. 72/2013 regarding measures for avoiding late payment of sums arising from agreements concluded between professionals and between professionals and public authorities (hereinafter referred to as “*Law no. 72/2013*”, or “*the Romanian Legislation*”).

Previous transpositions measures have also been adopted, namely by Law no. 287/2009 - the Civil Code, Government Ordinance no. 13/2011 regarding remunerative interest and default interest for monetary obligations, as well as by Law no. 134/2010 - the Civil Procedures Code – particularly the provisions regarding the procedure of payment order.

At first sight, the transposition measures adopted by Romania and mentioned above represent a rigorous reproduction of the European counterpart. Nonetheless, several key differences exist and offset the Romanian legal framework.

Those differences set out by Law no. 72/2013 shall be thoroughly analysed hereinafter.

**II. Law no. 72/2013. Specific provisions**

**1. Subject matter and scope**

In line with the scope of the Directive, Law no. 72/2013 expressly sets out to improve competition within the Romanian business market, as part of the European Union Internal Market. However, Law no. 72/2013 does not expressly declare the intention of protecting small and medium-sized enterprises, although measures in this respect are provided within the section regulating unfair contractual terms and practices.

Furthermore, the Romanian legislator expressly opted to provide that receivables against a debtor undergoing insolvency procedures or amicable debt settlement shall not be governed by the provisions of Law no.72/2013.

Regarding the legal entities which are subject to the provisions of Law no. 72/2013, the Romanian legislation does not comprise major differences from the Directive. As such, Law no. 72/2013 shall apply to agreements concluded between professionals, and between professionals and public authorities.



Thus, on the one hand, it can be observed that the Romanian legislator focuses on regulating combating late payment by public authorities. The memorandum of reasons which preceded the adoption of Law no. 72/2013 expressly states that the new legislation endeavours to persuade public authorities to perform agreements within a term as short as possible.

In practice, this may prove as a challenge for public authorities, given that modifications to the general budget are needed, within a relatively short period of time. Furthermore, internal regulations of public authorities may prove to need modifications as well. As such, breaches of contract by public authorities are still foreseeable, impairing the very design of the new legislation.

On the other hand, regarding agreements concluded by professionals, it must be pointed out that the term “professional” shall be interpreted in accordance with the provisions of the Romanian Civil Code as being natural or legal persons who exploit a business in order to gain profit. As such, the provisions of Law no. 72/2013 complement the previous Romanian legal framework.

## **2. Unfair contractual terms and conditions**

One of the key-provisions laid down by Law no. 72/2013 stipulates that unfair contractual terms and conditions shall be deemed as null and void.

This provision aims to fulfil the very scope of Law no. 72/2013, by circumventing illicit practices and by urging the parties to pay explicit attention to clauses regarding, but not limited to, the date or period for payment, the rate of interest for late payment or the compensation for recovery costs, should such a clause be grossly unfair to the creditor.

Furthermore, court of laws shall be the only body empowered to judge whether a contractual term or condition may be deemed as unfair, by taking into consideration all aspects of the case. Also, the Romanian legislator has paid particular attention to the legal criteria stipulated by the Directive for assessing whether a clause is unfair.

As such, given that member states are expressly allowed to provide national measures which not only transpose the Directive<sup>1</sup>, but also secure new measures for protecting creditors, Law no. 72/2013 comes into the aid of small and medium-sized enterprises, stipulating that the position of the parties when entering the agreement may account as terms for unfair clauses, namely the dominant position of the counterpart.

This legal criterion may prove particularly useful in regards to agreements concluded between small and medium-sized enterprises and public authorities.<sup>2</sup>

Furthermore, Law no. 72/2013 provides that certain clauses shall be deemed as unfair, without the need to be subjected to judgement of court, clauses which:

- Set default interest of lower value than the legal default interest;

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<sup>1</sup> According to Directive article 12 pt. 3, “Member States may maintain or bring into force provisions which are more favorable to the creditor than provisions necessary to comply with this Directive”.

<sup>2</sup> In this respect, the National Council of SMEs in Romania expressly backed these provisions of Law no. 72/2013 during the legislative process and not only.

<http://cnipmmr.wordpress.com/2013/04/09/cnipmmr-saluta-adoptarea-legii-privind-combaterea-platilor-intarziate/#more-533>



- Comprises obligation to put in default in order to grant right for interest;
- Set a longer term upon which lapse the creditor shall be entitled to claim interest, in respect to national provisions as transposing the Directive;
- Set a longer term upon which lapse the creditor shall be entitled to claim interest, regarding the agreements concluded between professionals and public authorities, in respect to national provisions as transposing the Directive.

Another key addition made by Law no. 72/2013 regards the application of law in time, namely which contracts<sup>3</sup> shall be subject to the provisions of Law no 72/2013. As such, the Romanian legislator expressly states that the provisions mentioned above regarding the penalty for unfair clauses – to be regarded as null and void – shall apply not only to agreements concluded after the entry into force of Law no. 72/2013, but also to agreements concluded prior to this moment.

The solution adopted by Romanian law may prove too enthusiastic, given that parties which in good faith entered into agreements prior to the entry into force of Law no 72/2013 may be affected by unpredictable changes of legislation, with possible dire effects.

Furthermore, these retroactive effects of Law no. 72/2013 may generate unwanted litigation between professionals; in order to avoid this, it can be argued that a practical solution may be found by conventionally amending the provisions in question by the parties, should such a solution be agreed upon.

### **3. Other specific provisions. Issuance of invoices. Penalty**

In accordance with Law no. 72/2013, the parties, whether professionals or public authorities, cannot conventionally set a term within which to issue/receive the invoice, under the penalty that such a clause shall be deemed as null and void. This provision aims to restrict bad-faith parties from evading the terms for payment set out by Law no. 72/2013.

### **4. Conclusions**

In all, Law no. 72/2013 lays out rules which favour creditors and should prove effective in avoiding late payments. However, several provisions require amending, for lack of clarity or for proving as too intrusive.

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<sup>3</sup> According to Directive article 12 pt. 4, *“In transposing the Directive, Member States shall decide whether to exclude contracts concluded before 16 March 2013”*.