

Bulgarian perspectives on the abuse of rights in lights of the Directive 2011/7/EU on combating late payment in commercial transactions¹

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Abstract

*The subject matter of this research is the abuse of rights in context of the late payment in commercial transaction. The abuse of rights as a law concept is well known in continental law families dates back to ancient Roman law. Considering the vision of the Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transaction³ the Bulgarian legislation offers a new point of view of that concept which is currently been discussed in this article as a new law concept. That point of view has been considered by the author as an abuse of interests instead of abuse of rights. That vision was legislative introduced by the provisions of Art. 303a, paragraph 1-2 BCA and Art. 309a, paragraph 3 BCA in response to the requirement of *acquis communautaire*⁴. As well as the abuse of interests is considered as a new law concept there is a necessity of a clear explanation of that notion and criteria for distinguish it from the old concept of the abuse of rights.*

Keywords: *abuse of rights; BCA – Bulgarian Commerce Act; OCA – Obligations and Contracts Act; CRB – Constitution of the Republic of Bulgaria; BGB – Bürgerliches Gesetzbuch; ABGB - Allgemeines Bürgerliche Gesetzbuch.*

JEL Classification: K20, K22, K33

1. Introduction

The term “abuse” can be found in different legal texts of the Bulgarian Commerce Code. We find it in the headline of Article 289 BCA and in the context of the three others – Article 303a, Paragraph 1 and 2 BCA and Article 309a, Paragraph 3 BCA. We logically presume *prima facie* that the notion of “abuse” is a uniform concept. Nevertheless, the legal provisions constitute a doubt. Such doubt stems from the phrases, which has used in the legal texts. In some cases, there is an “abuse of right”, but in the others certain actions are recognizes as “abuse of interest”. Such substantive difference disproves the concept of the uniform notion of “abuse”. However, the veracity of this concept should be verified.

¹ OJ, L 48/23.02.2011.

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³ For convenience to readers the name Directive 2011/7/EU of the EP and of the Council on combating late payment by commercial transaction will be simply used in context of the article as “The Directive”.

⁴ Community *acquis*.

2. “Right” vs “Interest” and Abuses of them. Reaction of the System

2.1 Terminology

The content of the “right” is not identical with the content of the “interest”. The existence of a given right is considered as a power, which can be “used” or “abused”. At philosophical point of view, the subjective rights are not a physical matter. Therefore, we physically could not use a given right. We exercise⁵ them. In this sense, the wrongful use of right would have had the name “wrong exercising”. Instead that name in present study will be placed the term “abuse” as well-known and approbated.

2.2 Doctrine view of the subjective right

According to the popular belief in the doctrine the right is recognized by the law as a person`s ability to act with certain behaviour and to require from another person to act in compliance with that behaviour⁶. The right exists for purpose to satisfy somebody else`s interest. The satisfaction of the interest is perceived by everyone in a social community as normal, and therefore is tolerated.

2.3 Interest as a purpose of a given right

The interest is not part of the contents of the subjective right⁷. The interest is a purpose of exercising the right. Therefore, even from a semantic point of view, interest is being “pursued”. The law recognizes the existence of the subjective right as a sort of instrument of its holder to satisfy its needs. The conclusion is legally justified: people exercise their rights to satisfy their interests (Art. 8, Para. 2 OCA). The stipulation of law is clear. The interest is definitely not identifiable with the right⁸, since the difference between right and interest is legally enforced.

Despite the legality of the term “interest”, it is thoroughly explained by the sociology, the object of which is the social systems. Therefore, interest is considered both as social and legal category. According to the sociology the interest is a value relation to the surrounding material and spiritual world⁹. But it is selective by reason of its connection with the process of wealth distribution in

⁵ H. Kelsen, *Subjektives Recht: Berechtigung und Ermaechtigung*. Deutsche Verlag. Wien. 1960, Bulgarian translation St. Yotov. *Subjective rights: German visions*, Sofia Press “Criticism and Humanism” 2016, pp. 44, 57.

⁶ V. Tadzher, *Civil Law of the Republic of Bulgaria. General Part*. Section I, Sofia: Sophie-R 2001, p. 359; like M. Pavlova, *Civil law. General Part*. 2nd ed., Sofia: Sophie-R 2002, p. 173.

⁷ M. Pavlova, *op. cit.*, p. 173.

⁸ The theory of subjective right as legally protected interest, developed by Jhering in the past, today is not recognised as correct.

⁹ M. Semov, quoted by S. Marinova, *The interest in the law*, in *Research papers of the University of Rousse*, 2011, volume 50, series 7, pp. 96-102.

society¹⁰. Being in a community, the individuals form their interests thanks to this community, in which legal rules of conduct, ethical standards, traditions and customs function.

2.4 The society as a governor of the interest

In this sense, the community is not only a catalyst for the process of forming interests, but also a stopper due to the existence of a common measure in the community itself for reasonableness and rationality of the particular individual's interest¹¹. Any kind of irrational interest alerts the community and causes a response to its rejection for the purpose of self-preservation. As far as the interest is intangible and has only an ideal existence, the system can not "see" it before its embodiment in a reality. The system reacts to a visible objective action, not an invisible subjective attitude. The external act of pursuing the interest is usually dressed in a legal form, normally used and formally admitted. The most common used instrument for that purpose is the contract. Making a contract is encouraged by the system. The contract is an instrument of distribution of goods and services. Wealth distribution is normal when it is useful to members of the system and fair according to the public beliefs. The system reacts only when using the contract leads to an unfair distribution of goods and services. This injustice affects the society, not only individuals. The law prevents this adverse effect through setting out mechanism for counteraction. Such mechanism is the recognition of the prohibition of abuse of rights as a legal principle. This prohibition is perceived as a value, because it guards the fair wealth distribution in the society and prevents the conflicts within that society. Its perception of social value is based on the ideas of "good" and "wrong". In other words, if the fair is the desired "good" and the abuse of rights has the ability to destroy it, then such abuse is recognized as the "wrong" that should be eliminated.

3. Abuse of rights in commercial law

The abuse of rights is a concept, which origin is in the international public law¹². The concept was aimed condemnation the abuse of public authority with discretion functions. In contemporary approach the abuse of rights spreads also in field of the private law.

¹⁰ S. Marinova, *op. cit.*, pp. 96-102.

¹¹ *Ibid.*

¹² Byers, M., *Abuse of Rights: An Old Principle, a New Age*. 47 McGill L.J. 389, 2002; Lenaerts, A., *The General Principle of the Prohibition of Abuse of Rights: A Critical Position on Its Role in a Codified European Contract Law*, „European Review of Private Law”, 6, 2010, p. 1121-1154; Taylor, G. D. S., *The Content of the Rule Against Abuse of Rights in International Law*, 46 Brit. Y. B. Int. L. 323, 1972-1973.

3.1 Natural state of a war of everyone against everyone

It is well known that each society is able to regain the natural state of the “war of everyone against everyone”¹³. That’s why as a society we need law, which brings order and governs our relationships with each other. The Bulgarian Constitution prohibits any kind of abuse when “*there is an infringement of rights and lawful interests of others*” (Art. 57, Para. 2 of the Constitution of the Republic of Bulgaria). The purpose of the law is to set boundaries in the actions of legal persons. The historical experience has shown that everyone is prone to an abuse of granted power¹⁴. Limits to the allowed exercise of own rights are somebody else’s rights and legitimate interests. Behind constitutional decree stands the simple maxim of law that everyone is completely free to do what is not harmful to others¹⁵. In the long term, the constitutional ban pursues the preservation of the society and prevents the destructive conflict within it. The abuse of rights has a special projection in the commercial legislation.

3.2 Vision of the national law against the conflicts in the society

According to the provisions of Art. 289 BCA the exercise of right on the basis of a commercial transaction is unacceptable if it is carried out only with the intention of harming the other party in the relationship. The provision penalizes wrongful actions, deriving only from commercial transactions^{16,17}. The provision extracts two-component set of facts comprising an objective and subjective elements. The objective element requires such behaviour by which one of the parties exercises his right in wrongful manner. The subjective element is so called *animus nocendi*. The damage caused is not an element of the abuse of rights. Such may not follow. The abuse of right manifests itself in the narrow boundaries between the freedom to act and the obligation not to cause harm by that action. If the action causes damages, the wrongful conduct will be assumed as a tort.

3.3 Constitutive elements of abuse of rights

Two essential elements constitute abuse of rights. The first one is an existence of a valid commercial transaction and valid right origin from it. This right should be executable and not terminated at the time of its exercise¹⁸. The second

¹³ T. Hobbes, quoted by G. Yankov, *Political Thought from Ancient Times to the Present Day*, 2nd ed., Sofia University Press 1999, p. 51.

¹⁴ Montesquieu, quoted by G. Yankov, *op. cit.*, p. 73.

¹⁵ J.J. Rousseau, quoted by G. Yankov, *op. cit.*, p. 82.

¹⁶ Definition of a commercial transaction under national legislation – see Art. 286 and 287 Bulgarian Commerce Act.

¹⁷ Definition of a commercial transaction according to European legislation - see Art. 2 § 1 of Directive 2011/7/EU and the Council.

¹⁸ G. Horozov, *Abuse of right resulting from the commercial transaction* in „Commercial and Contractual Law”, 2015, N. 2, pp. 18-26: the author rightly challenged decisions of the judicial

one is an ill will to harm others by exercising the given right. The provision prohibits any wrong exercise of the given rights¹⁹, in conflict with their social function and purpose²⁰ (Art. 8, Para. 2 OCA). The law focuses on unlawful conduct, but imposes sanction only when the action is undertaken by ill will. Obviously, the Bulgarian law perceives the subjective theory for abuse of rights like the German (§ 226 BGB)²¹ and Austrian law (§ 1295 Abs. 2 ABGB)²². Strict interpretation of the provisions leads to conclusion that the abuse of rights occurs when the only motive of the individual exercising the right is to cause harm to the other party. This conclusion is made by reason of using the word “only” in the legal text. In such wording, the law is not able to manifest its action. There is a dead law. This is so because the commercial transactions are remedies for achieving an economic prosperity. The motive in commercial transactions is associated with the pursuit of greater or lesser profit. At the same time, during the pursuing of economic benefit the creditor is being aware that his action may cause damage. The intent to harm always is accompanied by intention to gain economic profit. The economic benefit is pursued with the knowledge that its achievement will cause damage for sure. Because there always are combined motives, we should find the leading and decisive motive for that action²³. The constant case-law tends to this idea²⁴.

3.4 Example

For example, creditor K owns a promissory note and has a right to receive 10 000 Euro from debtor D. At the same time, he has a right to receive 10 000 Euro from the same debtor by a contract guaranteed by that promissory note. If the debtor D pays to creditor K 10 000 Euro, the debtor D is no more obligated to creditor K neither by the promissory note, nor by the contract. Formally, the promissory note and the contract are different legal grounds of obligations. But knowing that the debtor was already paid on ground of the promissory note, K

practice, equalizing the abuse of right with infringement of morality. A transaction, concluded in contradiction with morality is invalid (Art. 26, Para. 1, Obligations and Contracts Act), whereas in the case of abuse of rights the transaction is valid, but the actual acquired subjective right has been illegally exercised.

¹⁹ P. Goleva, *Commercial Law. Second Part. Commercial Transaction*, Sofia: Apis 2015, p. 76; M. Pavlova, *op. cit.*, p. 211.

²⁰ V. Tadzher, *op. cit.*, p. 420; O. Gerdzhikov, *Commercial Transactions*. 4th ed., Sofia Press “Labour and law” 2015, p. 36.

²¹ Available on: <http://www.gesetze-im-internet.de/bgb/BGB.pdf>, consulted on 1.10.2019.

²² Available on: <https://www.ris.bka.gv.at/Bundesrecht/>, consulted on 1.10.2019.

²³ A. Ivanov, *Commercial transactions and bankruptcy with the synthesis of jurisprudence*, Sofia: Ciela 2017, p. 34; O. Gerdzhikov, *op. cit.*, p. 37; D. Nachev, *On the Concept of Abuse of Right*, „Scientific Works of the Institute of the State and Law”, Volume VIII. Sofia: Bulgarian Academy of Sciences, 2013, pp. 230-243.

²⁴ Decision No. 26 of 24.04.2014 on Commercial Case No. 1027/2013, Section II of Supreme Court of Cassation; Decision No 120 of 30.07.2010 on Commercial Case No. 988/2009, Section II of Supreme Court of Cassation; Decision No 17 of 21.04.2011 on Commercial Case No. 213/2010, Section II of Supreme Court of Cassation.

could not claim that money on ground of a contract. If he does so, he will carry out an abuse. The creditor's motive is economic - he will receive a benefit, which under the circumstances he does not follow. In this case the creditor also assumes that his action will be detrimental to the debtor. The creditor demonstrates *animus nocendi* as a dominant motive, which determines his behaviour. Finding that motive is sufficient step to detect an abuse of rights. The intention of damaging (*animus nocendi*) is associated with a wilful behaviour, despite the knowledge of its harmful outcome.

4. Abuse of interest as a special form of abuse of rights

4.1 Vision of the European legislation

The "abuse of interest" is a new concept for the commercial law. It was introduced by the provisions of Art. 303a, Para. 1 and 2 BCA²⁵ and Art. 309, Para. 3 BCA²⁶ in response to the requirement of the European legislature to transpose Directive 2011/7/EU of the European Parliament and of the Council dated 16.02.2011. The concept can only be considered in the context of the Directive and in view of the objectives it pursues²⁷. On the basis of monitoring and experience, the European legislature has "seen" contractual practices with a negative impact on the functioning of the single internal market.

In the internal market was found a common practice for settling unjustifiably long deadlines for payments imposed by the economically stronger party in whose favour the term has been agreed. Such contractual terms provide a competitive advantage to one of the parties. In respect of that only one party may operate longer on the market with alien funds as well. A lack of financial resources is proved detrimental especially to creditors with the status of small and medium-sized enterprises, supporting the viability of the internal single market. It was necessary such contractual terms or practices to be discouraged (Recital 12 of the Preamble to the Directive), so the European legislator set itself the task of 'combating late payments in commercial transactions' (Art. 1, § 1 of the Directive).

4.2 The freedom of a Member State to settle adequate measures

Each Member State become a freedom to settle alternative measures by which certain contractual practices are considered either not applicable or applicable, but their use may be recognized as a ground of claim for damages (Art. 7 § 1 of the Directive). Based on that freedom the Bulgarian Parliament introduces

²⁵ Implemented by § 2 from the Transitional provision of the Amendment Act of the Bulgarian Commerce Act, promulgated in State Gazette, Issue N 20/28.02.2013.

²⁶ Implemented by § 3 from the Transitional provision of the Amendment Act of the Bulgarian Commerce Act, promulgated in State Gazette, Issue N 20/28.02.2013.

²⁷ J.P. Jacquet, *Institutional Law of the European Union* (translation from French. St. Kliment Ohridski), Sofia University Press 2007, pp. 434-435: Stresses the obligation of the national judge to interpret the national law in the light of the Directive, even if it refers to situations which arose before the expiry of the period of the Directive, without to affect the principle of legal certainty.

special provisions, which promote a notion of “abuse of interest” as unlawful behaviour of the creditor. What instantly makes an impression is the fact that the Directive does not use the term “*abuse of interest*”. Instead, it uses expressions like “*abuse of freedom of contract to the detriment of the creditor*” and “*unfair to the creditor*” or in short “*abuse*”. This abuse may be obviously “*grossly unfair*” (Art. 7, § 2 and 3 of the Directive), but may be not. Such grossly unfair actions are forbidden (Art. 7, § 1 of the Directive).

According to the Directive any violation of good commercial practice contrary to good faith and fair dealing is unfair (Art. 7 § 1 (a) of the Directive) as long as it is gross (Art. 7, § 1 (b) of the Directive), taking into account the nature of the product or service offered. However, the commercial practice will be not unfair when “justifiable” circumstance occur. In other words, some practices will be not abusive when there is objective reason for: deviation from the statutory default interest rate for late payment, from the payment period or from the fixed sum of EUR 40 as a compensation for recovery cost (Art. 7, § 1 (c) of the Directive). Nevertheless, the justifiable circumstance is irrelevant if the contractual term or practice **excludes in general** the payment of default interest rate (Art. 7, § 2 of the Directive) or compensation for recovery costs (Art. 7 § 3 of the Directive). The legal text makes it clear that abuse of interest, referred to in the Directive as “grossly unfair” debtor`s act, is prohibited. This prohibition is established in favour of the creditor and protects its interests by satisfying its needs to save economic losses in the area of its professional undertaking. It makes an impression that the abuse is committed not by the creditor, but in respect to him. This abuse is not of right, but of freedom of contracting (Argument of recital 28 of the Directive). This freedom manifests itself in the process of creating the legal relationship, but does not constitute its contents. From this point of view, the freedom of contracting is not identified with the subjective right, but with the ability of individuals to determine the contents of their act of will.

4.3 Raison d'être of abuse of interests

The Directive protects the legitimate expectations of the creditor to collect his money in a reasonable period of time, to receive compensation for late payment within a reasonable amount and to rely on guaranteed compensation for recovery costs. The legitimate expectations (interests) are not rights. They exist before the rights occur and can be understood as subjective rights in process of their forming. Although they do not constitute subjective rights, the interests of the creditor may still be impaired by “malicious” creations of obstacles to their transformation into subjective rights. The prevention of “malicious” behaviour is to limit the autonomy of the free will.

The limits of this will are the good morals (Argument from Art. 303a, Para. 1-2 BCA and Art. 309a, Para. 3 BCA). The consequence of the excess of these limits is the invalidity of the contractual terms by reason of conflicting with good faith and fair dealing (Argument of Art. 26, Para. 1 OCA and Art. 7, § 1 of the Directive).

5. Conclusion

The interpretation of legal texts in the light of Directive 2011/7/EU of the European Parliament and of the Council leads to difference between abuse of interest and abuse of right. In the case of abuse of right, the creditor is the person, who acts abusively. In the case of abuse of interest such abusive behaviour has the debtor. There is abuse of right when the creditor exercises his free will to the detriment of the debtor, in contrast to the abuse of interest, when the debtor acts to the detriment of the creditor. In the case of abuse of right, the harming action is possible after the establishment of a subjective right. Contrary to that, in the case of abuse of interest such an action is possible in the process of forming the right. Nevertheless, in both cases the established bans act as legal remedies to protect the others. Despite the similarity of that legal function, the abuse of interests in commercial transactions can be considered as a special form of abuse of rights.

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