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.

PLEA AGREEMENT DURING THE CRIMINAL PROSECUTION OF A CRIMINAL TRIAL

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Abstract

The Plea Agreement is one of the latest institutions and one of the special procedures introduced by the New Romanian Criminal Procedure Code.
The Romanian procedure law adopted it because the State wanted a reduced cost of the justice action; thus, the courts would have fewer trials and the procedures would be accelerated. This work wants to analyze the congruity of this procedure with the right to a fair trial.

Keywords*: agreement, recognition, guilt, prosecutor, trial.*

1. Introduction

The Romanian quick social and economical development has been constantly claiming the need for adjusting the judicial system to the contemporary reality, for a good, prompt and efficient justice action.

One of the important institutions introduced among the special procedures, regulated by Title 4, Chapter 1 of the Special Part of the New Criminal Procedure Code, is represented by the plea agreement.

It is considered special because it is regulated mainly by some norms, derogatory from the normal procedure, applicable unitarily in solving criminal cases.

The special derogatory character draws from aspects concerning the limits of the law court assignment, the object of the trial, the rules set for the trial whenever the instance is informed about such agreement.

Some states have been using this special practice for a long time now. For instance, in the United Kingdom of Great Britain, the first pieces of evidence of this procedure date since 1743, whereas in the USA from 1804.

This work wants to study the circumstances of signing this type of agreement, used only during the criminal investigating stage.

We are going to analyze the duties of both the criminal prosecutor and his hierarchically superior, and at the same time, the obligations of the accused person when accessing this procedure during the criminal investigation stage of a criminal case.

2. Authors and procedure initiation

According to art 478 paragraph (1) Criminal Procedure Code, the defendant and the prosecutor are the authors of the plea agreement.

This document can be signed either by the prosecutor who investigates the criminal case, according to art. 56 paragraph (3) Criminal Procedure Code, or the prosecutor who supervises the criminal investigation carried out by criminal investigating bodies.

Pursuant to art 82, Criminal Procedure Code, the defendant is the person against whom a criminal action has been started. As the law doesn't make the difference, the plea agreement can be signed by both a natural and legal person[1] representing the defendant.

It is worth mentioning that when a defendant is confronted with a criminal prosecution for having committed several crimes, he has got the possibility, provided the legal requirements are complied with, to reach an agreement regarding only some of these offences. The rest of criminal deeds, not included in the plea deal, are to be subjected to the regular legal procedure.

At the beginning, the underage defendant was not allowed to access this procedure, neither personally nor through a legal representative. Nowadays, such restriction is no longer in force but its validity depends on the clearly expressed agreement of the underage legal representative[2].

When there are several defendants in the case, it is possible that only some of them to express their acceptance for a plea bargain; in such case, each of them will have a separate agreement, without affecting the presumption of innocence of those who haven't consented to the deal.

The capacity to initiate the procedure is valid for both of its authors.

Article 108 paragraph (4) thesis I of the Criminal Procedure Code states that "the judicial body must inform the defendant about the possibility to reach a plea agreement during the criminal prosecution". The defendant is informed about it and his other rights and

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[1] See N. Volonciu, A.S. Uzlău (coord.), *The New Criminal Procedure Code- commented*, 2nd edition, Hamangiu Publishing House, Bucharest, 2015, p. 1266.

[2] Paragraph (6) art. 478 Criminal Procedure Code has been amended by art II p. 118 of the Government Decision no 18/2016 on amending and completing Law no 286/2009 on Criminal Code, Law no 135/2010 on Criminal Procedure Code, also for completing art 31 paragraph (1) of Law no 304/2004 on judicial structure, Official Gazette No 38 /23.05. 2016.

obligations in writing, under signature, before his first hearing; in case of incapacity or refusal to sign, a minutes shall be drawn up pursuant to art 199 Criminal Procedure Code.

If the procedure is initiated by the defendant, though the law doesn't mention the form, the jurisprudence accepts it either as a written demand addressed to the prosecutor or an oral request put down in a minutes by the criminal prosecuting bodies.

Nevertheless, it is necessary to underline the fact that appealing to such procedure is recognized and guaranteed as a right rather than an obligation for its authors. So, any of them have the right to choose whether to initiate it or to refuse its initiating action done by the other author, if there are reasons to believe it is not favorable, or legal provisions are not observed. When the procedure is announced by one author or is already begun, the judicial body doesn't have to notify it to the victim, the civil party or to the responsible plaintiff party.

3. The object of the plea agreement

According to article 479 Criminal Procedure Code[3] "the plea agreement represents the recognition of the offence and the charge, object of the criminal action, and also the way and the length of the punishment, together with the manner of application of the educative measure or, if it is the case, the solution to give up or postpone the punishment order."

It is important to stress the fact that compared to the procedure of guilt recognition, the plea agreement includes both recognition of the offence and the acceptance of the charge. Pursuant to art 482 letter g) Criminal Procedure Code, this recognition must be expressed as a clearly identified statement and not as a result of an interpretation of the defendant attitude as silent recognition (for instance, when the defendant understands to make use of his right to remain silent and not to cooperate with the judicial authorities).

Yet, nothing stops the defendant or his layer to ask for the change of the legal classification of the offence before the procedure begins.

The statement given by the defendant according to art 109 Criminal Procedure Code, and recorded according to art 110 Criminal Procedure Code, even when he admits his guilt and the legal classification at that particular time, but before the beginning of the plea bargain procedure, cannot be considered as guilt recognition in the spirit of art 479 Criminal Procedure Code, because it is not a proof of evidence that can be used against the defendant.

As for the punishment, in the absence of a clear distinction, both the main punishment (fine or prison) and the secondary one are to be taken into account.

About the kind of punishment, according to art 485 paragraph (1) letter a. Criminal Procedure Code, stating the solutions to be ruled by the Court, (related to the plea bargain), the parties, meaning the prosecutor and the defendant accompanied by his lawyer, can agree upon the prison punishment as liberty deprivation measure (with or without accessory punishment or complementary punishments) or upon the fine, by negotiating their length and sum, or upon the application manner for the suspension of probation.

The solution reached through agreement could be waiving the punishment or postponing its application.

Besides the observance of general terms for concluding the plea agreement, the prosecutor must verify the compliance with the provisions of art 80 Criminal Procedure Code in order to reach the solution of waving the punishment application.

When the negotiation focuses on the solution of postponing the punishment application, the prosecutor must also verify the observance of provisions of art 83 Criminal Code; after that, they will negotiate the number of days for unpaid labor for the community and the obligations stated by art 85 paragraph (2).

When negotiating the punishment suspension, it is necessary to register the fulfillment of provisions of art 91 Criminal Code, establishing a clear supervision term[4], the number of days of unpaid labor for community and which obligations, stated by art 93 paragraph(2), Criminal Code, are to be ruled.

The presence of these supplementary conditions has a direct influence on the maximum punishment length admitted in case of plea agreement[5].

We have to underline the fact that, besides the possible acceptance of the plea agreement for the underage defendants, its object can be made up by the form and manner of the applied educative measure, but it is clear that its length is not negotiated.

We can notice that safety measures are not negotiable. Yet, the Court has to rule also on them as based on art 487 letter a) Criminal Procedure Code, the sentence must contain also the mentions provided by art 404 Criminal Procedure Code, among them being the ones related the safety measures.

4. Content provisions for the plea agreement

After analyzing art 478 – 482 Criminal Procedure Code, we can see that there are some circumstances that must be collectively observed in order to reach a plea agreement.

Even from the start we have to say that such agreement is allowed only during the criminal prosecution stage. The solution seems to be justified by the reasons of its introduction and also by the fact that

[3] Amended by art II p 119 of Governmental Decision no 18/2016.

[4] Probation time is between 2-4 years, minimum the time of the ruled punishment.

[5] Waving the punishment can be ruled only for the crimes where the law provides maximum 5 year prison time and for punishment postponement, the law provided punishment must be less than 7 years.

during the trial, the defendant can make use of the procedure of guilt recognition.

This circumstance is also fulfilled when the criminal prosecution is re-started pursuant to art 335 Criminal Procedure Code, art 341 paragraph (6) letter b. Criminal Procedure Code or art 341 paragraph (7) point 2 letter b) Criminal Procedure Code, but not when the criminal prosecution is restarted when the case is referred to the prosecuting body by the Judge of the Preliminary Chamber, according to art 334 Criminal Procedure Code.

The first condition, stated by art 480 paragraph (1)[6], envisages the maximum limit of the punishment provided by law, in the logic of art 187 Criminal Code: "the punishment provided by law which incriminates the committed offence, without considering the causes for its reduction or increase." This procedure can be started when the punishment provided by the law for the committed offence is maximum 15 years prison (as single punishment or alternatively with fine punishment) or a fine, without limitation of its quantity.

The law maker chose to refer to the degree of the deed abstract danger, with no consideration for committing an attempt, for the mitigatory circumstances or the special cases of punishment reduction nor the aggravating circumstances (aggravating circumstances, continuous crime and recidivism after the enforcement).

We have to point out here the difference between the mitigated types of a crime and the special cases for punishment reduction. In the first case, the reference is made to the highest level mentioned by the text incriminating the deeds, related to the type form crime.

On the other hand, the special cases for punishment reduction don't have any influence over the possibility to reach a plea agreement related to their beneficiaries.

Art 480 paragraph (2) Criminal Procedure Code, introduces the condition that all evidence should result into sufficient data for the existence of a crime considered the cause of the beginning criminal prosecuting action and for the defendant guilt.

In case the procedure is initiated by the prosecutor, the evidence charging the defendant present at the file must observe the provisions of art 309 paragraph (1) Criminal Procedure Code[7], stating that "a criminal action is begun by the prosecutor, by order, during the criminal prosecution, when he finds that there are pieces of evidence proving that a person committed a crime and none of the special cases provided by art 16 paragraph (1) can be applied here". Therefore, the plea agreement is also blocked if one of the special cases of preventing the beginning or the exercise of the criminal action is enforced.

The reason of this term is the very special feature of this procedure and it represents a supplementary warranty for the observance of the presumption of innocence and of the right to a equitable trial, a real pertinence of the *in dubio pro reo* principle instituted by art 4 paragraph (2) Criminal Procedure Code.

During the trial stage, in the absence of the adversarial principle, there will be no further evidence produced nor shall be analyzed the ones employed during the criminal prosecution, considered sufficient to make up the Court opinion, beyond any reasonable doubt, regarding the existence of the crime and the defendant's guilt. It is therefore understood that for benefiting from such agreement, the defendant must accept that the judgment shall be made only based on the evidence employed during the criminal prosecution.

The prosecutor is the one that has to verify the observance of such condition. If the defendant express his will to have a plea bargain, and should the prosecutor finds that the provision of art 480 paragraph (2) Criminal Procedure Code is not complied with, he shall reject the demand by means of an order, according to art 286 Criminal Procedure Code. This order can be fought against pursuant tart 339 Criminal Procedure Code, but, in this case, the hierarchically superior prosecutor shall study only the lawfulness of the reasons of the rejection, with no appreciation on the opportunity to have a plea agreement. This shall be assessed only by the prosecutor, and therefore, the hierarchically superior prosecutor shall not begin or ask his subordinated prosecutor to begin the procedure.

Another controversial[8] condition, according to art 478 paragraph (2) and paragraph (4), Criminal Procedure Code, is represented by the necessity to get the previous approval of hierarchically superior prosecutor.

By means of a first approval, the hierarchically superior prosecutor decides the limits of the negotiations or even the solutions to avoid, whereas through the approval, subsequent to the negotiations, checks the observance of conditions imposed by law and by the previous approval for the plea agreement.

Here, the hierarchically superior prosecutor has a rather guiding role, whereas the final assessment is to be made by the prosecutor in charge with the criminal prosecution, as, enjoying the best position in analyzing the evidence, he is the only person responsible for the main ruling documents in the case.

By reconsidering the benefits given to the defendant who chooses to undergo this procedure by applying the provisions of paragraph (4) of art 480 Criminal Procedure Code, nowadays, the limits should not be between the maximum and the minimum line of the punishment provided by the special part of the Criminal Code or other special laws, but between the reduced limits by a third for the prison punishment or the corrective measures with deprivation of freedom, and a quarter for the fine punishment. Given the fact that, when negotiating, the prosecutor has to comply

[6] Punishment limit allowed in this matter was extended by art II p. 120 of the Gov Decision 18/2016.
[7] I. Neagu, M. Damaschin Treaty on Criminal Procedure. Special Part, *Universul Juridic* Publishing House, Bucharest, 2015, p. 472.
[8] See "Plea Agreement Procedure. Analysis." Public Ministry. Prosecutor's Office of the High Court of Justice and Cassation, April 7th 2014.

with the limits of the previous approval, he couldn't oversee this rule either.

After the negotiations, in order to preserve the balance with the procedure of informing the Court by means of indictment, when the hierarchically superior prosecutor verifies whether this action is complying with the law, during this special procedure, as an additional guaranty of lawfulness and of limits imposed by the previous approval, it is considered highly necessary to issue a new approval, as it is now that the agreement becomes good for producing effects, representing the act of informing the Court.

If the hierarchically superior prosecutor totally agrees with the prosecutor's proposition, as responsible for the criminal prosecution (content, *de jure* and *de facto* motives), it is sufficient for him to express his approval directly on the plea agreement paper. Should the hierarchically superior prosecutor considers some amendments are necessary, due to different opinion on the agreement content, he shall draw up a reasoned order, offering *de jure* and *de facto* motives as merits of his decision. As the law doesn't provide such aspect, pursuant to provisions of art 304 paragraph (2) Criminal Procedure Code, the same way will be followed in case of rejected agreement.

If the plea agreement is rejected when being approved, either before or after the negotiations, the prosecutor shall go on with the criminal prosecution according to the usual procedure.

At the same time, the plea agreement must be the result of the negotiations carried out between the prosecutor and the defendant, who, according to art 480 paragraph (2) Thesis I Criminal Procedure Code, shall be accompanied by a lawyer, observing the provisions of art 91 paragraph 2) and art 92 paragraph 8) Criminal Procedure Code. Non compliance with this obligation leads to absolute annulment of the agreement pursuant to art 281 paragraph (1) letter f) Criminal Procedure Code, and the defendant has the right to invoke any time during the trial.

Negotiation is the key of this procedure and implies that both the prosecutor and the defendant make concessions while observing the law provisions.

As the law doesn't clearly describe the procedure, we conclude that the negotiations shall be held directly between the prosecutor and the defendant assisted by his lawyer, either through dialogue or written documents. It is certain that the direct dialogue is the clear way to obtain promptness.

Taking into account the powerful personal character of the agreement, ant that the punishment shall be enforced after the probable admissibility, It must be able to assure the prevention and correction purpose of the criminal code. Consequently, the prosecutor has to envisage the general individualizing criteria[9] stated by art 74 Criminal Code. Several aspects will be taken into consideration collectively: circumstances and the modus operandi, the means[10], danger risk for the property, type and seriousness of the result or other consequences of the crime[11], the crime motive and purpose, the crime type and repetitiveness, representing the criminal record of the defendant[12], his conduct after committing the crime and during the criminal process[13], education level, age, heath status, family and social situation[14].

The powerful personal character of the agreement is also pointed out by analysis of the subjective criteria.

On the other hand, the defendant also enjoys the possibility to draw the prosecutor's attention on the favorable criteria.

If the defendant committed several crimes, he can express his interest in reaching an agreement for all or part of them. In this case, the analysis of the above mentioned conditions shall be exercised for each crime. When agreement are made concerning several committed crimes, the resulted punishment, according to art 39 paragraph (1) Criminal Code, shall be set by reference to the negotiated punishments.

5. Legal provisions on the plea agreement form and content

When the content of the plea agreement is approved by its authors, they will write it down. It is a form condition provided by art 481 paragraph (1) Criminal Procedure Code. In case of defendants who chose to follow this procedure, the prosecutor will not make up the indictment and the Court will receive the plea agreement directly.

This agreement shall contain as provided by art. 482 Criminal Procedure Code:

1. the date and place of signature;
2. last name, first name and capacity of its authors;
3. information on the defendant person, according to art 107 paragraph (1);
4. description of the deed object of the agreement;
5. legal classification and punishment provided by law;
6. evidence and evidence means;
7. express statement of the defendant admitting his guilt and his agreement with the legal classification which started the criminal action;

[9] The analysis of the individualizing general criteria is not a judicial individualization, being the exclusive attribute of the Court.

[10] The following are to be analyzed: place and time of the crime together with the modus operandi and the means used in order to establish the danger risk of the author.

[11] It is important for the result crimes, for the study of the crime direct and indirect results.

[12] For instance, the absence of criminal record is a favorable element for the defendant whereas his perfection in a criminal field will lead to more severe punishment. Maybe, the time between the previous sentences and the moment of committing the new crime would be taken into consideration.

[13] It is important to see if there was any attempt to prevent the crime result, to restore the stolen goods, to hide the crime traces, to escape from criminal prosecution, to intimidate the witnesses etc.

[14] There will be an analysis of poor health state, family environment, entourage influence, psychological troubles (that don't impair judgment) etc.

8. the type and the time (clearly mentioned, not by reference to two limits), and also the punishment application manner or the solution of waving to the punishment or the postponement of punishment application object of the agreement between the prosecutor and the defendant;
9. signatures of the prosecutor, defendant and his lawyer.

If there are several defendants in the case and if many of them or even all of them expressed their desire to reach a plea agreement and the prosecutor finds that the legal terms are complied with, he shall sign a separate agreement with everyone of them. Practically the negotiation has to be held separately, given its powerful personal character.

The specialized literature showed the necessity to present the defendant a copy of the agreement immediately after it was signed.

6. Conclusions

As we can see from the analysis of these legal provisions, the prosecutor is the representative of the general interests of the society, in charge with defending the lawful order and the citizens' rights and freedoms. Therefore, during the procedure, his role is to watch over the balance between the general and the particular interests, in other words, the balance between the opportunity of the procedure and the compliance of the legal provisions in order to have a valid agreement.

We consider this theme important and extremely useful given the fact that the prosecutor takes into account the defendant's will to cooperate for the criminal prosecution and also his position regarding his own crime.

Nevertheless, as we have already mentioned it, we are talking about a general interest as by using this plea agreement we have a fairly and expeditiously trial with fewer costs.

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JUDGE'S LIABILITY WHILE CARRYING OUT THEIR PROFESSIONAL DUTIES

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Abstract

Nowadays, the Romanian social and political context debates more and more on the patrimonial liability of judges for errors of law in cases settled by them. This work aims at presenting legal terms, based on which both the civil and criminal disciplinary liability can be generally enacted.

Keywords: *judge, prosecutor, liabiliy, status, disciplinary*

1. Introduction

This is a matter of general interest as it is an element which strongly supports the people's confidence in the act of justice, impartial and equal for all of them. Therefore, the state has a series of judicial instruments, in order to guarantee the lawfulness of the prosecutors and judges activity, their interest in protecting the law supremacy, in observing the people's rights and freedoms, and also in protecting their equal judicial treatment within the judicial procedures. These instruments represent the main subject of our work study.

In other words, we want to present the enforce regulations for judges' professional liability.

It is an important aspect as Romanians are not properly informed about the possibility to have judges in such position and therefore, we consider that a short description of the regulations in this matter would be very useful.

The Romanian Constitution states the patrimonial liability of the State for the errors of law. This means that the victim which suffered damages of rights caused by a public institution by means of an administrative action or by absence of solution of a demand within the legal term, has the right to get recognition of the alleged right or legitimate interest, the annulment of the act and the legal remedy.

2. The judge's liability

According to art 52, paragraph (3) of the above mentioned Romanian constitution, the State is liable for the damages caused by judicial errors produced by judges who proved mala fide or serious negligence in exercising their profession.

Article 94 of law no 303/2004[1] on the status of judges and prosecutors, classifies the liability as civil, disciplinary and criminal.

Also, the Criminal Procedure Code dedicates a whole chapter to the repair procedure of the compensation in case of error of law or illegal deprivation of freedom.

Judges liability is also regulated by: art 42 and art 44 - 50 of Law no 317/2004 on the Superior Council of Judges (CSM)[2], Internal Regulatiosn of Courts[3], Internal Regulations of Prosecutor's Offices[4] and the Order no 94 of 30.08.1999 on Romanian participation to procedures within the European Court for Human Rights and the Committee of Ministers of the European Council and the acceptance of the State after the decisions and conventions for amicably solutions[5].

2.1. Disciplinary liability

According to art 98 of Law no 303/2004, judges and prosecutors are disciplinarily liable for non compliance with the profession duties and for their actions affecting the justice prestige. Art 101 of the same law states that the disciplinary sanctions are to applied only by the departments of the Superior Council of Judges, pursuant to its organic law. Their application procedure is therefore regulated by Law no 317/2004.

Articles 12-16 on exercise of professional duties, part of the Deontological Code for judges and prosecutors, state that they:

- have the obligation to do their professional duties with competence and correctness, to comply with the

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[1] Law no 303/2004 was published in the Official Gazette, Part I, no 576 28th of June 2004; After amending by Law 247/2005 published in the Official Gazette, Part I, no 653 of 22nd July 2005, Law 303/2004 was republished in the Official Gazette, Part I n 826 of 13th September 2005.

[2] Law no 317/2004 was published in the Official Gazette, Part I no 599 of 2nd July 2005, after being amended by Law 247/2005 published in the Official Gazette, Part I, n 653 of 22nd July 2005, Law no 317/2004 republished in the Official Gazette, Part I no 827 of 13th September 2005.

[3] Approved by CSM decision no 159/2004, published in the Official Gazette, Part I, no 881 of 27th September 2004, with subsequent amendments and completions.

[4] Approved by Order of Minister of Justice no 2850/2004, published in the Official Gazette, Part I, no 1087 of 23rd of November 2004.

[5] Order no 94 of 30th of August 1999 on Romanian participation to procedures of CEDO and Ministry Committee of European council and the regress of Romanian State after the decisions and amicably conventions, published in the Official Gazette, Part I, no 424 of 31st August 1999, approved and amended by Law no 87 of 20th March 2001 published in the Official Gazette, Part I, no 145 of 23 March 2001.

administrative tasks assigned by law, regulations and orders;

- have the obligation to do anything necessary in order to carry out their duties within the legal terms, and if the law doesn't stipulate it, within the reasonable terms;
- have to protect the order and the solemn atmosphere in the court room and to adopt a dignify and civilized attitude towards the parties, lawyers, witnesses, experts, interpreters or other persons and ask them to adopt an appropriate behavior;
- have the obligation not to disclose or use the information for other purposes than those directly related to their profession activity;
- have to carry out their managing tasks by organizing the activity of the employee, to have initiative and be responsible; in making decisions they have to give priority to the interests of courts and prosecutor's offices, and to good justice act;
- as managers, don't have to make use of their prerogatives to influence the trials and decisions.

For justice reputation, an obligation provided by art 98 of Law no 303/2004 together with articles 17-20 of the same Deontological Code of Judges state that:

- judges and prosecutors have to refrain from any actions capable to compromise their dignity during the exercise of their profession and in the society;
- the relationships of the judges and prosecutors with other members of the groups they belong to, must be based on respect and bona fide, no matter the length of service and position;
- judges and prosecutors cannot express their opinion about the professional or moral probity of their colleagues;
- judges and prosecutors can express publicly their opinion by exercising their right to answer in case there are slanderous media articles or broadcasts about them;
- judges and prosecutors cannot carry out actions that, by their nature, financing or application manner, could alter the impartial, correct and legal fulfillment of their professional duties.

According to art 99 of Law 303/2004 the following represent cases for disciplinary sanctions:

- actions affecting the honorability of professional probity or the justice prestige, during the exercise, or not, of their profession duties;
- violation of legal provisions related to impairment and interdictions ruled on the names of judges and prosecutors;
- inappropriate behavior, while exercising their profession, towards colleagues, court employees and prosecutor's office personnel such as judicial inspectors, lawyers, witnesses, justice seekers or other institutions representatives;
- public political actions while being at work;
- unjustified refusal to receive the requests, conclusions, reports or other papers lodged by the trial parties;
- unjustified refusal to fulfill a professional duty;
- prosecutor's non observance of the legal written decisions ruled by the hierarchically superior prosecutor;
- repeated and unfounded non compliance of the legal provisions regarding the prompt solution of causes and repeated delay in carrying out works, out of imputable reasons;
- non compliance of the obligation to abstain when they have to, according to law, and also lodging repeated and unjustified requests to abstain in the same case, leading to the case deferral;
- non compliance with the provisions on secret about debates or works, or other information of the same nature, disclosed during the exercise of the profession, except for those of public interest, within the limits of the law;
- unjustified, repeated absence from work, directly affecting the activity of court or the prosecutor's office;
- interfering with the activity of another judge or prosecutor;
- unjustified observance of the decisions or administrative ruling pronounced according to law by the head of the court of prosecutor's office or other administrative institutions provided by law or regulations;
- usage of the position in order to get a favorable treatment from authorities or interventions to solution certain requests, claim or acceptance of personal interests;
- serious and repeated non observance of the provisions regarding the random distribution of cases;
- occlusion of the control activity of judicial inspectors, by any means;
- direct or indirect participation to pyramid type games, gambling or investment systems with no funds transparency;
- total lack of motivation of the judge's ruling or of the prosecutor's judicial actions, pursuant to the law stipulations;
- usage of inappropriate expressions while ruling the decision or while drawing up the judicial papers, affecting the justice prestige or the judge position dignity;
- non observance of the decisions of the Constitutional Court or the decisions ruled by the High Court of Justice and Cassation in solving the appeals according to law;
- mala fide or negligent position disrespect.

The disciplinary sanctions applicable to judges or prosecutors, depending on the seriousness of their non compliance, are as it follows:

- warning ;
- up to 20% reduction of the monthly gross indemnity for a period up to 6 months;
- disciplinary moving for as period of up to 1 year to another court or another prosecutor's office upon a Court of Appeal;
- suspension for up to 6 months;
- elimination from the Judges Council.

Disciplinary sanctions for judges are applied by the special committees of the Superior Council of Judges, made up of one judge and 2 judicial inspectors, whereas for prosecutors, the committee is made up of one prosecutor and 2 judicial inspectors. Each year the Superior Council of Judges through its special departments for judges and prosecutors appoints the members of these committees.

For disciplinary sanctions it is necessary to have a previous investigation which is ordered by the author of this action, being represented by the corresponding disciplinary commission of the Superior Council of Judges. The investigation is performed by inspectors of the judicial inspection department[6], one for judges and one for prosecutors. The result of this investigation is forwarded to the disciplinary commission within 60 day time from the moment the Superior Council of Judges registers the request.

If the disciplinary commission considers the investigation unjustified, they will classify it[7]. On the contrary, after receiving the result of the investigation or of supplementary confirmation, the disciplinary commission informs the corresponding department in order to take further disciplinary actions and have a conclusion issued by the Council[8].

The prescription period is 1 year from the moment of committing the crime.

According to art 45 of Law no 317/2004 of CSM, the disciplinary investigation focuses on actions and circumstances and any other important information proving the guilt. The investigated judge or prosecutor have the right to be heard, to make statements, to be present during the investigations, and when they refuse it their decision is put down in a minutes, which is not an obstacle for the investigation to go on. Also they have the right to study all the file documents and to ask for evidence in order to prepare their defense.

2.2. Criminal liability

Judges and prosecutors have to be independent and impartial, and for this, the legal system contains measures which protect them from abusive trials, vicious procedures and all kind of urges. It is important to say that the most important protection is to grant special capacity for criminal investigations and trials of crimes committed by prosecutors and judges[9].

Thus, according to art 324 paragraph (1) together with art 56 paragraph (3) letter a) and art 38 paragraph (1) letter c), the criminal prosecution must be carried out by prosecutor for crimes committed by judges of Law Courts, and by prosecutors of offices affiliated to these institutions.

The New Criminal Procedure Code considers that a criminal investigation conducted by a prosecutor is an additional guarantee of lawfulness and thoroughness in cases with high complexity degree, given the matter or the author status[10].

Article 95 paragraph (2) and (3) shows that judges, prosecutors and side judges can be searched, retain in custody or even preventively arrested only after there is approval from the departments of the Superior Council of Judges, and if it is a clear crime, they can be retained, searched and arrested pursuant to law, while the Superior Council of Judges is immediately informed about these actions.

2.3. Civil liability

People consider that judges are the only social category not being held responsible for their work. Therefore, people wanted to amend art 96 of Law no 303/2004 on the status of judges and prosecutors and several senators and deputies of Romanian Parliament forwarded a initiative concerning the situation when Romanian State is convicted by an international court, such as CEDO, and compelled, by final decision, to pay compensation. They consider it is absolutely necessary to have an action against the judge who, with mala fide or by negligence caused prejudices. Also, the project envisaged that “after the damages are remedied by the State, this one will start immediately an action for legal remedy against the judge or prosecutor who with mala fide or by negligence did the judicial error causing the losses”. “The prescription term of the right to begin action for all the cases provided by this article, is 10 years".

But, after analyzing the law project, the reasons, the approval issued by the Law Council, the decision of the Superior Council of Judges and other opinions, the project for amending art 96 of Law no 303/2004 on the status of judges and prosecutors was rejected.

Studying the circumstances where a judge has patrimonial liability, we will see that the current legal system allows the justice seeker, who suffered because of the solution ruled by the judge, to obtain legal remedy and the State to recover from this one the paid compensation through a regress action against the judge.

Romanian Constitution and Law no 303/2004 present two different institutions: State patrimonial liability for judicial errors and judges’ patrimonial liability.

Thus, art 52 of the Romanian Constitution shows that he State pays for the prejudices caused by judicial errors. It is set by law and doesn’t eliminate the liability

[6] Rules on Judiciary Inspector Body organizing and functions, art 1paragraph (3): the purpose of the judiciary inspection is to help to improve the quality of the justice act, its efficiency, by means of independent inspections and assessment of the activity.

[7] Resolution of 27 April 2012. The Commission for discipline of CSM, rules: classification of the case where lady Judge C.M.L., of C. Court, committed disciplinary error provided by art 99 letter m of Law 303/2004 on the status of judges and prosecutors, as amended by Law no 24/2012, and where ladies Judge N.A., C.D. and I.R. of C. Law Court committed disciplinary error provided by art 99 l t.

[8] Liability of Laura Ivanovici, Court of Appeal of Bucharest Judge Cristi Danileț, Cluj Law Court.

[9] www.mpublic.ro.

[10] M.Udroiu, Criminal Procedure Code. Commented Articles, C.H. Beck Publishing House, Bucharest, 2015, page 865.

of judges who have done their work with mala fide or negligence.

So, the victim has to prove the mala fide or the negligence of the judge which have caused the prejudice.

Article 99 of Law no 303/2004, on status of judges and prosecutors, explains both the expression mala fide and serious negligence, saying that: mala fide is when the judge or prosecutor intentionally violates the material or procedural law, seeking or accepting to cause prejudices to a person; severe negligence is when the judge or prosecutor willingly and severely violates the law.

Also, art 96 stipulates that the state liability is set by law and doesn't eliminate the liability of judges or prosecutors who did their work with mala fide or severe negligence. The Criminal Procedure Code presents the cases where the victims have the right to claim compensation for damages caused by judicial errors made in criminal trial. The person who had a part in causing the judicial error made by the judge or prosecutor, has no right to claim damages.

It is important to see that the law makes a difference between errors made during the criminal trial and other trials. For the criminal trial, the State liability is set by the Criminal Procedure Code. Art 99 paragraph (4) stipulates that the right of victims to legal remedies in case of material prejudice caused by judicial errors in trials other than the criminal ones, cannot be put into practice unless it was previously decided, by final decision, the criminal or disciplinary liability of the judge or prosecutor, for a crime committed during the trial, and whether this crime is able to result in judicial error.

In both cases, the victim can start an action only against the State, represented by the Ministry of Public Finances.

Therefore, the patrimonial liability of the judge is secondary to the one of the State in relation with the victim and at the same time, indirect towards the victim. Thus, if the victim wants to hold patrimonial liable the judge or the prosecutor, for their activity, it is necessary to ask for the damage repair upon the Ministry of Public Finances, which is the Romanian State representative.

For this, we consider very important the provisions of art 538-541 which offer explanations about the remedy circumstances procedure for material or moral damages in case of judicial error in case of illegal freedom deprivation.

Thus, the person who was sentenced by final decision, has the right to claim legal remedy from the State if after the retrial of the case, after annulment or elimination of the sentence decision for a new crime proving that a judicial error was made, ruled a acquittal solution. The same thing happens when, in a retried criminal case where the defendant had been judged in absentia, a final acquittal decision is ruled.

So, the first condition for a victim to obtain damages paid b the State is to have a final sentence[11], the source of serious material or moral prejudice. Moreover, it is necessary to have a judicial error.

Another condition is that the convicted person be acquitted by means of a final decision, after:

- the case retrial, having annulled or eliminated sentence decision for a new or recent crime proving that it was a judicial error;
- re-open the criminal case for the convicted tried in absentia.

This regulation stated by art 538 paragraph (1) of the new Criminal Procedure Code, concerning the annulment or elimination of the conviction decision, complies with the CEDO jurisprudence, which shows that art 3 of Protocol no 7 of the Convention can be enforced only after the elimination of the criminal convicting decision[12].

The person has the right to claim damages also in the case of illegal freedom deprivation.

Thus, art 539 of the New Criminal Procedure Code, called "the right to compensation in case of illegal detention, stipulates exactly this right, to compensation if during the criminal case, the person was illegally detained". Paragraph (2) states that illegal detention must be proved, according to the case, by prosecutor order, by final conclusions of the judge for freedoms and rights or the decision of the Judge of Preliminary Chamber, together with the Court final decision.

It is important to take into account the fact that if art 538 of the New Criminal Procedure Code envisages only the case where a person is acquitted as the result of a case retrial for a new or recent crime or for a case where the person was tried in absentia, art 539 focuses on any illegal detention, even if this measure was adopted for a person convicted for a crime which is not punished by criminal law. Such example is represented by the retention of a witness for several days because he/she doesn't want to make e statement[13].

In this matter, we have some CEDO decision, such as "Creangă vs Romania" and "Konolos vs Romania".

The New Criminal Procedure Code also presents the way of compensating the victim taking into account the retention period together with the consequences produced on the victim, family or the person in the situation described by art. 538.

According to paragraphs (2) - (4), the compensation represents a sum of money or a lifetime pension, or the obligation of the State to support the costs of the victim placing in a social and medical institution.

[11] According to art 551 NCPP the decision of the court of first instance becomes final the ruling date, when there is no appeal, or the date the appeal becomes invalid. Also, the decision of the court of first instance becomes final the date the appeal is withdrawn, if this was lodged after the set term, or the date of the decision ruling the rejection of the appeal.

[12] CEDO, Matvezev vs Rusia, decision of 3 July 2008, paragraph 38.

[13] M.Udroiu, Criminal Procedure Code. Commented Articles, C.H. Beck Publishing House, Bucharest, 2015, page. 1383.

The compensation type shall depend on the situation of victim.

Victims with the right to compensation who, before being retained as the result of a final convicting decision, had been forced to labor, will benefit from provisions of law stating that the time worked in such circumstances shall be considered as seniority together with the time spent in illegal detention.

The passive procedure quality as described by art 538 and 539 of the New Criminal Procedure Code, shows in paragraph (5) of art 540, that it is reserved only for the Romanian State, represented by the Ministry of Public Finances, and not for the judicial bodies who caused the judicial error. These bodies shall have patrimonial liability only if the State shall begin legal action against them.

Victims with the right to legal compensation are, according to art 541 paragraph (1) either the victim or the persons supported by the dead victim.

According to art 541 paragraph (2), the prescriptive period is for lodging legal remedy demands against the State is 6 months beginning with the date of the final decision of the court and the date of the order or conclusions of the judicial bodies which proved the error of law or the illegal detention.

4. Conclusions

As we have already said, the current legal system makes the clear difference between two liabilities: the State patrimonial liability in case of error of law and the patrimonial liability of the judge in relation with the first one.

According to art 52 paragraph (3) of the Constitution, the State liability is set by the law conditions and doesn't exclude the judges' liability for having done their work with mala fide and serious negligence.

Article 96 of Law no 303/2004 details the provisions. It states that the victim has the right to legal remedy caused by error of law during criminal trials in the cases regulated by the Criminal Procedure Code.

Therefore, the terms for actions against the State are provided by art 542 of the New Criminal Procedure Code, called "Legal Remedy Action".

If the legal reedy has been done according to art 541 and if the Romanian State has been convicted by an international court for one of the cases provided by art 538 and art 539, the legal remedy action for the paid sum can be lodged against the person who, with mala fide or by severe fault, caused the situation which led to serious damage, or against the insurance company for damages in case of damages caused while doing the job. The State has to prove during the legal remedy action (regress action), by prosecutor's order or criminal final decision, that the insured person according to paragraph (1) caused with mala fide or by severe professional fault the damaging error of law or the illegal detention leading.

In conclusion, the terms for exercising the regress actions are the following:

- the existence of a final decision ruled by a domestic or international court[14];
- the legal remedy paid by the State to the victim;
- proof of mala fide or the severe professional fault by means of the prosecutor's order or final criminal decision.

We can see though, the regress action of the State against the faulty judge, for the judicial error, is still an optional thing. Moreover, the Ministry of Public Finances has never lodged such action so far. Also, the same Ministry has never been notified by the Superior Council or Judges, which has the right to set the civil or disciplinary liability of judges, according to art 94 of Law 303/2004, regarding the lodging of a regress action in order to recover the prejudice caused to the State[15].

References:

- Romanian Constitution;
- Romanian Criminal Procedure Code;
- Law no 303/2004, on the status of judges and prosecutors with subsequent amendments and completions;
- Law no 317/2004 on Superior Council of Judges organizing and functioning with subsequent amendments and completions;
- Order no 94 of 30 August 1999 on Romania taking part at the procedures of CEDO and of Committee of Ministers of European Council approved and modified by Law no 87 of 20th March 2001;
- Rules for organizing and functioning of judicial inspection;
- Mihail Udroiu, Criminal Procedure Code, Commented articles, C.H. Beck Publishing House, Bucharest, 2015;
- Internal rules of Courts and Prosecutor's Offices;
- CEDO Decision of 23 of February 2012, ruled in case Creangă vs Romania;
- CEDO Decision of 07 of February 2008, ruled in case Konolos vs Romania.

[14] Such example is when during a criminal case, a third party statement is used after it has been obtained by torture. (CEDO, Othman Abu Qatada vs United Kingdom, decision of 17 January 2012, parag 267).

[15] www.cdep.ro, site accessed on 29th February 2016, at 14:30.

THE PROBATION MEASURES – THE REASONS FOR THE REGULATION

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Abstract

For a proper understanding of the law institution, it is necessary to understand the reasons that gave rise to the its regulation. By reasons of regulations, we understand the social, economic, political, legal, moral justifications, but also of any other nature that established the legislation adoption represents a positive source of the institution in question. Trying to find reasons for the regulation is a useful step, even under stronger word, if the institution researched is relatively new in the normative context, character that can be easily subject to error, assigned to the probation measures into Romanian law. The utility of teh step is to know the circumstances that caused, encouraged or even imposed the settlement of the probation measures in our country, but also of the goals that the new institution will answer them.

Keywords: *probation measures, restorative justice, the treatment of the offenders in the community, the prevention of the repeated offense, social reintegration, the compensation for the victim's damage, international and european legal on probation measures*

Introduction

In order to facilitate the understanding of the institution of probation measures, we believe it is useful to start by knowing the circumstances which led, encouraged or even required regulation of the measures in question, as well as social, economic, political, legal, moral justifications, but also of any other nature that established the legislation adoption represents a positive source of the institution in question.

Subsequently, we will refer to the purposes more spcific pursued by the lawmaker through the probation measures establishment and we may discover that the main purposes related thereto are reducing the risk of repeated offense, increasing the chances of rehabilitation and social reintegration, excluding extrapersonal and long-term harmful effects, specific to inprisonment, increasing the chances of compensating the prejudice caused by the offense and reducing the financial costs of administrating the criminal justice in its executing phase.

1. The context of imprisonment

As in other countries, in our country a first context that favored introducing the probation measures was the one for an overwhelming increase in the number of people sent to prison. Thus, during the communist regime, a maximum of 60,000 inmates was reached, out of which a significant proportion of serious crimes committed reduced[1]. The maximum noted was close to being reached and after the social, economic and political turmoil after the anti-communist revolution in December 1989, in 2001 the number of the detainees reached 49.840[2].

In this context one of the main reasons for enacting the probation measures was a significant reduction in the number of people who were sent to detention. Of course, reducing the number of the detainees at one time conducted the operations in the period before and after the anticommunist revolution in December 1989, with a multi-anual[3] regularity sometimes, but these reductions intervened through acts of pardon or amnesty.

Unlike the acts of pardon or amnesty, the reduction that was intended by the introduction of the probation measures could operate in parallel with the provision of minimum guarantees to ensure social reintegration of those who were not sent to prison and to preserve public order.

Thus, although in the Romanian legislation the probation measures in a similar form to the way they are outlined in the current legal sense were introduced by the Criminal Code from 1969[4], which established the educational measure of the supervised release and later, the correctional work[5] transformed in execution of the sentence in the workplace, the first institution to provide oversight of the measures in the true sense of the word was the suspended sentence of imprisonment under surveillance, introduced by Law no. 102/1992.

The institution of suspended sentence of imprisonment under surveillance began, however, to operate effectively and efficiently only after 2001 when the entire country, exceeding the experimental level the first specialized service in supervising the execution of the probation measures was set up and established by the

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[1] I. Chiș, The prison reform in Romania, Ando Tours Publishing House, Timișoara 1997, mentioned in I. Chiș, The penal law execution, Universul Juridic Publishing House, Bucharest 2015, p. 85.

[2] According to data from the Activity results on 2009 of the National Administration of the Prison, available on the website www.anp.gov.ro, section About ANP, subsection Reports and studies.

[3] I. Chiș, Executing the punishments, Universul Juridic Publishing House, Bucharest, 2015, p. 86.

[4] Penal Law, adopted thorugh Law no. 15/1968, entered into force on 1st of January 1969.

[5] The correctional work was introduced by Penal Law through Law no. 6/1973.

Government Ordinance no. 92/2000 on the organization and functioning of the social reintegration of the offenders and the enforcement of non-custodial sanctions.

Upon the establishment of the first state organizations specialized in supervising the execution of the probation measures, we believe that we can talk, rightfully, of a system of probation in our country for the development of this system anywhere in the world, and it depended naturally on the development of the services designed to implement it.

The last and most important legislative step in terms of probation measures was conducted when the current Criminal Code entered into force, which introduces a number of institutions based on the probation measures such as the conditional sentence, suspended sentence under supervision, release on conditional supervision.

The importance and the substance of the penal reform made by the current Criminal Code is also underlined by the adoption and entry into force of the simultaneous laws of the criminal custodial[6] and non-custodial[7] sanctions and of a new law for the organization and functioning of the probation services[8].

We can not state, in the most definite way that reducing the number of people subject to detention is due mainly to the introduction of the probation measures in our country, but we can see that since 2001 until now, the number of the detainees registered a permanent downward trend, reaching 27.455 people in 2016, according to data from the Annual Activity Report of the National Administration of Penitentiaries in 2016[9]. Of course, the decline in the number of persons in detention is based on multiple causes, but the introduction of the probation measures and of the specialized services in monitoring their enforcement has undoubtedly a significant contribution.

2. The context of civilizing the punishment

A broader context, which also facilitated the emergence and development of the probation measures in our country was represented by the so-called current *civilizing punishment*[10], a special manifestation of the overall progress of human society over its existence.

This trend started in the modern era, with a gradual reduction of the application cases of capital punishment or corporal under the influence of the thoughts of Cesare Beccaria. In his well-known work *Dei delitti e delle pene*, the famous enlightened, criticizing the death penalty, wrote: *Not the intensity of the punishment produces the greatest effect on the human soul, but its extent... The strongest brake against crimes is not the terrible, the passing show of a wicked death, but the long and arduous example of a person deprived of liberty, which turned into beast of burden, compensates with its toil that harmed her*[11].

Under the influence of Beccaria, a number of enlightened leaders abolished, in fact, corporal punishment and death penalty. Among them a famous author[12] reminds the Prussian King Frederick II, who abolished torture in 1756 and whom Catherine II oppossed the barbaric punishment in 1767 and, throughout his reign, could not admit the execution of any death sentences, but also Leopold of Tuscany, who banned in 1786, torture and death penalty, and Joseph II of Austria, who issued the Criminal Code in 1787, which punished with death only certain military crimes and the Criminal Procedure Code in 1788 prohibiting torture.

It followed the generalization of the prison sentences, all laws adopted since the late eighteenth century until the late nineteenth century providing that the main method of punishment the imprisonment in various ways: forced labour, reclusion, imprisonment, solitary confinement, prison[13].

Although the process of civilization of the sentences also registered the professionalization and humanization of prisons, in the late nineteenth century the system of prison punishments has increasingly become subject to criticism, leading to the conclusion that, instead of reducing the crime and reintegrating the offenders into society, it produced an opposite effect[14].

Finally, the civilizing process of the punishments culminated in the emergence of the probation measures. Moreover, other authors[15] consider that in the trend of the civilizing punishments can be framed even the emergence of the probation and the community sanctions.

We express our opinion that the process of civilization of the punishments will continue in the era of advanced technologies, as the possibilities for remote control and supervision of the offender will be developed and accepted as useful tools in the execution of criminal sanctions. However, we can not fail to notice that technological progress, materialized by the exponential growth of the means of mass communication, can produce a negative effect in terms of analyzed, namely

[6] Law no. 254/2013 regarding the execution of the punishments and of the custodial measures ordered by the court during the criminal trial.
[7] Law no. 253/2013 regarding the execution of the punishments, of the educational measures and of other non-custodial measures taken by the judicial bodies during the criminal trial.
[8] Law no. 252/2013 regarding the organization and functioning of the probation system.
[9] Available on the website *www.anp.gov.ro*, section About *ANP*, subsection *Reports and studies.*
[10] Civilizing punishments is conceptualized by the English criminologist John Pratt within his paper *Punishment and civilization: penal tolerance and intolerance in modern society*.
[11] C. Beccaria, *About crimes and punishments*, ALFA Publishing House, Iași 2006, p. 44.
[12] L. Coraș, *Criminal penalties alternative to imprisonment*, C.H. Beck Publishing House, Bucharest 2009, p. 34.
[13] A.V. Iugan, *The judicial individualization of the punishment. Alternatives to imprisonment*, PhD thesis developed in the PhD School of the Faculty of Law of the University "Nicolae Titulescu" Bucharest, unpublished p. 14.
[14] Idem, p. 15.
[15] G. Oancea, *Probation in Romania*, C.H. Beck Publishing House, Bucharest 2012, p. 31.

to induce among the population a sense of fear by publicizing exacerbated crimes.

However, we can not fail to notice that technological progress, resulted in exponential growth of the means of mass communication, can cause a negative effect in terms of analyzed perspective, namely to induce among the population a sense of fear by publicizing exacerbated crimes[16]. Paradoxically, this culture of fear can determine a stream of *uncivilizing punishment*[17], because globally crime is substantially declining as the economic progress raises the standard of living of the population, such as a process of tightening the sanctioning that the political factor can impose when trying to give a signal, sometimes populist, of intransigence to anti-social manifestations.

3. The legal international context

Another context which favored the development of the probation system and thus the introduction of the probation measures as an alternative to imprisonment, it was the need to adapt national legislation to the Council of Europe recommendations and normative acts of the European Union.

In the explanatory memorandum[18] that accompanied the projects and that have resulted in Law no. 253/2013 on the execution of penalties, of the educational measures and of other non-custodial measures ordered by the court during the criminal proceedings and in Law no. 252/2013 on the organization and functioning of the probation system, it shows explicitly that the drafts envisaged, inter alia, the Council of Europe's recommendations, namely Recommendation No. R(92)16 on the European rules on the community sanctions and measures; the Recommendation of the Council of Europe No. R(97)12 on staff involved in the implementation of the community sanctions and measures; the Recommendation of Council of Europe No. R(99)22 on reducinng the number of persons imprisoned and overcrowding them; Recommendation of teh Council of Europe No. R(2000)22 on improving the implementation of the European rules on community sanctions and measures; Recommendation of teh European Council No. R(2003)22 on the release on parole; Recommendation of the Council of Europe No. R(2006)2 on the European Prison Rules; Recommendation of the Council of Europe No. R(2008)11 on the European rules for juvenile offenders subject to criminal sanctions and measures, Recommendation of the Council of Europe No. R(2010)1 on the European probation rules.

Also, by drafting Law no. 200/2013 amending and supplementing Law no. 302/2004 on judicial cooperation in criminal matters, the proceeding to the adoption of EU instruments for cooperation in the enforcement matters of the probation measures, among other acts, the Framework Decision 2008/947/ JHA of 27 November 2008 on the principle of mutual recognition to judgments and probation decisions with a view to supervising probation measures and alternative sanctions, as resulted from the explanatory memorandum, was implemented[19].

4. The jurisprudence context of the European Court of Human Rights

A context, still very current, which has boosted and will continue to spur concern for identifying alternatives more and more diversified and viable for the custodial sentences and thereby to the development of the probation system, is the European Court of Human Rights, which finds a breach by the Romanian State of the article 3 of the European Convention on human rights and fundamental freedoms, as a result of placing detainees in irregular detention conditions (including overcrowding).

One of the most relevant causes[20] from the analyzed standpoint related to our country, the European Court mentions a report following its visit to Romania, drafted by the Commissioner for Human Rights, which, inter alia, urged Romanian authorities to develop a system of alternative punishments, an effective dispensation of the release on parole and one judicial policy involving the use of sparingly custodial sentences[21].

In this context, the reason for which the probation system will be developed in our country is to avoid future convictions for the conditions of detention which can be considered as inhuman or degrading treatment.

5. The purpose of reducing the risk of a repeat offense

In favor of the probation measures, among others, it pleads the argument through which it is ensured a better protection of the society and of the offender towards the risk to relapse into the criminal conduct.

Although even the custodial sentences ensure a protection of the society against a repeat offense and, throught the incapacity in itself, even of the offender, this protection is only on a short term (it lasts only as long as

[16] In the current media culture there are some well known news broadcast on national television at a time of great audience, who has as favorite theme to present in detail the most heinous crimes committed in the country; this show was the inspiration for other TV channels, thereby contributing to the proliferation of the genre and even imposing in the vocabulary a phrase that identifies this type of shows, *Headlines at 5 o'clock.*

[17] G. Oancea, *op. cit.*, p. 32.

[18] Available on the website of the Chamber of Deputies *www.cdep.ro*, section *Pursuing the legislative process.*

[19] Available on the website of the Chamber of Deputies *www.cdep.ro*, section *Pursuing the legislative process.*

[20] Cause *Iacov Stanciu against Romania*, Decision from 10.07.2012 of the third section, available on the website http://www.echr.coe.int.

[21] Cause Iacov Stanciu against Romania, paragraph. 128;

the offender is effectively incarcerated), and in terms of the offender, the protection is illusory.

Since the imprisonment runs in detention where, in spite of the separation criteria, the offenders freely communicate with each other, the prison contagion occurs and thus, the risk of a repeat offense increases significantly. Besides, the fact that penalty prison is running, as a rule and in the most significant part, it is in common, as a famous author noted[22] an obvious and insurmountable disadvantage of the possession by the fact that it allows the enraged and savvy criminals to exercise one bad influence on those who make first contact with the prison and who, although do not have one criminal culture, thus they acquire it and they release from prison much more prepared to conduct a criminal activity than they were following the entry into the prison.

The probation measures being performed into the community, are more protected from the risk of crime contamination because the community in which the performance takes place is an open, generally it represents the society that is fundamentally different from the closed and pernicious community prisons. We can say, in antagonism with the prison sentences that the probation measures are performed individually.

Moreover, even if serving the prison sentences is intended to be as individualized as possible[23], the execution of the probation measures allow a deeper administrative individualization, which can reach up to the level of customization for each individual[24]. It is this level of customization up to the convicted individual which is considered legal doctrine able to reduce to a significant extent the risk of recurrence[25].

6. The purpose of increasing the opportunities for rehabilitation and social reintegration

By that the probation measures leave much of the burden of re-education and re-socialization into the responsibilities of the offender, their execution increases the chances of effective reeducation and a real social reintegration.

Even if serving a prison sentence resulted in an exemplary rehabilitation of the offender who, during execution, acquired, let's say, a new job, that he could practice freely, he will carry for the rest life "the convict stigma", of the person imprisoned, who served a custodial sentence and, for that, in the collective mind, must have committed an abominable act.

This stigma is an almost insurmountable obstacle in the way of real and effective social reintegration after release, and he is not in case of executing the probation measures. The person whom were applied such measures is so much requested to work towards reintegration, knowing that he/she does not bear the stigma of convict, than the person who serving a custodial prison and knowing that it will be more difficult reaccepted by the society is not at all stimulated to act towards reintegration.

In most of the cases, after executing the probation measures, the perpetrator is not even subjected to a ban, fall or incapacity[26] or his rehabilitation will be more easy and, usually, earlier than the persons imprisoned[27], thereby having much greater chance at reintegration.

Moreover, the process of social reintegration of the persons performing the probation measures starts from the final judgment decision when the probation measures are imposed, which is another advantage over the assumption of prison punishment when the reintegration process can begin, actually, at the earliest when released from the prison.

7. The purpose of excluding extrapersonal and on long-term harmful effects, specific to the prison sentences

In addition to the strict legal orders effects and that are always borne by the individual who served a prison sentence under detention leave other traces, of different nature than the legal ones, within the family, or the relatives of the offenders. The legal doctrine referred to the fact that custodial sentences also affect the caregivers of the prisoner and that these effects extend far beyond the term of the release from prison[28]

The family and the inner circle of the persons serving a sentence in detention are required to make contact with the prison when they visit the prisoner or if providing packages, they are obliged to pay, sometimes more than significant, in order to keep in touch with the prisoner and to make his prison life bearable. After release, the impact of the acquired skills of the person that served the sentence in detention is often difficult to be resorbed by the kindred with substantial costs or even

[22] I. Chiș, *Executing the punishments*, Universul Juridic Publishing House, Bucharest, 2015, p. 22;

[23] In this respect, art. 89 para. (4) of Law no. 254/2013 regarding the enforcement of the sentences and the custodial measures, requires preparation, after the period of quarantine and observation by the provisions of art. 44 of an *Individualized Assessment and Therapeutic and Educational Intervention Plan*;

[24] In this respect, art. 1446-1450 from its Rules of application of Law no. 252/2013 on the organization and functioning of the probation service, approved by Government Decision no. 1079/2013, as amended and supplemented by Government Decision no. 603/2016, requires preparation of the *Monitoring Plan*;

[25] I. Chiș, *Executing the punishments*, Universul Juridic Publishing House, Bucharest, 2015, p. 22;

[26] This is the case, for example, of the person to whom it was given the solution of postponing the enforcement of the sentence when, according to art. 90 para. (1) Criminal Code, one is not subject to decay, prohibition or impairment that would result from such an offense if a crime committed back to the expiration of the supervision, it was decided to dismiss the delay and no cancellation policy cause has been found.

[27] This is the case, for example, of the convict whose surveillance sentence was suspended and according to art. 165 Criminal Code it is rehabilitated by law, with the only condition that no other offense be committed within three years from the expiry of surveillance.

[28] I. Chiș, *Executing the punishments*, Universul Juridic Publishing House, Bucharest, 2015, p. 21.

impossible for both sides. The negative effects of the prison detention spread like the shock waves in the community (family, entourage) of origin where the prisoner returns.

All these negative aspects can not be found if the probation measures, involving lower costs for the person who serves them and that allows them during the execution, to have a family, social life, almost the same as before acquiring the statute of person subject to surveillance measures.

8. The aim to increase the chances of compensation for damage caused by crime

Lately, it has been noticed an important change of paradigm, moving from a vindictive to one restorative justice, whereby to increase the chances of compensation for damage caused by the offense.

The probation measures as an alternative to detention, have this purpose, to increase under a double aspect, the chances to compensation for damages.

Under a first aspect, the objective reality is as obvious as possible that a person incarcerated has significantly fewer opportunities to make money from covering the damage caused by the offense than the person who is subject to the probation measures and that can lawfully earn income as a person who had contact with the criminal justice system.

Under the second aspect, of the legislative reality, this part of the probation system purpose has a normative consecration, both internationally and domestically.

At international level, repairing the damage caused by the offense is among the first targets in the Council of Europe Recommendation no. R (92)16 on the European rules regarding the community sanctions and measures.

The purpose of the current national legislation in question is guaranteed by lifting the compensation for the damage to a rank of imperative condition to achieve the full effects of serving all measures of probation in case of disposing different forms of individualization of punishment without imprisonment[29]. Likewise, the new law on the organization and functioning of the probation service obliges the probation officers to carry out steps to boost the damage repair[30].

We believe that even a more conspicuous emphasis on the purpose of repairing the damage caused by the offense can be achieved through a brief analysis of the historical perspective of the name that the probation service had it for over a period of its existence. Thus, by Law no. 211/2004 on the protection of victims[31], the name „social reintegration services for offenders and supervising the execution of non-custodial sentences" under the Government Ordinance no. 92/2000 was replaced by the suggestive name of "services to protect victims and social reintegration of offenders", which it has been maintained until the entry into force of Law no. 123/2006 on the probation staff statute[32].

9. The purpose of reducing the financial costs on the administration of criminal justice during its execution

Talking about the social costs of the monitoring measures, we can not just make reference to the financial resources that the state, through its specialized organs, must allocate to enable monitoring on the persons subject to the measures in question. And because these absolutely costs considered *ut singuli* may not provide much relevant information, we focused on a comparative analysis between the costs of the state probation measures and of the custodial sentences.

According to data from the Annual Activity Report of the National Administration of Penitentiaries in 2016, the average monthly cost for a person imprisoned was in reporting year of 3.532,42 lei. Analyzing data from the Annual Activity Report of the National Probation in 2016 and the budget for the same year for this institution[33], it results that dividing the budget (28.744.000 lei) to the number of monitored people (57.814 people), the monthly cost of a monitored person is about 41,43 lei.

As it can be seen from statistic data which we referred above, a conclusion downright shocking can be drawn: the cost of implementing the probation measures is over 85 times lower than the cost of the execution of the custodial sentences.

However, this conclusion is somewhat distorted by the fact that the probation system in our country works to a level of the ratio of people monitored by a a probation officer that we can call inappropriate and that is likely to cause a shock so powerful: 153 people monitored by a probation counselor[34]. This ratio can not

[29] Pursuant to art. 88 para. (2) and art. 96 para. (2) of the current Criminal Code, the disobeyance of reparing thedamage during the term of supervision is case to revoke the penalty postpone or of the suspended sentence under supervision.

[30] Pursuant to art. 65 of Law no. 252/2013 on the organization and functioning of the probation system in order to check the compliance of the supervised person with the civil obligations established by the judgment, six months before the expiry of the supervisory probation period, the probation counselor - case manager requests information regarding the steps taken by the person to fulfill these obligations, requiring proof of completion that is attached to the probation file if the person under observation did not fulfill the civic obligations, the probation officer checking the reasons for failure and, if necessary, directing the person to perform civil obligations three months before the expiry of surveillance; according to art. 67 para. (2) of the same law, if the monitored person does not fulfill civil obligations by no later than three months before the monitoring expiry, the probation officer prepares a report assessing, recording the reasons for failure and informs the court to revoke the benefit of individualizing the penalties without imprisonment.

[31] Law no. 211/2004 on the protection of victims was published in the Official Gazette no. 505 / 04.06.2004.

[32] Law no. 123/2006 on the staff regulations of the probation services was published in the Official Gazette no. 407/10.05.2006.

[33] Available on the electronic address http://www.just.ro/wp-content/uploads/2015/12/anexa-2.3.1-buget-DNP-16.03.2016.pdf.

[34] The report was based on the number of people monitored and of the number of the probation counselors out of the plan for the National Probation Directorate, as they appear in the annual activity report of the institution in 2016.

be one according to the Tokyo Rules[35], which in art. 13.5 establishes the number of cases assigned to each agent shall be maintained as far as possible at a reasonable level in order to ensure the effectiveness of the treatment programs.

Of course, there are efforts to normalize the numerical ratio between the monitored probation counselors and people under surveillance by recruiting a large number of advisers[36]. Although these efforts will lead to a cost increase that the state should support it for each person monitored, we assume without fear of making mistakes, that he still remains much lower than that the one involving a person imprisoned. Moreover, this increase in the number of probation counselors will bring not only an increase in the cost but also improved quality of the monitoring activities, which is the premise of the need to leave any political development of the probation system.

Conclusion

The conditions that favored in our country the emergence and development of the probation system in general, and the probation measures as a viable alternative to imprisonment, in particular, they were various and acted, although starting in different historical stages, in collaboration, thus creating a positive pressure on those responsible for drafting the criminal policy.

Thus, the context of over-imprisonment of civilizing penalties, of the international normativity, of the jurisprudence of the European Court of Human Rights provoked finding viable sanctioning alternatives to the custodial sentences, which in the historical period we are facing now proved not to be the most suitable to ensure the goals of rehabilitation and reintegration of the offenders, especially for those that comit crimes to a certain degree of hazard.

We believe that all those responsible for the development of the probation system, resulting in the analyzed contexts above continues to exert pressure on further development of how the probation system is structured and operates, thus working togheter to shaping a professional and efficient probation service.

Moreover, as I stated above, the need for closer monitoring and characterized of the persons performing the criminal sanctions in the community is a prerequisite for achieving the goals that the probation proposes: reducing the risk of repeat offenses, increasing the chances of rehabilitation and social reintegration, exclusion of extrapersonal and long-term adverse effect, specific to the imprisonments, increasing the chances of compensation for the damages caused by crimes and, not least, reducing the financial costs of administrating the criminal justice during its execution.

Of course, the probation can not be the universal response for the treatment criminal sanctions in case of committing any crime, its limit being represented by a certain threshold of gravity of the facts and of the perpetrators, above which the probation measures can not be assessed as effective.

However, the actual social reality showed that there are real possibilities of recovering a significant number of people who come into conflict with the criminal law, without requiring their imprisonment, while the social deviance that they manifest is of a certain severity and the possibilities for treating this deviance are more and more diversified.

In other words, if we draw a parallel with the medical community and the developments registered, we could compare the treatment of the offenders in the community with the treatment of the patients in ambulatory, the imprisonment of the offenders, similar to hospitalization of the patients and it must be a final answer, only applicable to the worst deviant.

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[35] The United Nations Minimum Rules for the development of non-custodial measures, known as the Tokyo Rules were adopted in the 68th plenary session of 14 December 1990.

[36] The Government Decision no. 328/2016 amending and supplementing the Government Decision no. 652/2009 on the organization and functioning of the Ministry of Justice and amending certain legislative acts, supplemented the probation services plan with 565 positions of probation counselors and support staff, which further fulfilled one of the strategic objectives which are included in the *Strategy for 2015-2020 for developing judicial system,* namely *Strengthening the administrative capacity of the Ministry of Justice and the institutions under its subordination and coordination*.

TERMINATION OF PREVENTIVE MEASURES – COMPARATIVE LAW ISSUES

Nadia CANTEMIR – STOICA*

Abstract

Preventive measures are one of the most important institutions of the criminal procedural law, because of the fact that by taking it the freedom of the citizen is restricted - one of the most important constitutional rights.
The legislator had a difficult task when it approved the rules governing the conditions for making, revocation and termination of the preventive measures, being necessary to balance the security of criminal procedures on one hand and freedom of the investigated citizen on the other hand.
In this study we intend to analyze the institution of legal cessation of preventive measures, reviewing a comparative presentation with other states that have chosen to regulate the procedural measures.
Not lastly, we will notify the identified inconsistencies and will issue the legislative proposals so that the provision should not be criticized by its recipient.

Keywords: *preventive measures, termination of the right, comparative law, prosecutor, house arrest.*

1. Introduction

The preventive measures are those procedural instruments offered by the legislator to the judicial bodies, so that if there is strong evidence or indications that a person has committed an offence under the criminal law and these are essential for carrying out the criminal procedures in a good condition.

The preventing measures are part of procedural measures category that are defined in the specialized literature as being institutions of constraint which can be ordered by the criminal court to properly perform the criminal proceedings and ensures achieving the object of the action in the criminal proceedings[1].

In the Code of Criminal Procedure, we find as regulated the following institutions which are part of this procedural measures category: preventive measures, security measures of medical nature, ensuring measures, reimbursement of the things and restoring the situation previous to committing the offence.

We believe that this study is of heightened importance given the fact that it examines the institution of legal termination of preventive measures, making a comparison with the other countries that have regulated this way to stop a preventive measure and identify whether the current position is objectionable and what improvements can be made to the standard criminal procedural law.

First we will analyze national legislation, then we will highlight criminal procedural elements identified in other legislations related to the institution of termination of the preventive measures.

The approached topic is well known, and the specialized doctrine chose to write about in several occasions about how these preventive measures cannot be perpetuated in criminal proceedings. In the research I could not identify, however, a paper that comparatively addresses the institution under discussion, meaning that, our duty is to try to offer a comprehensive study on the subject.

2. Preventive measures in the Romanian criminal procedural law

Following the defeat of compliance report, after the individual choses to commit offences under the criminal law, after triggering the mechanism of criminal proceedings, the judicial body has the power to choose whether the preventive measure should be taken not to threaten the smooth conduct of criminal proceedings.

As we already know, according to the national procedural law, the preventive measures that can be taken are detention, judiciary control, judicial control on bail, remand in custody and house arrest.

The 5th title of the General Part of the Code of Criminal Procedure is devoted to analyzing preventive measures and other procedural measures, the former being regulated in article 202- 244 C.C.P.

Having a procedural nature, the preventive measures may only be taken only under the conditions prescribed by law, by certain officials, following a certain procedure and for certain periods. Also, even though it implies a constraint similar to the one resulting from the execution of the penalty of imprisonment, the custodial preventive measures differ from imprisonment because it is only taken during the criminal trial, exceptionally, in order to prevent the suspect or defendant to avoid prosecution, trial or execution of the sentence or to obstruct finding the truth[2].

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[1] I. Neagu, M. Damaschin, *Treaty of Criminal Procedure, Overview*, ed. Universul Juridic, București 2014, p. 583.
[2] G.Mateuț, Treaty of Criminal Procedure, Overview, Vol. II, C.H.Beck, București, 2012, p. 329.

Thus, we see that the legislator established a series of guarantees for people who are being investigated in criminal proceedings, such as periods which the preventive measures can take, category of judicial bodies that can appreciate the opportunity to take an action, revocation, termination of or replacing those measures.

The most important aspect is generated by the facultative character of these procedural measures so that the legislator does not list a number of crimes for which would be essential to take a preventive measure.

Once satisfied the condition of the opportunity to take preventive measures in a certain case, the judicial body imposes the obligation to motivate what was the reason for choosing a particular preventive measure out of the ones offered by the legislator in the article 202 line 4 of C.C.P., and why another one is not sufficient for the good conduct of the criminal trial. We also have to note that this obligation of the judicial bodies is to be found both in taking a preventive measure as well as at the time when questioning the extension or maintaining it.

2.1. Termination of the preventive measure of detention

A. Conditions in which the measure can be taken

According to the provisions of article 209 of C.P.P., the preventive measure of detention may be taken only in the first phase of the criminal proceedings or criminal prosecution stage, by the criminal investigation body or prosecutor towards the suspect or the defendant, if such action is necessary to ensure the conduct of good conditions of the criminal trial, of the breach of absconding the suspect or the defendant from trial or prevent committing of a crime. However, it is necessary not be a cause which prevents the initiation or exercise of criminal proceedings from the ones provided by article 16 of C.C.P and the preventive measure must be proportional to the seriousness of the accusation made to the suspect or the defendant. We hereby observe that the only preventive measure that can be ordered is, on one hand, towards the suspect and, on the other hand, towards the criminal investigation body.

The preventive measure of detention should not be confused with other forms of deprivation or temporary limitation of freedom of movement:

- Catching the perpetrator and presenting him immediately in front of the prosecution, in the case of flagrante delicto;
- Driving a person to the police station, as an administrative police measure provided under Law no. 218/2002 on the Functioning of the Romanian Police;
- Bringing subpoena and remaining at the disposal of the judicial body for no longer than 8 hours (article 265 of C.P.P.);
- Remaining in the witnesses and expert courtroom at the court of law disposal, after hearing them and until the end of the inquiry act which is carried out in that meeting (article 381 line 9 C.P.P.)[3].

The preventive measure may be imposed for any offense under the Criminal Code or special laws, after the criminal investigation body or prosecutor who hears the suspect or defendant in the presence of the chosen counsel or ex officio. The suspect or the defendant has the right to personally inform his chosen lawyer and this has the obligation to present himself in at least two hours at the judicial body premises.

The judicial bodies have an obligation to inform the detained person of the offence he is accused of, the reason of detention, the order under **which** this measure was taken, the right to bring a complaint against it and the maximum period for which it can be taken.

Regarding the maximum period for which this measure can be ordered, we can see that the legislator sets a 24-hour period, calculated from the initiation time of the measure by ordinance by the prosecutor or criminal investigation body. Therefore, this term will not include driving the suspect or defendant at the judicial body premises, according to law and also any period when the suspect or the accused was under the power of warrant for arrest.

Therefore, this term is a substantial one that is calculated as per the provisions of article 271 of C.P.P., *thus in calculating the periods on preventive measures or any other right restrictive measures, the hour or the day when it starts and ends the period enters its duration*.

B. Termination of the measure

In the theory of criminal trials it was showed that discontinuation of preventive measures happens when there is a legal obstacle in its maintenance, the authority before which the case is under disciplinary and even criminal responsibility, to immediately release the person detained or in custody, or to immediately lift the obligation not to leave the town or country or obligations imposed by judicial control[4].

With reference to 241 of C.C.P. which is the legal basis for termination as preventive measures, we note that the detention may cease in the following situations:

- When the period ends, provided by law – we are in this situation when the prosecutor ordered the detention for a period of 24 hours and at the end of this time the suspect or defendant was released or if a proposal for preventive detention was made but was not solved, the defendant will be released from the witness stand and will plead with him in liberty.

In the specialized literature, it was pointed out that according to their nature and purpose, the preventive measures are always temporal, being taken on a term precisely or relatively fixed[5].

In the article 268 line 2 of C.C.P. marginally called consequences to failure to comply with the term,

[3] N.Volonciu ș.a., New Code of Criminal Procedure, 2nd edition revised and enlarged, ed. Hamangiu 2015, p.470.
[4] G.Theodoru, *Treaty of Criminal Procedural Law*, 3rd edition, ed. Hamangiu, București, 2013, p. 375-376.
[5] V.Dongoroz ș.a., Theoretical explanations of the Romanian Code of Criminal Procedure, ed. All Beck, București, 2003, p. 314.

the legislator regulates the fact that *when a procedural measure can be taken only for a certain term, its expiry draws the termination of the measure*.

- When the term set by the judiciary body expires – we are in this situation when the criminal investigation body or the prosecutor orders the preventive measure of detention on a period of less than 24 hours, meaning that, reaching this term leads to termination of the measure.

Making a practical analysis I have never identified the assumption that the judicial body would order as a preventive measure for a period less than 24 hours, but such a situation is impossible as long as the legislator intended to regulate it.

We are in the position that the defendant might be released before the expiry of the 24-hour term set by the criminal investigation body or by the prosecutor, assuming that it is formulated a proposal for preventive detention, and as per the provisions of article 227 line 1 C.C.P. *the rights and freedom judge, if it considers that the conditions set by the law for the defendant's preventive detention, rejects, by a reasoned conclusion the proposal of the prosecutor, ordering the release of the detained defendant*[6].

This circumstance is more a special revocation type, even though the rights and freedom judge would not order the revocation of detention, but immediately releasing the detained defendant.

2.2. .Termination of the preventive measure of judicial review and judicial control on bail

A. Conditions in which measure can be taken

Depending on the seriousness of the crime incriminating the accused, the manner in which it was committed and the person accused, the judicial body if it believes that a custodial sentence is not necessary for the purposes of criminal proceedings may take a measure restricting liberty, respectively, judicial or judicial bail.

These preventive measures that are similar can be arranged if the following conditions are met:

- There is evidence and clues which point to the reasonable suspicion that a person has committed a crime;
- The measure is necessary to ensure the smooth conduct of the criminal trial, to prevent the defendant from absconding from prosecution or trial or to prevent committing another offense;
- Defendant to be heard in the presence of the lawyer chosen or ex officio;
- The measure to be proportional to the seriousness of the charge and necessary for achieving the goal;
- Not to exist a case which prevents the exercise or initiation of criminal action between those apprehended in article 16 C.C.P.

Measure can be ordered both the prosecution stage and in the preliminary chamber and trial by the prosecutor, the rights and freedom judge, the judge of preliminary chamber or the court, a period of 60 days which can be extended to maximum 1 year[7], two years respectively[8] in the first phase of the criminal investigation and trial up to five years, calculated from the time of prosecuting.

B. Termination of the measure

The criminal procedure law has held a number of cases where preventive measures shall automatically be terminated by operation of law, excluding the possibility of appreciation in these cases from the judicial body on the appropriateness or necessity of ending the measure[9].

Although the legislator regulates what are cases where preventive measures will terminate, they still have to be found by the judicial authorities, in order to identify whether the conditions are met to operate the termination.

Therefore, the cases of termination of the measure as judicial control or judicial control on bail are:

- When the term provided by law expired;

The term set by the legislator is 60 days and will be incident this case of termination of law when the prosecutor had not ordered the extension of the preventive measure of judicial review or judicial control on bail or if the judge for preliminary chamber or the court has not checked legality or validity of the measure.

There were situations in the specialty practice when the courts have failed to question the legality of maintaining the preventive measure of the judicial control, meaning that, at the term, it was discussed the termination of preventive measure given the fact that the term provided by law initially set by the judge expired.

By concluding the hearing in the criminal case[10] no. 45092/3/2016/a1.2, the preliminary chamber judge from the Bucharest Court of Law decided *based on article 348 line 2 Code of Criminal Procedure with reference to article 241 line 1 letter of Code of Criminal Procedure., article 241 line 2 Code of*

[6] The conclusion 270/2014 of Suceava Court of Law ordered in the criminal case no. 7655/86/2014 rejects the proposal of the Prosecution office attached to the Court of Suceava of taking preventive detention for a period of 21 days of the defendant VORNICU IONUȚ ANDREI, as unfounded. Based on art. 227 line 2 of Code of Criminal Procedure reported to article 202 line 4 letter b Code of Criminal Procedure, judicial control measure is taken against the defendant Vornicu Ionut Andrei investigated for the offense of false testimony laid in article 273 line 1 and 2 letter d Code of Criminal Procedure, with application article 35 line1 Code of Criminal Procedure orders releasing the detained defendant Vornicu Ionuț Andrei if not detained or arrested in another case. 2. Rejects the proposal of the Prosecution Office attached to the Court of Law in Suceava to take the preventing detention measure on a period of 21 days of the defendant BALAN DENISIA, as unfounded. Orders the immediate release of the defendant BALAN DENISIA, if not detained or arrested in another case.

[7] article 215^1 line 6 C.C.P. if the penalty provided by law is a fine or imprisonment of up to 5 years.

[8] article 215^1 line 6 C.p.p. if the penalty provided by law is life imprisonment or imprisonment exceeding 5 years.

[9] N.Volonciu ș.a., New Code of Criminal Procedure, Second edition revised and enlarged, ed. Hamangiu 2015, p.565.

[10] http://portal.just.ro/3/SitePages/Dosar.aspx?id_dosar=300000000737017&id_inst=3.

Criminal Procedure, article 2151 line 2 Code of Criminal Procedure determines as being terminated, starting with Nov. 10, 2016, prior to issuing the document instituting preventive measure of judicial control, given to S. V. defendant by the ordinance no. 987/D/P/2016 of September 11, 2016 of the Prosecution Office attached to the High Court of Cassation and Justice – D.I.I.C.O.T. – Bucharest Territorial Service. Enforceable. With the right of appeal within 48 hours from the notification. Decided in the chambers, today, January 17, 2017.

- When the terms given by the judiciary bodies expire;

As I said in the preventive measure of detention, the legislator regulates only the maximum length on which a preventive measure can be taken, meaning the judicial body, the principle of *ad majori ad minus* has the opportunity to dispose the preventive measure to judicial control or judicial control on bail and for a shorter period of time. As a result, if the prosecutor decides to take the measure of judicial control over a period of 50 days, it will lawfully stop, to the extent that the measure would not be extend by an ordinance.

If the procedure of preliminary chamber has been completed and the court has not checked the legality and merits of the judicial control within 60 days from the last maintain of judiciary control and lacked maintenance of judicial control, the preventive measure ceases after this term[11].

In fact, against the defendant it was decided to take judicial supervision for a period of 60 days expiring on July 22, 2016. Subsequently, the DNA representatives – ST Alba Iulia have decided through the Ordinance of July 22, 2016 "the extension" of the judicial control measure for a period of 60 days starting with July 24, 2016. In those circumstances, the defendant made the request for the termination of the preventive measure ordered against him, saying rightly that the initially taken measure expired before the so-called extension. It has been argued that taking such a new measure is possible only if the new elements that had not been known at the date on which the extension could have been applied for the initial considerations for the measure.

By Conclusion no. 6/08.08.2016, the rights and freedoms judge of the Alba Court of Appeal upheld the finding of the defendant's request for termination of the measure as judicial control. The court noted in this context that *the extension of a preventive measure implies that prerequisite situation the pre-existence of such a measure, ordered as per the legal dispositions, we well as an unbroken continuity between the period of 60 days to measure judicial control established and duration for ordering the extension of this measure. Therefore, the prosecutor's decision ordering the extension of the measure, although it was given before its expiry and its fining cessation termination of the judicial control, taking place on July 22, 2016, a legal appearance, can no longer take effect when the rights and freedoms judge finds terminated the measure taken against the defendant.*

By Ordinance of October 08, 2016, the prosecutor's office representatives order again the preventive measure to judicial control against the same defendant for the same reasons taken into account at the previous "extension". Following the complaint made against that ordinance, the rights and freedoms judge of the Court of Appeal Alba received and noted the conclusions of the defender to the defendant meaning that taking a new measure may be ordered only if there is new evidence to justify the need for it.

For these reasons, the conclusion of the criminal case no. 7 of August 12, 2016, the court admitted the complaint stating that the prosecutor did not find the existence of new facts or circumstances, arising after the date on which it was ordered extension of judicial review (even if regarding this it has been found that its effects have been exhausted due to the termination of the initially ordered measure) and to justify taking a new preventive measure against the defendant, ordinance from August 10, 2016 is, in reality, an extension of the preventive measures that ceased and ceased to have effect.

The rights and freedoms judge has estimated that despite the provisions of article 238 line 3 Code of Criminal Procedure refers only to preventive detention, they should be applied *mutatis mutantis* in any similar situation. Therefore, taking a new preventive measure (regardless of its nature) is possible only if the emergence of new elements showing the need for it[12].

- During the criminal investigation or during the trial at first hearing on reaching the maximum term provided by law;

As mentioned above, these preventive measures may be ordered for a period of 60 days and can be extended up to one year, respectively two years during the criminal investigation of 5 years during the judgment at first instance, this last term when calculating from the moment of prosecuting.

We observe that legislator did not set a maximum term for the measure of judicial control or on bail during the preliminary room, we believe that it is applied the term stipulated for the trial stage, meaning it may not exceed 5 years from the moment when referring the court with the indictment.

During the trial the same obligation applies to periodically check but not later than 6o days the legality and merits of the preventive measure, meaning that this operation will not interfere, the preventive measure will be found as terminated.

- In cases where the prosecutor decides not to indict a solution or the court of law issues a solution of acquittal, closure of the prosecution,

[11] M.Udroiu, Criminal proceedings.Overview, ed.3, ed. C.H.Beck, p.677.
[12] http://www.chirita-law.com/prelungirea-controlului-judiciar-ulterior-incetarii-de-drept-a-masurii-preventive.

waiving the penalty or postponement of penalty or punishment by fine, even not final;

Naturally, if the judicial body considers that there must be a solution of conviction against the defendant who is being investigated in a case, not even keeping the preventive measure judicial control or bail cannot exist, since it is not longer necessary for the proper conduct of the trial.

Assuming that the prosecutor decides to cancel the prosecution, we consider that the preventive measure shall terminate as from the date of issue of the order, without regard to subsequent proceedings for confirmation of the order imposed by the judge for preliminary chamber, given the fact that the prosecutor appreciated on the opportunity to exercise criminal action, meaning that no measure cannot subsist, this no longer being needed.

We note, however, that if the court gives the suspension solution under surveillance or when applied to a non-custodial educational measure, it will not be found as being terminated the preventive measure judicial control or on bail, being able to maintain this measure or on the contrary, may be revoked.

In the specialized literature[13], it is considered that the measure of judiciary control will terminate even when the fine penalty accompanies imprisonment, if the court of law decides to delay the enforcement of the penalty; therefore when the fine penalty is accompanied by imprisonment, it is not necessary for the court to have a solution for sentencing, the provisions of article 62 of C.C.P. may be applied when it is delayed the enforcement of the penalty.

- The date of the final judgment when the defendant was convicted.

The need of perpetuating the preventive measure no longer exist, given the completion of the judgement by convicting the defendant, taking into consideration that its purpose was generated even by the good conduct of the criminal trial.

2.3. Termination of the measure of house arrest and preventive detention

These two preventive measures are the toughest of the five measures covered by the legislator, which can be taken both in the prosecution phase as well as during the preliminary trial chamber, consisting of deprivation of liberty for a determined period of time. The legislator pays special attention to the conditions under which these preventive measures can be arranged, by introducing a number of guarantees against the defendant for which it is considered the need for home arrest of preventive detention.

A. General conditions for taking these preventive measures:

- There are evidence and important clues which point to the reasonable suspicion that a person has committed a crime;
- The measure is necessary to ensure the good functioning condition of the criminal trial, of preventing the defendant from absconding from the prosecution or trial or to prevent committing another offense;
- The defendant to be heard in the presence his chosen lawyer or ex officio.;
- The measure be proportional to the seriousness of the charge and necessary for achieving the goal;
- Not to be a case which prevents the initiation or exercise of criminal action between those provided in article 16 C.C.P;
- To be found as alternative achievement any of the situations referred to in article 223 C.C.P.[14].

B. Termination of house arrest and preventive detention

Analyzing article 241 of C.C.P., regulatory framework of the institution of termination of preventive measures, we observe that the legislator establishes under line 1 general cases applicable to all preventive measures and in the second line special cases which are incident only in the case of house arrest and preventive detention. Thus, the magistrate will determine as being terminated the preventive measures analyzed in the following cases:

- When the term provided by law or determined by the judicial body expires or on the expiry of 30 days term, unless the judge for preliminary chamber or court has not checked the legality and merits of preventive arrest in this period, namely at the expiry of 60 days period, if the court has not checked the legality and merits of the home arrest or preventive detention[15].

The term set by the legislator for taking these preventive measures is 30 days, meaning that, if the rights and freedoms judge or the court does not decide setting the extension or maintenance of such measures,

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[13] M.Udroiu, Procedură penală.Partea generală, ed.3, ed. C.H.Beck, p.678.

[14] 1. a) the defendant escaped or has been hiding, in order to evade prosecution or court, or has been any type of preparing for such acts.

b) the defendant tries to influence another participant in the committing the offense, a witness or an expert, or to destroy, alter, hide or to escape as evidence or to cause another person to have such conduct.

c) the defendant puts pressure on the injured person or tries to achieve a fraudulent deal with him.

d) there is reasonable suspicion that after the initiation of criminal proceedings against him, the defendant has intentionally committed or prepares to commit a new crime.

2. The preventive detention of the defendant may be taken if from the evidence there is reasonable suspicion that he committed a deliberate crime against life, a crime that has caused injury or death to a person, a crime against national security stipulated in the Criminal Code and other special laws, an offense of drug dealing, arms trafficking, human trafficking, terrorism, money laundering, counterfeiting money or other valuables, blackmail, rape, deprivation of liberty, tax evasion, assault, judicial assault, corruption, an offense committed by means of electronic communication or another offense for which the law prescribes imprisonment of five years or more and, based on assessing the seriousness of the offense, the manner and circumstances of committing it, of the entourage and the environment from which it originated, criminal background and other circumstances relating to his person, shows that deprivation of liberty is necessary to eliminate a state of danger to public order.

[15] M.Udroiu, Criminal Procedure. Overview, ed.3, ed. C.H.Beck, p.591.

they shall terminate, the defendant being released, and such legislation having a strong protection and security trait against illegal extensions.

During the criminal investigation, the total duration that can be taken in preventive detention and house arrest is of 180 days. According to article 222 line 10 C.P.P. reproduced as amended by article I of Law 116/2016, following the occurrence of the Constitutional Court Decision no. 927 of December 15, 2015[16], *the length of deprivation of liberty ordered by the house arrest measure it is taken into account for calculating the maximum time of preventive detention of the defendant during the criminal investigation.* We see therefore that in the event that a certain cause was decided both the house arrest and preventive detention, these two measures can be taken over a period of maximum 180 days.

In the event that the defendant was taken into preventive detention for a period of 180 days during the criminal investigation and was ordered the prosecution in preventive custody, if the judge of the preliminary chamber decides to return the case to the prosecution, this will not be able to also maintain the preventive measure because it would have exceeded the maximum limit regulated both in CCP and the Constitution.

- If the prosecutor decides to dismiss or waive the criminal prosecution or the first court ordered by the sentence an acquittal solution, to terminate the criminal proceedings, to wave the penalty, to delay the enforcement of the penalty or suspended sentence of the execution of sentence under supervision;

Given that the fact that the first phase of the criminal proceedings ceases through a nolle prosequi or waiver solution of the criminal prosecution, obviously preventive measure cannot subsist beyond those limits. Moreover, looking at the cases where other solutions are disposed, we notice that they are incompatible with the perpetuation of a state of detention against the defendant.

- When before giving a solution in the first instance, during the arrest he has reached half the maximum penalty provided by law for the offense that is the subject of accusations, without exceeding the term of 5 years from the date of notifying the court of law;

In order to identify which is the special maximum of the punishment, we will relate to the punishment provided in the text of law without taking into account the obvious reasons for reducing or increasing the punishment.

- In the appeal, if the preventive measure of preventive detention or house arrest has reached the penalty ordered by the conviction sentence;

It will be found the termination of the preventive detention measure also assuming that the court of appeal admits an appeal declared only by the defendant and sends the case back to the first court, if the penalty imposed in the first instance is equal to the duration of the preventive detention; in this case, due to applying the *non reformatio in peius* principles courts will not impose a punishment greater than the punishment originally applied[17].

When the court orders by sentence convicting the defendant to imprisonment equal to the duration of detention, preventive detention and house arrest;

Clearly, the same reasoning is applied and intervene the termination by law and if the punishment set by the court is shorter than the duration of deprivation of liberty through the preventive measure.

When the seized the court of law decides upon a sentence to the penalty fine or a non-custodial educational measure;

From our perspective, we will operate with this institution of termination and when the court decides that the fine penalty is accompanied by imprisonment, and on which suspends the supervision or delays the enforcement of the penalty.

- At the date of the final decision of conviction to imprisonment with execution or life imprisonment;

In this circumstance, the preventive measure converts to penalty, which is to be enforced by the convicted person, the latter becoming convicted person from a person under arrest.

3. Aspects of Comparative Law

Analyzing other countries' legislation, we find that detention measure may be taken for a period of 24 hours in Luxembourg, Greece, Canada, Colombia and Germany and in Portugal, Russia or Poland of 48 hours and 5 days in Brazil.

In the Netherlands, as a preventive measure may be ordered for a period of 3 days, which may be extended by the prosecutor for a further period of 3 days.

In The Republic of Moldova[18], in case when the instruction judge, examining the steps regarding the application for preventive detention of the suspect according to article 307 of the CCP, rejects the request or applies a lighter preventive measure, the detained suspect is released after the expiry of 72 hours, and if in the process of examining steps it is found an essential violation of law to the person's arrest, he will be released immediately from the hearing room.

According to the criminal procedural legislation of the Republic of Moldova, the preventive measure terminates:

- when the terms provided by law or determined by the prosecuting authority expire (taking into account by the prosecutor) or by the court of law, if it was not extended according to the law;

[16] www.ccr.ro.
[17] M.Udroiu, Procedură penală.Partea generală, ed.3, ed. C.H.Beck, p.593.
[18] https://dreptmd.wordpress.com/teze-de-an-licenta/masurile-procesuale-de-constringere-in-legislatia-procesual-penala-a-republicii-moldova.

- in case of removing the person from criminal prosecution, finishing the criminal proceedings or of the person's acquittal;
- in case of execution of the conviction sentence;
- in case of adopting a conviction sentence with non- custodial penalty;
- the expiry of 10-day term of preventive detention or any preventive measures applied to the suspect, 30 days of arrest of the accused, or 6 months, 12 months or 4 months to extend the preventive detention of the accused, of 30 days ordering the not to leave town or the country by the accused:
- conviction with establishing the sentence and with exempting from punishment;
- conviction without punishment, and exempting from criminal liability;
- imprisonment with suspension of parole.

The Dutch Code of Criminal Procedure regulates in Title IV, the special means of coercion that can be arranged in criminal proceedings. Analyzing the criminal law legislation, we can observe that the concept of termination of coercive measures is regulated, but it uses the cancellation phrase, as follows:

- if case of decisions regarding the declaration of incompetence and release from prosecution, the temporary arrest will be canceled;
- in case of all final sentences - except for the provisions of line 6 and article 17 line 2 - the temporarily arrest will be canceled if, in connection with the offense for which the order was issued, the defendant is not required unconditionally the punishment of imprisonment for a period greater than the time spent by him in temporary custody, nor any measure that would attract imprisonment or which may attract imprisonment;
- in case that the period of the penalty of deprivation of liberty it is unconditionally imposed already exceeds the period made during the temporary arrest with less than 60 days, and it was not unconditionally imposed any measure that entails or may entail imprisonment, the temporary arrest will be cancelled in the final decision, without breaching the provisions of Article 69 with effect from the moment during this arrest is equal to the respective penalty.

In the Serbian Criminal Procedure Code, we have identified as incident the following measures to ensure the presence of the defendant and peaceful conduct of criminal proceedings, which are: summons, mandatory presence, provisions relating to travel and other restrictions, bail and detention. In the case of the measures on travel[19], according to article 168 line 11, these can last as long as necessary, but not later than the judgment becomes final. Instruction judge or the presiding judge has the obligation to check every two months if the measure applied is required.

The detention may be ordered for a period of one month, which can be extended up to two months, up to three months respectively, when the punishment provided by law is five years or more. In the event that, at the end of the periods charges are not brought, the defendant is released (in procedure held before the instruction judge).

The Belgian Code of Criminal Procedure governs the preventive detention. Thus, the arrest may be ordered for a period of 24 hours in case of flagrante delicto or where there are serious indications of guilt on a felony or a misdemeanor, but this time, with further conditions.

The person arrested or detained shall be released as soon as the measure has ceased to be necessary. The deprivation of liberty may in no case exceed 24 hours reckoned from the notification of the decision, if precautionary measures of coercion were taken from the time when the person no longer has the freedom to come and go.

The arrest warrant issued by the instruction judge is valid for a maximum of five days from its execution. The ordinance to keep in detention is valid for one month from the day in which it was given. As long as the detention has not ended and the instruction is not closed, the Council chamber is called upon to decide, every month, on maintaining the detention. Before the action of the defendant presents himself before the Council Chamber, provided in Article 262, the instruction judge can decide on the withdrawal of the arrest warrant by a reasoned order and immediately informs the King's prosecutor.

This ordinance is not subject to any appeal. Following the decision of the Council chamber under article 262, the instruction judge may, during the instruction, lifting the arrest warrant by a reasoned order and also informs the King's prosecutor. The Registrar shall inform as soon as possible in writing the defendant and his counsel. If the King's prosecutor does not oppose this ordinance within 24 hours of notification, the defendant is released. If the Council chamber did not decide within that period, the defendant is released.

According to article 267 C.C.P., in case of unwatched ordinance or resubmission ordinance to the police, the defendant is released, provided that he is not sent back for an act constituting an offense under Articles 418 and 419 of the Criminal Code or article 33, § 2, and 36 of the Law of March 16, 1968 relating to the road traffic police.

If the Council chamber resends the defendant before the Criminal Court or the police court, on

[19] (1) If there are circumstances indicating that the accused might run away, might hide or could go into an unknown place or abroad, the court may prohibit him from leaving home without permission by issuing a decision with stating of the reasons. (2) In situations referred to in paragraph 1 of this Article, the court may issue a decision prohibiting the defendant to leavehe the apartment or house, or ordering him to leave the apartment under surveillance on certain people. (3) According measures 1 and 2 of the article, the defendant may be ordered the following:1) prohibition from visiting certain places; 2) prohibition to meet with certain people; 3) to be present, occasionally and on exact time, in front of the court of law or any other state body; 4) temporary depriving of travel documents; 5) temporary deprivation of driving license and vehicle driving ban.

grounds of a deed which should not lead to a penalty equal to or greater than a year, the defendant will be released on condition to be present on a fixed day before the competent court.

When the Council chamber, adjusting the procedure, resends the defendant before a police court for reasons of an act for which preventive detention is founded and which is legally punishable by imprisonment superior to the duration of preventive detention which has already been subject to, it can release the defendant or decide by ordinance that the defendant will remain in custody, or he will be released, imposing him more conditions.

Provided that he is not be detained in another case, the defendant or remand prisoner is, despite the call, immediately released if acquitted, sentenced suspended or only fined, or if they benefit from have suspension of the pronounced sentence. The immediate release of the defendant or the remand prisoner involves, as far as he is concerned, the ban on the use of any means of coercion.

If he is sentenced to primary prison without delay, he is released, despite the appeal, from the time of the undergone detention is equal to the main prison term; in other cases, he remains detained for the time the decision will be given because of the action that motivated the detention.

In the IVth book of the Italian C.P.P. there are regulated the preventive measures (preventive detention and house arrest) and coercion (prohibition of expatriation, obligation to present oneself to the judicial police, the removal of the family home, the ban and obligation of the residence).

Analyzing the article 300 of C.C.P., we can observe as being regulated the institution of termination of measures following the delivery of certain sentences, such as:

- The measures ordered against a particular act immediately lose their effectiveness when, for this act and against the same person, archiving[20] is decided or sentence is pronounced due to lack of procedure in order to continue or to be released;
- If the defendant is in a state of preventive detention and by the sentence of release or lack of procedure to continue to apply the security measure of internment in the judiciary psychiatric hospital, the judge takes action according to Article 312;
- When in any court it is pronounced a convicting sentence, the measures lose efficiency if the imposed penalty is declared extinctive or conditionally suspended;
- The preventive detention also loses its effectiveness when the convicting sentence is pronounced, yet it is subject to the attack, if the period of the arrest is already lower in amount than the imposed penalty;
- The released defendant or against whom the judgment has been issued for lack of procedure in order to continue is subsequently convicted for the same offense may be ordered some coercive measures against him when preventive requirements are restored as per article 274 paragraph 1 b) or c).

Termination of the arrest due to not taking to the questioning of the person in a state of preventive detention, can intervene if happens during the preliminary investigation and judge does not take the interrogation in a certain period of time. However, the preventive detention loses its effectiveness when:

- the commencement of its execution the terms provided by the law already passed without the provision the judgment or order through which the judge has short judgment to have been issued according to article 438, or without being pronounced the sentence of enforcement of the penalty at the request of the parties;
- three months, when action is taken for an offense for which the law provides imprisonment not exceeding a maximum of 6 years;
- six months, when action is taken for an offense for which the law provides imprisonment of more than 6 years, except the provisions from no. 3;
- a year, when action is taken to an offense for which the law provides imprisonment for life or with imprisonment of not less than 20 years, or for one of the offenses indicated in article 407, paragraph 2, letter a), provided that this law provides for imprisonment of up to maximum 6 years.;
- from issuing the provision which requires judgment or from execution of the arrest have passed following terms without being pronounced the convicting sentence in the first instance:
- six months, when action is taken for an offense for which the law provides imprisonment of more than maximum 6 years;
- a year, when action is taken for an offense for which the law provides imprisonment of not more than 20 years, except for the provisions of no. 1;
- one year and six months, when action is taken for an offense for which the law provides imprisonment for life or with imprisonment exceeding maximum 20 years;

The total duration of arrest, taking into account the extensions provided by article 305, cannot exceed the following limits:

1. two years, until action is taken for an offense for which the law provides imprisonment not exceeding a maximum of 6 years;
2. four years, when action is taken for an offense for which the law provides imprisonment of not more than 20 years, except the provisions of letter a);
3. six years, when action is taken for an offense for which the law provides imprisonment for life or with imprisonment exceeding maximum 20 years;

[20] Until the dates provided for previous articles, the prosecutor, if the information on the case is unfounded, shows the judge the archiving request.

4. The procedure through which a preventive measure is established as terminated

The holders of issuing a preventive measure as being terminated as are the judicial bodies which having ordered the measure, or prosecutor, the rights and freedoms judge, the preliminary chamber judge or the court of law before which the case is pending. The judicial bodies will decide by an ordinance (the prosecutor) or terminate ex officio upon the request or referral of the prison administration[21].

The judicial bodies will have the right decide upon the termination of the preventive measures, ordering if the one detained or taken into preventive detention to immediately release him, if not detained or arrested in another case. Therefore, we find another incongruity of the legislator which does not also mention the situation of the one under house arrest for the same reasons there should be the same solution.

The rights and freedom judge, the preliminary chamber judge and not least the court of law shall rule by a reasoned conclusion in the presence of the defendant, who will be mandatorily assisted and with the participation of the prosecutor. There is a possibility that the judiciary bodies to rule in absentia but is required to be represented by a lawyer chosen or not producing any harm in such case, but aiming to promptly solve the request or notification. The judicial bodies are incumbent upon the obligation to immediately notify[22] the person against whom the preventive measure was decided and the institutions responsible for enforcement of the measure a copy of the order or conclusion / judgment / decision through which it has been detected the termination of preventive measure.

Against that conclusion, a complaint can be made by the prosecutor or the defendant within 48 hours of delivery for those present, and from the communication of the prosecutor or the defendant, who missed the pronouncement. The complaint filed against the decision through which the termination of this measure was found does not suspend the execution, the termination being enforceable[23].

5. Conclusions

Through this work we tried to go over the cases of termination as preventive measures under national law and a comparative presentation with other legislation on criminal procedure. The study developed under review we identified deficiencies institution and also have highlighted tasks judicial bodies in this matter and the rights of persons subject to preventive measures.

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- N. Volonciu et al, The new Code of Criminal Procedure explained, ed. Hamangiu 2014;

[21] See Judgment 206/2015 of I.C.C.J. file no. 1054/2 / 2014 / a18: Admits the complaint filed by the defendant Chiriță Mihai Gustin against the decision from date of February 3, 2015 of the Court of Appeal, Criminal Division II in case no. 1054/2/2014. Completely abolishes the contested conclusion and, re-judging: admits notification ANP and finds terminated the preventive detention measure taken against the defendant Chiriță Mihai Gustin. Orders the release of the defendant under the power of preventive arrest warrant no. 17 / UP / 25.11.2013 issued by the Court of Appeal, Criminal Division I. Legal costs remain the responsibility of the state. Onorariul parțial cuvenit apărătorului desemnat din oficiu până la prezentarea apărătorului ales, în cuantum de 50 lei, se va suporta din fondul Ministerului Justiției. Definitivă.

[22] See case Ogică c. Romania (judgment of May 27, 2010): Friday, January 31, 2003, immediately after final judgment according to which the sentence imposed expires at midnight (see paragraph. 8), the Registry of the Court of Appeal Bucharest wrote a letter to inform the Bucharest-Jilava Penitenciary about the judgment so that the administration can take appropriate action. A report prepared in the same day at 3:10 p.m. graft court of appeal referred to the steps taken on the basis of the judgment mentioned above. In this it is mentioned that, on the phone, the commander of the Bucharest-Jilava Penitentiary Registry informed that the secretariat was closed and that no one could receive the fax regarding the judgment. According to this report, the commander redirected the call to the prison guard officer who, in turn, stated that releasing the defendant cannot be made solely on the basis of a phone call, in the absence of a written document. After receiving the fax, on Monday, February 2, 2003 at 7:52 am, the judgment of 31 January 2003, the Bucharest-Jilava Penitentiary administration has taken the necessary steps and, at 10:40, the defendant was released. Concerned, the Court notes that the final decision of 31 January 2003 sentenced the defendant to a term equal to the duration of detention already served by that date and that, immediately after the judgment, the Registry of the Court of Appeal contacted the Bucharest-Jilava Penitenciart to take the necessary steps in order to release the interested party; The Court notes that the failure of these efforts was recorded in the minutes drawn up on the same day at 3:10 p.m. The Court recalls that, in considering the term for enforcement of judgments for reconditional discharge of the plaintiff in cases where the conditions required for the release were achieved at a time when prison staff in charge of operations required in this regard was not present due to the work program, it did not exclude periods as evening and night. It can not, much less, to adopt an approach to the question especially since, unlike the case *Calmanovici*, the Registry of the Court of Appeal contacted the administration of the Bucharest-Jilava Penitentiary during the day to inform of the final judgment and the need to take the measures required to release the defendant. The Court can not accept that, because of the work program of the secretariat, the administration of prisons do not take steps to reception, on Friday, in the early afternoon, a document sent through fax, necessary for releasing the defendant, knowing that closure of Secretariat will result in maintaining the concerned party of an additional detention for more than forty-eight hours. According to the Court, such a delay can not be an "inevitable minimal delay" for the execution of a final judgment has the effect of releasing an individual. Therefore,the detention in question was not based on one of the paragraphs of art. 5 of the Convention. Therefore, it appears that a violation of Article. 5 § 1.

[23] http://cks.univnt.ro/cks_2015_archive/cks_2015_articles.html.

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OBSERVANCE OF THE FUNDAMENTAL RIGHTS OF CONVICTED INDIVIDUALS DURING THE RE-EDUCATION AND SOCIAL REINSERTION PROCESS

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Abstract

The recent criminal justice reform brought by the entry into force of the new Criminal Code and the new Criminal Procedure Code carries forward the changes in approach with regard to sentence execution, introduced following the adoption of Law No. 275/2006 on the execution of sentences and the measures ordered by judicial bodies during the criminal trial. Having as a point of departure the joint standard set by Recommendation 2006/2 of the Commission of Ministers, this scientific paper is aimed at presenting the evolution of the Romanian legislative system in terms of sentence execution and the manner of regulation of the new institutions, including custodial educational measures that may be ordered for juvenile offenders, but also in terms of the positive obligations incumbent upon the institutions of the State involved in sentence enforcement and sentence execution supervision.

Keywords*: International and European recommendations transposed into national criminal legislation, organising custodial sentence execution, re-socialisation for convicted individuals, rights of convicts, execution of custodial educational measures, national strategy for social reinsertion of former convicts.*

1. Introduction

The overall national legal system and the laws governing the serving of criminal sentences cannot be approached in isolation. It is paramount to correlate them to the relevant European benchmarks and values.

This is actually the very reason for which the Romanian state undertook ample reforms in the matter of criminal law and criminal trial, but also in the field of sentence execution, the latter being started by the adoption of laws on the enforcement of sentences and measures ordered by judicial bodies during the criminal trial.

This legal science paper provides a significant contribution, by dealing distinctly and specifically (in relation to the common standard set by Recommendation 2006/2 of the Committee of Ministers) with the development of each legal institution in the matter of criminal sentences, the regulation of the new institutions, but also the positive obligations incumbent on the different national entities responsible for the enforcement and supervision of sentence execution.

Thus, this comparative research furthers the existing relevant literature, by carrying out a critical review of each principle set forth in Recommendation 2006/2 of the Committee of Ministers, and by presenting their integration in the national laws, indicating the level of internalisation of these guiding principles and pointing out specific challenges encountered in the process of integration.

On the other hand, this paper does not only provide a comparative legal iteration, but also a historic perspective of the relevant international and national values set forth by Resolutions no. 663C (XXIV) of 31 July 1957 and no. 2076 (LXII) of 13 May 1977, Recommendation R (87) 3 of the Committee of Ministers of the Council of Europe, Recommendation R (93) 6, Recommendation R (98) 7, Recommendation R (99) 22, Recommendations R (79) 14, R (82) 16 and R (79) 14, Recommendation R (2003) 23, Recommendation R (2003) 20 and Recommendation R (75) 25, Recommendation (2006) 2 and not only, at international level, as well as Law no. 275/2006, Law no. 253/2013, Law no. 254/2013, Criminal Code, Criminal Procedure Code, at national level. This paper explicitly illustrates the qualitative leap of the national law in the matter of sentence execution, but also areas that should be improved in the future.

2. Paper content

Adopted on 11 January 2006 by the Committee of Ministers during the 952nd meeting of Ministers' Deputies, the Recommendation of the Committee of Ministers to Member States on the European Prison Rules (2006) 2 arises from constant international and European concerns with standardising minimum rules on the treatment of convicted prisoners, thus being included in a series of international documents of maximum relevance for defining the concept of social reaction to crime.

The First United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Geneva, in 1955, adopted Standard Minimum Rules for the Treatment of Prisoners, approved by the Economic and Social Council in its Resolutions no.663C (XXIV) of 31 July 1957 and no.2076 (LXII)

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of 13 May 1977. Recommendation R (87) 3 of the Committee of Ministers of the Council of Europe established the "European Prison Rules". These were followed by an series of recommendations on the rights of convicted prisoners and execution of sentences: Recommendation R (93) 6 on prison and criminological aspects of the control of transmissible diseases including HIV/AIDS and related health problems in prison, Recommendation R (98) 7 concerning the ethical and organisational aspects of health care in prison, Recommendation R (99) 22 concerning prison overcrowding and prison population inflation, as well as Recommendations R (79) 14 and R (82) 16 on release/leave from prisons, Recommendation R (2003) 23 on the management of life-sentence and other long-term prisoners, Recommendation R (2003) 20 on education in prisons, and Recommendation R (75) 25 on prison labour.

Recommendation (2006) 2 on the European Prison Rules was one of the benchmarks for harmonising Romanian laws with international regulations in the matter. In the successive development of all the regulations covering the enforcement of custodial sentences, the 107 Rules set forth by the Recommendation were considered alongside the above-mentioned international documents, and provided the foundation for a radical reform of the national sentence execution system.

This international instrument provided a premiere in collecting the rights of convicted prisoners in a veritable code of rules, and setting forth correlative obligations for the Member States to implement the contents of such rules[1], of which the following should be recalled:

- All persons deprived of their liberty shall be treated with respect for their human rights.
- Persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody.
- Prison conditions that infringe prisoners' human rights are not justified by lack of resources.
- Life in prison shall approximate as closely as possible the positive aspects of life in the community.
- All detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty.
- National law shall provide mechanisms for ensuring that these minimum requirements are not breached by the overcrowding of prisons.
- Prisoners shall be allowed to communicate as often as possible by letter, telephone or other forms of communication with their families, other persons and representatives of outside organisations and to receive visits from these persons.
- Prison authorities shall ensure that prisoners are able to participate in elections, referenda and in other aspects of public life, in so far as their right to do so is not restricted by national law.
- While prisoners are being moved to or from a prison, or to other places such as court or hospital, they shall be exposed to public view as little as possible and proper safeguards shall be adopted to ensure their anonymity.
- Disciplinary procedures shall be mechanisms of last resort. Whenever possible, prison authorities shall use mechanisms of restoration and mediation to resolve disputes with and among prisoners. Only conduct likely to constitute a threat to good order, safety or security may be defined as a "disciplinary offence".

Representing the start of reforms in the matter, Law no. 275/2006 on the execution of sentences and measures ordered by judicial bodies during the criminal trial, in its Title I, reiterates the principles established by the Constitution of Romania and the European Convention on Human Rights (CEDO). Articles 1 to 5 state the principles of lawful detention of a person after conviction by a competent court; respect for the dignity of human beings; prohibition of subjecting convicted prisoners to torture, inhuman or degrading treatment or other ill-treatment; and prohibition of any forms of discrimination in the serving of sentences.

As a novelty in the field of sentence enforcement regulations, Law no. 275/2006 introduces the institution of the "judge delegated for the serving of custodial sentences", judge responsible for supervising and verifying the lawfulness of prison sentences and pre-trial custodial orders regulated by the previous Criminal Procedure Code.

Intended to regulate the enforcement of penal fines, supervision orders and other obligations imposed by courts on the grounds of the 1969 Criminal Code (in the case of supervised suspension of sentence serving provided for by Article 86^1 and subsequent), Titles II and III also include provisions on the responsibilities of the judge seconded to the criminal sentences enforcement unit of the enforcement court, but also on the work of the counsellors employed by the services for victim protection and social reinsertion of offenders. The effective organisation of the serving of custodial sentences is regulated under Title IV that, in 9 chapters, lays down rules on sentence serving regimes; detention conditions; rights and obligations of convicted prisoners; labour carried out by convicted prisoners; educational, therapy, psychological counselling, social assistance, school and training activities in which detained convicts participate during their term in prison; rewards that may be granted and sanctions for breaches of rules; conditional release; documents prepared by the prison administration.

Pursuing correlation with the provisions of Law no. 301/2004 on the Criminal Code (a bill that was adopted on 28.06.2004 and published in the Official Journal of Romania no. 575/2004 la 29.06.2004, but that never came into force), Law no. 275/2006 envisaged reconsidering the criminal policies, such as to abandon the repressive approach to punishments in

[1] Ioan Chiş, Alexandru Bogdan Chiş – Executarea sancţiunilor penale, Ed, Universul Juridic, 2015, p.361.

favour to an educational one, based on the need for social reinsertion and education of convicted prisoners. This was the first instance (Cap. II, Articles 18-24) when four regimes for the serving of custodial sentences were identified, defined by a progressive or regressive system, as applicable, whereby convicts may be relocated to a different regime, depending on their behaviour during detention, thus: maximum security, closed, semi-open and open prison regimes. The differences between the prison regimes are defined by the detention conditions; limitation of inmates' freedom of movement; conditions of working; and participating in educational, cultural, therapy, psychological counselling and social assistance activities. A board for individualisation of sentences set up in each prison was tasked with determining the detention regimes and the judge seconded for supervision of custodial sentences was given the authority to change the regime at any time to a more or less severe one, as applicable, depending on the conduct of the convicted prisoner. The measures ordered by the judge may be appealed against with the court of jurisdiction in the area where the prison is located.

By transposing Rules **14-18 of Recommendation (2006) 2,** Chapter III of Title IV of Law no. 275/2006 regulates the detention conditions, namely reception, accommodation, clothing and nutrition, strictly defining the cases when, in order to prevent a real and present danger, detainees may be physically restrained. Thus, in compliance with the above-mentioned international standards and rules, Article 37 positively prohibits chaining of prison inmates, providing that this measure may only be taken in exceptional cases, when no other means is available for removing the risk, by prior approval of the prison director. Furthermore, the prison management is required to communicate immediately to the delegate judge any use and cessation of use of any means of constraint, detailing the facts that led to such use.

A novelty is Article 31 (4) of the Law prohibiting the transfer of underage individuals serving educational or custodial sentences to any prisons and, in the latter case, to adult prisons, for longer than 5 days, this provision being compliant with Rule **no. 11 of Rec. 2006 (2)** and set forth both for the purpose of preventing juveniles being placed in environments that may impair their social rehabilitation process and for ensuring continuity in the education of juveniles who participate in schooling or vocational qualification programmes.

Article 34 also introduces an element of novelty, by regulating the dress code of convicted prisoners [in compliance with Rule **20 1-3 of Rec. 2006 (2)** and the UN Prison Rules], thus eliminating the mandatory wearing of prison clothes and envisaging the provision of detention conditions approximating as close as possible the life of free individuals and transposing into the Law Principle no. 5 stated in the Preamble of Rec. (2006) 2. Thus, the Law provides that, during their imprisonment, the convicts are to wear civil clothes, irrespective of the detention regime and, in case they do not have personal clothes, such will be provided free of charge by the prison administration.

Moreover, by transposing Rules 24 and 29 of Rec. (2006) 2, the provisions of Chapter IV of Title IV recognise the rights of persons serving prison sentences to express their opinions and religious beliefs, to information, correspondence, telephone calls, to receive visits and goods, the right to health care, diplomatic assistance for foreign nationals, and the right to marriage. Articles 38-39 instate a system of guarantees for observance of these rights, by providing the right to complain to the delegated judge about any breach of rights and to appeal the latter's decisions with the court of jurisdiction of the place of detention. The same Articles also impose on the prison administrators the positive obligations of taking the required measures to ensure that these rights are exercised in full. The procedure for petitioning the delegated judge (Article 38 (3-4) involves the mandatory hearing of the convicted prisoner, but also the possibility to hear any person that may provide data and information required for determining the truth.

Article 46 (5) provides that, in case convicted prisoners lack the necessary money, the costs of petitioning national courts, international organisations whose jurisdiction is recognised in Romania, or legal advice and non-governmental organisations active in the field of human rights is to be covered by the prison administration. For the purpose of avoiding any interference of the prison administrators with the right to correspondence, Article 45 (4) lays down explicit and limitative situations when mail may be opened or withheld, with rules that are similar with those applicable for free individuals, namely, only when reasonable cause exists to suspect that an offence was committed and only based on a written and reasoned order issued by the delegated judge, the convict being notified in writing as soon as such measure was ordered.

Given that, according to the 1969 Criminal Code, labour is a main component of offenders' social rehabilitation, Chapter V of Title IV establishes a new regime for the work of convicted prisoners, such as to harmonise the legal provisions with Rules 26 1-15 of Recommendation (2006) 2. The general provisions on work carried out in detention facilities (Article 57) instate the principle that such work is remunerated, except for housekeeping work required in the prison and work carried out in case of calamities. The subsequent articles detail the working conditions, exclusively based on the agreement of the inmate, the duration of the working day, working regime, payment, distribution of income due to inmates, health and safety at work rules and forms of social assistance available in case of work capacity loss caused by work accident or professional illness occurring during imprisonment (Reg. 26.14). Another novelty ensuing from the above-mentioned Recommendation is the assimilation of

educational, qualification, training or retraining activities with effectively carrying out work. Article 57 (10) provides that such work is to be remunerated. The regulations governing vocational training provide that such programmes are to be delivered based on curricula developed jointly by the administration of each prison together with the National Employment Agency or its territorial branches, with the programmes being adapted to the inmates' preferences and aptitudes. In order to facilitate social reinsertion of convicts, Article 66 (1) provides that the certificate of completion of a training programme should not mention that the training programme was completed whilst in detention.

According to Rule 26 (8) of Rec. (2006) 2 – providing that though any financial profit generated for the penitentiary can be valuable for raising standards and improving the quality of training, yet the interests of the prisoners should not be subordinated to that purpose –Article 15 (6) of the Law provides that the income obtained by detained convicts from their work is to be used for improving the conditions of detention.

Regarding the distribution of earnings, the percentage due to the prisoner was increased to 40% compared to the previous regulation (Law no. 23/1969), of which 75% can be used by the prisoner during his/her imprisonment and 25% is deposited in a savings account on his/her name and is to be handed over to them on release, including any interest due. Article 60 (2) transposes Rule 105.5 and provides that, in the case of a sentenced prisoner who was also ordered to pay some form of reparations that were not covered before his/her reception in the prison, 50% of the 40% share of earnings due to him/her for the work done during detention will be used for providing reparations to the damaged party.

In the light of the principle of lawfulness of sentence execution, Chapter VII of Title IV provides for a new system of rewarding convicted prisoners that demonstrate good behaviour and diligence in work or educational activities. Such rewards include assignment of responsibilities in educational programmes, lifting of previous sanctions, extra rights to visits and packages, awards or leave from prison for maximum 5 to 10 days, as applicable. At the same time, in compliance with Rules 56-60 of Rec. 2006/2, the punishable disciplinary offences were explicitly listed, with the specific determination that any such punishment cannot limit the prisoners' right to defence, petitioning, correspondence, health care, food, light and daily outside walk. Also, collective and corporal punishments or the use of instruments of restraint or of any from of degrading or humiliating treatments are explicitly prohibited as punishments for disciplinary offences. Article 74 provides guarantees against arbitrary punishments: the convicted prisoner is entitled to challenge the punishment decided by the disciplinary board by petitioning the delegated judge. Such petition procedure must include the hearing of the convicted prisoner and the decision of the judge may be appealed against with the court of justice of jurisdiction in the area of the prison.

Title V of Law 275/2006 transposes the Rules laid down in Part VII of Rec. 2006/2 (on untried prisoners) and includes rules on the enforcement of custodial remand orders differentiated by trial stages: in preventive detention and arrest centres subordinated to the Ministry of Administration and Internal Affairs, in the case of custodial orders issued during the criminal investigation, or in preventive arrest centres or in special sections of prisons – both subordinated to the National Prison Administration. These articles also state that the above-mentioned provisions on detention conditions, rights and obligations of convicted prisoners, work, educational and cultural activities, therapy, psychological counselling, social assistance, rewards (except for prison leave and disciplinary punishments) also apply to untried prisoners.

The coming into force on February 1st 2014 of Law no. 286/2009 on the Criminal Code and of Law no. 135/2010 on the Criminal Procedure Code caused material changes in the matter of prison sentence enforcement and required the improvement of the legal framework established by Law no. 275/2006 which, being focused on execution of prison sentences, did not correspond to the circumstances created the introduction of the new criminal law or criminal trial institutions.

Law no. 254/2013 regarding the execution of sentences and custodial measures ordered by the court during the criminal trial appended the substantive and procedural law rules comprised in the two new Codes, detailing the manner of implementing such for achieving the judicial purposes of social rehabilitation of convicted adults or underage individuals, preventing reoffending, ensuring good conduct of the criminal trial by preventing the suspect from absconding from the criminal investigation or trial.

Similarly to Law no. 275/2006, Title I reiterates the principles of lawful imprisonment – respect for human dignity, prohibition of torture, inhumane or degrading treatments or other ill-treatments, prohibition of discrimination in the serving of prison sentences – enshrined both in the Constitution and in the New Criminal Procedure Code, with the new regulation (Article 7) additionally stating – in compliance with ECoHR and Rule 2 of Rec. 2006/2 – that inmates shall exercise all the civil and political rights except those taken away from them in compliance with the law by the decision sentencing them, as well as those rights that cannot be exercised or are limited inherently by the status of being imprisoned or for reasons related to the safety of the prison facilities.

The institution of the judge delegated for the execution of custodial sentences is now redesigned and redefined under the title "judge for supervision of deprival of liberty" in Title II, Articles 8 - 9 of Law no. 254/2013, such judge being assigned to supervising and verifying the lawfulness in the execution of sentences.

By the listing of all such judge's responsibilities, a number of practical difficulties were removed that existed in the implementation of the previous rules on sentence execution (mainly separation of administrative duties from administrative-jurisdictional ones). The law-maker's decision to strengthen the institution of the supervision judge was based on the need to effectively control the execution of prison sentences, with the new regulations introduced in Article 9 on the designation of stand-ins, seconded court clerks and the imperative obligation imposed on the detention facility management to provide the amenities required for these activities, as well as any necessary information or documents, establishing such judges' functional independence. The resolutions of the delegated judge – now enforceable – and the written orders issued in compliance with the prison law under the procedure applicable in cases where inmates refuse food are mandatory for the prison director or the head of the pre-trial detention and arrest centre.

In addition, the above-mentioned provisions state that, in carrying out his/her judicial duties, the judge for supervision of deprival of liberty may hear any person, request information or documents from the detention facility management, carry out on site checks, and has access to the personal file of the prisoner, records and any other documents required for discharging his/her duties.

A separate chapter is dedicated to regulations on safety in prisons. Articles 15-21 impose both safety measures and provide for the assessment of individuals (in compliance with Rule 52 of Rec. 2006/2) on admission to the detention facility, in order to determine the risk they may pose to the community, in case of breakout, and to the safety of the other inmates, prison facility staff, visitors or to themselves. In the light of the same recommendations, clear, imperative and explicit rules are laid down on the use of restraint instruments and antiterrorist and specialised control applicable to all persons and luggage they carry, but also to any vehicles that gain access to the prison. The prisoners' body search is explicitly regulated, with clear distinction between body search, external body examination and internal body examination, with a special focus on the intrusive character of this measure, Article 19 (5) providing that examination can only be carried out by medical staff, as also provided by Rule 54.6 of Rec. 2006/2.

In compliance with Rule 69 1-3 of Rec. 2006/2, Article 21 of the Law provides that only the prison guarding staff and that carrying out escort missions outside the prison facilities, in the cases and under the terms provided by law, are permitted to carry fire arms. The carrying and use of fire arms or other non-lethal weapons in the detention facilities is prohibited, except in critical incidents explicitly defined in the Rules of Implementation approved by the Minister of Justice.

Article 23 provides for the possibility to protect inmates who intend to injure themselves or commit suicide, injure another person, destroy goods or cause serious disorder, in that the possibility is provided for such prisoners to be accommodated individually, in a specially designated and fitted room. During the accommodation in such a protection room, the prisoner at risk of harming him/herself or committing suicide is to be monitored by medical staff, receive psychological counselling and be kept under permanent video surveillance, but ensuring that human dignity is respected at all times. When using restraint instruments or weapons and when temporarily accommodating the prisoner in the protection room and keeping him/her under video surveillance, it is mandatory that the judge for supervision of deprival of liberty be notified in writing accordingly.

Intended to regulate the prison sentence serving regimes, Chapter III of Law no. 254 reiterates the four prison regimes provided for by Law no.275/2006, namely maximum security, closed, semi-open and open, the novelty being the possibility to instate a certain regime on a provisional basis (Article 33) for a short period of time, after the completion of quarantine, and only if the prison regime was not determined during the quarantine. The effective sentence serving regime is decided by a board, based on criteria explicitly stipulated in the Rules for Implementation, namely: the duration of the sentence; risk levels of the convict; age and health status; good or bad conduct of the convict, including in previous detention terms; identified needs and abilities of the convict required for his/her inclusion in educational programmes; convict's needs for psychological and social assistance; and his/her willingness to work and participate in educational, cultural, therapeutic, psychological counselling and social assistance, moral-religious, schooling and vocational training activities and programmes.

In terms of dealing with any petition filed by a convicted prisoner or the prison management against a resolution of the supervision judge, a new procedure is established under the jurisdiction of the local court where the prison is located. The convicted prisoner only appears in court if and when summoned by the judges (in such case, he/she is also heard) and legal advice is not mandatory. When a prosecutor and a representative of the prison administration participate in the court session, they make claims and submissions.

Also, as an exceptional measure, it is provided that prisoners may be included in an imprisonment regime more or less severe than that associated with the duration of the prison term, taking into account the nature of the crime and the manner it was committed, the convicted prisoner's personality and behaviour until de determination of the prison regime.

Another novelty is the provision for a social rehabilitation programme adapted to each prisoner, accompanying the imprisonment regime and being a manner of individualising the regime of prison sentences (Articles 41 and 42). This means that each individual prisoner should participate in educational, cultural, therapy, counselling and social assistance, schooling, vocational training and work activities

depending on his/her prison term, conduct, personality, risk, age, health, identified needs and capacity for social reinsertion.

Chapter IV of Law no. 254/2013 represents a real progress in approximating Rules nos. **14-18 of Rec. (2006) 2,** by detailing the basic requirements applicable for admission to the prison; quarantine and observation period; rules for transportation of prisoners; imprisonment of convicted persons from special categories; release, transfer, accommodation, clothing and food; refusal of food; and documents to be drawn up by the prison administrators in the case of deceased prisoners. According to the above-mentioned rules, Article 43 contains a new provision on the minimal measures required on admission to the prison, namely: detailed body search; making a list of personal belongings; general clinical examination with findings entered in the medical record; fingerprinting that are kept in hard copy on the personal record of the prisoner and stored in electronic format in the national fingerprint match database; photographing for records; and interviewing to ascertain the immediate needs of the convicted person. The law text pays special attention to persons who do not speak or understand Romanian or to persons with disabilities.

Regarding the transfer of convicted prisoners, Article 45 (8) reiterates the previous provision that prohibited the transfer to prisons for more than 10 days of juveniles serving a sentence of internment in an educational or detention centre.

Another novelty are the regulations on the nutrition of convicted prisoners (Article 50), requiring the administration of the detention facility to provide adequate conditions for the cooking, distribution and serving of food, in compliance with the food hygiene regulations, depending on the age, health status, kind of work done, and in observance of the religious beliefs declared by the prisoner in a sworn statement.

The rights and obligations of convicted prisoners, stipulated in Chapter V, to a large extent take over the provisions of the previous Law no. 275/2006, but clarify the matter of legal advice, which should be provided on any legal issue, the room and facilities necessary to consult a lawyer being provided, in observance of confidentiality but under visual monitoring. Furthermore, the provisions on medical care and examination carry forward most of the previous regulations, the new aspects covering convicted prisoners with serious mental disorders, who are to be placed in special psychiatry wards [Article 73 (7)]. These provisions were introduced based on Rules 47 and 12 of Rec. 2006/2, but also following the visit reports of the European Committee for Prevention of Torture, which found that a significant number of prisoners show signs of mental conditions.

The matter of work by convicted prisoners – detailed in Chapter VI – did not undergo substantial changes compared to the previous Act. The new provisions include the possibility for prisoners to carry out voluntary or community work, thus making better use of the prisoners' interest for working, taking into account that work is one of the most important social rehabilitation factors. The distribution of the money earned by convicted prisoners for their work is the same as in the previous regulation, with only the share that can be used by the prisoner during imprisonments being changed from 75% to 90%. Also, based on the transposition of Rule no. 105.5, Article 60 (2) of Law no. 275/2006 was maintained, which provides that, when the convicted prisoner was also ordered to provide reparations that were not covered before his/her reception in the prison, 50% of the 40% share of earnings due to him/her for the work done during detention is used for providing reparations to the damaged party.

Educational, psychological and social assistance activities, school education, higher education and vocational training of convicted prisoners are all detailed in chapter VII that includes specific rules on the conditions for the provision of such activities, but also distinct rules on the status of disabled convicts. Rules are set forth for the carrying out of a multidisciplinary educational, psychological and social assessment of each convicted prisoner at the time of their admittance into the prison. This assessment informs the development of a personal educational and therapy evaluation and intervention plan, including the activities recommended in relation to the prison regime and sentence serving route.

Chapter VIII presents a new approach to parole (conditional release), emphasizing its optional character. Besides the requirements set forth in the previous regulation, when considering a parole, the board takes into account the prison regime to which the convicted prisoner was allocated and his/her reparation of any civil liabilities ordered in the sentence, except where the prisoner demonstrates that he/she had absolutely no means of meeting such obligations.

The enforcement of educational prison sentences applied to juveniles is regulated in Title V and is required by the reform of the system of criminal punishments introduced by the New Criminal and Criminal Procedure Codes.

The execution of prison sentences is to be carried out in special juvenile rehabilitation facilities or in educational and detention centres set up by the reorganisation of minors and youth prisons and re-education centres.

In the case of underage interned in detention centres, two types of sentence serving regimes are provided: open and closed. The decision is the responsibility of a board in which a probation counsellor, and a representative of the General Department for Social Assistance and Child Protection of the County Council or the Local Council, as applicable, may participate. After the convicted juvenile has served a quarter of the sentence, the board is tasked with reviewing the conduct of the candidate and his/her efforts towards social reintegration.

With a view to the social rehabilitation of the underage, the law provides that, 3 months before the end of the term, the persons serving educational sentences under open regime may be accommodated in specially designated facilities, where they will carry out self-managing tasks under the direct supervision of designated personnel form the centre.

In the case of internment in an educational centre, unlike in a detention facility, the execution regime is the same for all inmates, and the individualisation of the regime – in terms of deciding educational, psychological and social assistance provided to each convicted person – is the responsibility of a purposely established Educational Board. The board membership includes the centre director, centre deputy director for education and psycho-social support, the case educator, primary teacher or form teacher, a psychologist, a social worker, and the head of the supervision, records and allocation of rights for interned persons. Also, a number of guest members may be invited: a probation officer and a representative of the General Department for Social Assistance and Child Protection of the County Council or the Local Council. A board with a similar membership is set up in each detention centre and is responsible for determining, individualising and changing the internment regime.

Irrespective of the type or custodial educational sentence being served, the regime applicable to convicted minors is aimed at providing them with assistance, protection, education and development of their vocational skills, with a view to their social rehabilitation, so that the provisions governing their rights and obligations during internment (Articles 161-170) focus on social reinsertion, psycho-social support, school education and vocational training activities and programmes. Moreover, the regulations on disciplinary offences take into account the specific obligations and interdictions applicable to convicted juveniles, namely to attend school up to completing compulsory education and to participate in vocational training programmes and in other activities provided by the centre, for the benefit of social reintegration. To an equal extent, the adopted reward system includes specific regulations for minors, with a new rule providing for: 24 hours leave of absence in the town where the centre is located; weekend leave to the town of domicile; family leave during school holydays for up to 15 days, but not more than 45 days per year; participation in camps or field trips organised by the centre alone or in partnership with other organisations.

The development of the regulations on the enforcement of custodial educational sentences was based on a number of international instruments[2], namely United Nations Convention on the Rights of the Child, United Nations Rules for the Protection of Juveniles Deprived of their Liberty, United Nations Standard Minimum Rules for Non-custodial Measures (Tokio Rules), United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), Recommendation 87 (20) of the Committee of Ministers on social reactions to juvenile delinquency.

Starting from the international and European regulations in the matter of human rights and, in particular, the rights of children – to which Romania is a party – the criminal justice reform does not end with the adoption of specific provisions on the serving of sentences.

Bearing in mind that "the current regulations do not make full and systematic reference to cooperation and complementarily aspects in the provision of support to persons serving custodial sentences by the prison staff, probation officers or representatives of other public agencies, associations and organisations involved in the provision of post-imprisonment support", the National Strategy for the social reintegration of persons deprived of liberty 2015-2019[3] identified the need for the criminal justice policies to develop a framework for the cooperation and synergy between public agencies, associations and organisations involved in then provision of post-imprisonment assistance, alongside with defining clear responsibilities of the social stakeholders.

The three objectives laid down in the National Implementation Plan, as a tool for the implementation of the Strategy cover:

- institutional capacity and institutional development in the field of social reintegration of inmates and persons who served custodial sentences, by the training of the staff involved, development of the institutional infrastructure, improving the regulatory framework and promoting amendments to the laws;
- developing educational programs, psychological support and social assistance in detention, by providing education, psychological and social support to persons deprived of liberty, and raising public awareness on the issue of social reintegration of the inmates;
- facilitating post-prison assistance at systemic level, by ensuring continuity of intervention for people who executed custodial sentences, developing partnerships with public institutions, associations and non-governmental organisations and local communities, in order to facilitate the social reintegration of persons who executed custodial sentences; developing inter-institutional procedures concerning the responsibilities of the stakeholders in the social reintegration of persons who served custodial sentences; aking over cases and providing post-prison support.

3. Conclusions

The numerous recommendations issued by the Council of Europe in the matter of execution of sentences underline the need for the Member States to

[2] Recitals of Draft Law no. 254/2013.
[3] G.D. no. 389/2015, published in the Official Journal no. 389 of 27 May 2015.

take legal and administrative measures aimed at maintaining the necessary balance between the need to protect public order, on the one hand, and the crucial requirement to consider the social reinsertion needs of offenders, on then other hand.

In the light of these recommendations, it is my opinion that the social reintegration of persons deprived of liberty is a complex process that starts at the time the conviction sentence becomes final and continues, from the admission of the convict at the detention facility until the term in prison is served or deemed to have been served, but also subsequently, through the various types of support provided by the society to the former convict.

Thus, within these time milestones, the role of the prison system is not only to provide the guarding, escorting, supervision and enforcement of detention regime, but also to prepare the prisoners for post-imprisonment life, the prison administrators being required to permanently evaluate the educational, psychological and social support needs of the inmates, to individualise and plan their sentence serving route, by organising and delivering school education, vocational training, educational, psychological and social assistance programmes so that, at the end of the prison term, to accomplish the educational function of the prison term or custodial educational measure.

Designed as a tool for improving the European Prison Rules of 1987, Recommendation (2006) 2 is a true code of requirements regulating all the aspects related to the management of detention facilities, with a special focus on observance of fundamental rights and all other rights that have not been explicitly taken away by the sentencing decision or that are obviously incompatible with the status of imprisonment. The rules included in the above-mentioned Recommendation are not intended to lay down an exemplary system of operations, but rather codify a minimal standard the provision of which should be of real concern in any modern and progressive judicial systems.

The approximation into the national laws (by the successive adoption of Laws nos. 275/2006 and 254/2013) of the system of rules established by Recommendation (2006) 2 does not mark the end of the prison system reform. Improving the prison system efficiency requires the continued promotion of criminal justice policies aimed at improving the legal-regulatory framework, the development of cooperation and synergy between public agencies, associations and non-governmental organisations involved in the provision of post-imprisonment support, at adapting and improving the prison staff training system and at intensifying international cooperation with the prison systems of the other Member States.

This paper draws attention to the need to continue the process of correlating the national to European laws, to maintain the efforts in this direction, for the purpose of raising the quality of national laws on the serving of prison sentences, with the ultimate outcome of improving the protection of convicted prisoners' rights.

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SHORT REFLECTIONS REGARDING PRECAUTIONARY AND PREVENTIVE MEASURES ORDERED IN THE CRIMINAL TRIAL AGAINST AN INSOLVENT LEGAL PERSON

Luminița CRISTIU-NINU[*]

Abstract

The judicial realities have shown us that the field of the precautionary and preventive measures ruled in the criminal trial against the insolvent judicial person is not correctly and efficiently regulated. There are a series of peculiarities that should be attentively analyzed in order to eliminate the negative effects of the interference of the criminal procedures with those of insolvency. The lack of a specific package of standards that help managing such a situation, but also, sometimes, the misinterpretation of the existing regulations in the field may generate situations that go almost beyond the legal persons in such a position.

Keywords: *insolvency, procedure, legal person, precautionary measures, preventive measures, order, trial/ law suit.*

Introduction

This study is intended to approach some aspects implied by the interference of the insolvency procedure with the criminal trial and since the most frequent question of the experts in insolvency has become if, the criminal trials may block the insolvency procedure, it seems convenient to start with the conclusion itself, that criminal trials should not hold back the insolvency procedure.

The lack of clear judicial provisions and especially enacted for managing such issues and sometimes the misinterpretations of the existing provisions may generate situations that the legal persons may find hard to go beyond.

1. Economic measures taken against the insolvent legal person

During a criminal trial, several categories of economic measure can be taken against a legal person and it is important to make a clear-cut distinction between measures that may be taken during the criminal trial and those taken by final criminal judgement.

If the respective legal person is in an insolvency procedure, as a debtor, the distinction above is very important since the existence of an ongoing criminal trial or, on a case to case basis, of a final criminal judgement influences in different ways the insolvency procedure, as follows.

1.1. Measures taken during the criminal trial

The measures that may be ordered during the criminal trial that have economic consequences for the legal person and for the insolvency procedure, are:

- precautionary measures meant to remedy the damages caused by the offence;
- preventive measures;

These two categories of measures raise significant problems with respect to the interpretation of the law and to the correct and efficient management of the two procedures.

1.1.1. Precautionary measures that can be inflicted on a legal person during the criminal trial

Precautionary measures have as a result the preservation of the assets or real estate belonging to the suspect, defendant or to the liable person, with a view to a special confiscation, to an extended confiscation, to the execution of the fine sentence or of the judiciary expenses or to covering the civil damages.

During a criminal trial, against the legal person the court may rule precautionary measures in three situations:

- the legal person has the quality of defendant in a criminal trial in which it may undergo precautionary measures in order to offer the guaranty of executing the fine sentence, the judiciary expenses, the warranty of the special confiscation and of the extended confiscation, the warranty of repairing the damages resulting from the offence;
- the legal person is liable in the civil lawsuit, case in which it may undergo precautionary measures that guarantee the recovery of the damage resulting from the offence, in order to cover the judicial expenditures;
- finally, the legal person may not have any of the qualities above, but it may be imposed precautionary measures, as a third party, in whose custody or possession are the goods that may be affected by the safety measures of the special confiscation or of the extended confiscation, stipulated in art. 112 and 112 [1] of the Criminal code.

A. The legal person, defendant in a criminal trial

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The provisions regulating the criminal liability are contained in art.135 of the New

Criminal code, and from the way of regulating this liability, we can easily conclude that a legal person may frequently be considered liable from the criminal point of view, be it only for offences committed while achieving its own objectives, to its benefit or in the name of the legal person.

Still, as it is, the criminal liability of a legal person is a problem of law that cannot be solved only by the simplistic interpretation of the provisions in the criminal laws, but also by corroborating them with the stipulations of Law 31/1990 on companies, regarding liabilities and the mandate of managers and other persons representing legal persons, and with the stipulations of the Civil code, that are particularly relevant from this point of view.

Thus, according to art. 219 of the Civil code, lawful or illegal acts committed by the representatives of the legal person, are incumbent upon the legal person itself, but only if they are connected to the attributions or to the purpose of the positions it was entrusted with.

At the same time, according to the provisions of art. 72 of Law 31/1990, the obligations and liabilities of managers are regulated by provisions regarding the mandate and by those especially mentioned in this law.

As a result, even in situations when an executive, an agent, the representative of the legal person commit an offence within the sphere of activity developed by the legal person in carrying out the object of its activity, according to the law or to the articles of incorporation, or to the benefit of the legal person (the offence to the benefit of the legal person is that when the profit resulting from the offence goes wholly or partly to the latter or when the profit consists in avoiding a loss)[1] or in the name of the legal person (we must stress the fact that in the name of the legal person, offences may be committed only by the persons officially appointed for representation attributions)[2], in my opinion, the legal person cannot be automatically, ope legis, held liable, except when material evidence shows that the natural person who committed the offence did not exceed the limits of the mandate or the attributions or purpose of the position the legal person entrusted him/her with.

That is why I consider faulty the opinion formulated in the doctrine[3], according to which if hypothetically a natural person commits an offence to his/her exclusive benefit, but in connection with the object of activity of the legal person or even against its interests, given the fact that at least one of the hypothesis alternatively stipulated by the law is met, the legal person may be considered criminally liable.

Accepting the thesis of the criminal liability of the legal person only as a result of meeting only one of the three alternatives stipulated by art. 135 of the Criminal code (the offence was committed while carrying on the object of activity, to the benefit or in the name of the legal person) would mean denying the principle of criminal personal liability, but also a dilution of the criminal and civil liability of natural persons – actual authors of the offences- who, under the umbrella of the liability of the legal person may continue the criminal activities.

The problem of the criminal liability of legal persons is very sensitive in the case of the legal persons whose objects of activity are very complex, who have many employees, multiple shareholders, many executives and it cannot be approached in the same way with the situation of the companies with limited liability, where the manager and the associate are usually taken for the legal person.

Without enlarging upon the issues connected to the criminal liability of the legal persons, the opinion in the doctrine[4] is worth mentioning: the legal persons in the phase of compulsory liquidation may be held criminally liable for offences committed exclusively during this phase, for the reason that the liquidated legal persons maintain the legal capacity necessary for capitalizing goods as money and for the payment of the liabilities.

B. Legal person, a party with civil liabilities

The legal person may undergo precautionary measures with a view to the remedy of the damage resulting from the offence committed by its agent and of the judicial expenditures made during the criminal trial, when it has the quality of a party liable in the civil lawsuit.

Regulations on the tort, in a criminal trial, regarding the legal person as a party liable in the in a civil lawsuit, are to be found in the provisions of the procedural criminal and civil law.

According to art 19. Par 2 of the Criminal code procedure , the civil action in a criminal trial is exercised against the defendant and, on a case to case basis, against the party liable in a civil lawsuit.

According to art. 86 of the Criminal procedure code, a party liable in a civil lawsuit is that person who, according to the civil law, is liable to remedy, wholly or partially, single or jointly, the damages resulting from the offence.

According to art. 1373, par. 1 of the Civil code, the principal is liable to remedy the damage caused by his/her agents anytime the offence committed by the latter is connected to the attribution or to the purpose of the positions they were entrusted with, while according to par. 2 of the same article, the principal is the person who, by virtue of an agreement or by law, exercises direction, supervision and control of the person who has positions or assignments to his interest or to another person's interest.

It goes without saying that the legal person, as the party liable in the lawsuit, will be held responsible for the remedy of the damages caused by its agent only to the extent the latter committed the offence in

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[3] Dobrinoiu, ș.a *New Criminal Code annotated, general section, vol. I,* Ed. Universul Juridic, București, 2012.
[4] Jurma, *The legal person – active subject of civil liability*, Editura C.H. Beck, București,2010.

connection with his attributions or functions he was assigned.

The principal will be held liable for the damage caused by his agent(s), according to art.1373 in the Civil code, only when the agent causes damages to a third party as a result of an illicit action outside the field of the agreement, that is tort. The principal will always be held responsible for cases when the agent committed the illicit action to his own interest or upon his request to another person's interest, within the strict limits of the attributions entrusted to him, by complying with the instructions and orders the principal gave him. The principal will also be held responsible for damages caused by the agent when the latter acted by deviation from his assignment, by exceeding his limits and even by abuse of office, if the offence committed was connected to his/her assignment or with the purpose of the entrusted position"[art.1373 par. (1) final part of the Civil code] or, if at least apparently the agent acted – when the harmful event was committed – in connection with the assignment or with the purpose of the entrusted position [art. 1373 par. (3) in the New civil Code][5].

Art 1373 par. (3) stipulates that this condition is not fulfilled and, consequently, the principal will not be held liable in case he "proves that the victim knew, as the case may be, or could know – at the moment of the harmful event was committed – that the agent acted in no relation to the assignment or with the purpose of the entrusted position"; in the New Civil code, bona fide is presumed by the law to the benefit of all the natural and legal persons until proven otherwise; thus, the principal may dispute the relative legal presumption of the victim's bona fide, proving the contrary.

In the New Civil code, the liability of a legal person, as a principal, is regarded as an objective liability, based on the idea of the principal's obligation of guaranteeing everyone's safety in connection with the activity it organizes and develops, by association with or by hiring agents, and it manages it to his own direct or indirect interest. The obligation of guarantee is sustained by the risk of activity which also includes the authority's risk, since between agents and principals there are subordination relations that give the principal the right to give orders, instructions to the agents and to supervise, guide and control them[6].

C. The legal person, third party in the criminal trial

Precautionary measures may be inflicted to legal persons, third parties in the criminal trial who own or have in custody goods that may be subject to a special or extended confiscation.

The goods stipulated by law that can be subject to special confiscation and according to art. 112 in the Criminal Code that, thus, may undergo precautionary measures, are the following:

- goods obtained by committing actions stipulated in the criminal law;
- goods that were, in any way, used or meant to be used to commit an offence stipulated by the criminal law, if they belong to the offender or if, belonging to another person, the latter knew the purpose to which they were used;
- goods used immediately after committing the offence, in order to ensure the offender's escape or keeping the profit or the product obtained by offence, if they belong to the offender or if, belonging to another person, the latter knew the purpose to which they were used;
- goods that were given to determine committing the offence stipulated by the criminal law or for rewarding the offender;
- goods acquired by committing the offence stipulated by the criminal law, if not returned to the injured person and to the extent they do not serve to the latter's remedy/compensation;
- goods whose possession or holding is forbidden by the criminal law.

The precautionary measures with a view to the special confiscation may be taken, as shown above, in most of the cases, when the legal person has the capacity of defendant (or suspect) and less in cases where it has the capacity of third party in the criminal suit. An exception is the situation in which, although a third party and owner of the goods, the legal person was aware of the purpose to which the offender used them, be they goods used to commit the offence, or goods that ensured the offender's escape or the keeping of the benefits or of the product obtained by offence. The incidence of these cases in practice is rare, since we speak about a psychological, cognitive element, that is, about the legal person's awareness of the fact that its goods are used to a certain purpose by the offender, and, in most of the times, it is hard to be proved.

As regards the extended confiscation, according to art. 112^1 in the Criminal code, this measure can be taken only if there is a decision of conviction for one of the offences mentioned by the legislation and, given their peculiarities, only certain of them can be committed by the legal person, for example: offences against the patrimony, tax evasion, violations of the customs regime, disclosure of classified economic information, unfair competitions, offences against the financial interests of the European Union.

According to art.112^1 in the Criminal code, the extended confiscation may also be decided if the value of the goods (obtained by the convicted person during the previous 5 years, and, if necessary, after the offence was committed, until the issue of the referral note) is obviously exceeding the income obtained illicitly by the convicted person and if the court has the firm belief that the goods were obtained by offences of the kind stipulated in the same judicial text.

According to art 112^1 of the Criminal code, the value of the goods transferred by the convicted person

[5] Oana Andreea Motica, Special Conditions of Tort Liability of the Principal for Damages caused to Third Parties by Illegal Acts of Agent, avaliable at https://drept.uvt.ro.

[6] www.legeaz.net/noul cod civil, principal's liability for the agent's action.

or by a third party, to a member of the family or to a legal person controlled by the convicted person will also be taken into account.

According to par. (7), money and goods obtained from the service or use of the goods confiscated as well as the goods produced by the latter, will also be confiscated[7].

At present, the measure of extended confiscation, as per criminal laws, may be taken in several cases against a legal person, as compared to the special confiscation, at least in its capacity of legal person controlled by a convicted person, but criminal laws, as conceived by the law makers, are rather vague and the law maker did not establish a procedure to be followed for determining the incomes during the 5 years before and after committing the offence, the incomes that exceed the licit amounts, as, for example, stipulates Law no. 176/2010 regarding integrity in public offices. At the same time, the too vague wording of this legal text, according to which the confiscation may be decided if the court "firmly believes" that the goods result from offences, has been received with a grain of salt. During the criminal suit, all the decisions of the court, both criminal and civil law decisions, are based only on firm proofs, on material evidence and not on presumptions and, on the other hand, the question arises if by these decisions, the law maker did not deviate from the constitutional principle of the licit acquirement of property, stipulated in art.44 par. (8) of the Constitution.

The Constitutional Court's jurisprudence states that "regulating this presumption of innocence does not impede the investigation of the illicit character of the acquirement of property, the task of presenting the proof being incumbent on the part invoking it. To the extent the interested party proves that some goods, part of, or all the property of a person was acquired illicitly, for those goods or for the property acquired illicitly, confiscation may be decided, "under the conditions stipulated by the law'. The Constitutional Court's jurisprudence also states that "regulating the presumption of innocence does not impede the primary or authorized legislator to implement the provisions of art. 148 of the Constitution – European Union integration, to adopt regulations that allow the full compliance with the legislation of the European Union in the field of fighting criminality", with direct reference to the Framework- Directive of the Council of February 24th 2005 regarding the confiscation of products, instruments and goods connected with the offence[8].

Still, due to the lack of regulations in a probation system, the lack of a procedure defining clear rules for overturning this relative legal presumption, but also appropriate procedural guarantees for the owners of goods, the legal provision regarding the extended confiscation may be regarded as an interference in the right to a private property, according to art.1 of the Protocol no.1, additional to the Convention for the defense of human rights and fundamental liberties.

The court's firm belief that the goods or money owned by the convicted person might result from offences committed before the one for which the conviction was decided, can be based only on evidence, the criminal trial being governed by the principle of finding the truth based on evidence, or speaking about previous actions that are not the subject of the *pending* judgement and for which, as a result, no evidence has to be produced, this firm belief cannot be but subjective, arbitrary. The arbitrary will also be found in the quantification of the sums of money that will be confiscated, in distinguishing the licit from the illicit incomes. Not very clear is also the way of establishing the sums of money transferred to the legal person controlled by the convicted person, but, most probably, the law maker had in mind the contribution/ shares within the legal person, under the form of goods or sums of money, equities or interests owned by the convicted person.

Cautiousness in applying these rules regarding the extended confiscation is even more necessary as we also speak of goods belonging to third parties that have the constitutional right to have their property rights protected. Any interference with the exercise of this right can be justified only by strong beliefs, based on material evidence, on the respect of all the procedural guarantees and of the right to defense, including the third parties, meaning that their goods, all or part of them, result from offences of the type stipulated in art.112¹ Criminal code – provisions that are also to be found in art.8 par.(8) of the 2014/42/EU Directive.

It is also important to mention that according to the Constitutional Court's decision no. 365/June 25th 201, the precautionary measures connected to the extended confiscation can be taken only for goods acquired after Law no.63/2012 took effect, while the offences should have been committed after that date.

1.2. Measures taken as a result of a final criminal judgement

If the criminal trial is over and the legal person, be it convicted, or a party liable in a lawsuit, was deemed to pay damages to the civil parties, the judiciary expenses or condemned to a criminal fine (as defendant), or if a special or extended confiscation was inflicted on the legal person, according to art 112 or 112¹ of the Criminal code, we will face certain and exigible claims in favor of common creditors or, on a case to case basis, in favor of the State. Within the insolvency procedure for legal persons, these certain and exigible claims do not differ much from the rest of the competing claims, the only difference being that they are decided by final judgement and can no longer

[7] By the decision of the Constitutional Court no. 11/2015, they found out that the dispositions under art. 1121par.. (2) letter. a) din of the Criminal Code are constitutional to the extent to which the measure of extended confiscation will not apply to assets acquired prior to coming into force of Law no.. 63/2012 on amending and supplementation of the Criminal Code of Romania and Law no.. 286/2009 on the Criminal Code.

[8] published in the official Gazette of Romania, Part I, no. 440 / 23.06.2011.

be challenged in court. Moreover, they are not subject to the trustee's or liquidator's verification, according to art 58, par (1) let. K and art 64 let. f of Law no. 85/2014.

The fact that these claims have the judicial regime of the common receivables or of tax receivables results from the provisions of the criminal procedure that regulates the way the claims are executed.

Thus, civil damages and judicial expenditures due to the parties and established by criminal judgement, will be executed according to the civil law, as stipulated in art.581 of the Criminal code procedure.

As regards the safety measures connected to the special or extended confiscation, according to art. 574 of the Criminal code procedure, the confiscated goods will be handed over to the bodies lawfully appointed to take them over or to capitalize them. If the confiscation regards sums of money that are not registered in banks, the judge appointed for the execution will send a copy of the operative part of the judgment to the tax bodies, the execution being performed according to the legal provisions on budgetary debts.

As a result, in case the criminal trial is over, the claims resulting from the final criminal judgement will be capitalized against the insolvent debtor, just like any other claims, in a collective procedure and having the priority conferred by the insolvency law.

2. Interference of safety measures with insolvency procedure

Against a legal person under the insolvency procedure they can order security measures, in the criminal trial, for the purposes already above presented. Naturally there is this question arising: what is going to happen with the assets affected by the safety measures, in relation to the ongoing insolvency procedure?

We should seek the answer in the definition given by the law in connection with establishment of the safety measures, respectively to avoid hiding, alienation or removing the assets from investigation, this is, assure the creditors' chance to obtain enforcement of the enforceable title against the debtor, at the time of delivery of the final judgment, and also in respect of the definition given by the law for the actual safety measure, and also the definition of the safety measure itself, according to art. 249 par. 2 of the Criminal code procedure, respectively preservation of movable and immovable assets by establishing a seizure on them.

Preservation of the movable or immovable assets means for the owner of the assets loss of the right to dispose of them, execute deeds on the disposition of the assets, according to the meaning of the word preservation itself.

Such preservation may not have the effect of, in principle, blocking the insolvency procedure, yet with certain nuances. To the question whether the criminal investigation can hold down the insolvency procedure, there is no simple answer: the criminal investigation cannot hold down the insolvency procedure since there is no legal disposition in this respect, yet at the same time, it does not allow the procedure to take place normally, according to the provisions of the Insolvency code.

We should point out that at this time, the criminal procedure no longer holds down the civil procedure, absolutely and unconditionally, as provided by former criminal procedure provisions.

According to the provisions of art. 27 par. (7) Criminal code procedure, when the victim of an offense decides to initiate an action before a civil court, the lawsuit before the civil court shall be suspended after initiation of the criminal action, yet solely until settlement of the criminal case by the court of first instance, and no longer than one year.

Setting aside the fact that suspending the law suit before the civil court, in carrying out the right of indemnification, may not exceed one year, and the civil law suit may continue unimpeded even when there is no final decision in the criminal procedure, we should add that , if suspending of a civil action before the civil court is grounded on the fact that the object of civil action itself is based on the damage caused by an offense, the insolvency procedure is not a civil action, and the object thereof is not to *establish the claims* of various creditors, which are usually preexistent, but its object is *to capitalize* such claims, by a *collective procedure* and following a certain order as provided by the law, and also *set up a collective procedure in order to cover the liabilities of the debtor under the insolvency procedure.*

The legal provisions in this matter make few references and definitely are not helpful in the settlement of this issue.

Thus, according to art. 75 of Law no. 85 / 2014, " starting with the date of commencement of the procedure, all judicial and extrajudicial actions or enforcement measures for *establishment of the claims against the debtor's assets will be lawfully suspended.* Recovery of their rights will only take place within the insolvency procedure, by filing the request for registration of the claims.

According to par. (2) , the lawful suspending provided under par. (1) will not operate for: (1) the debtor's appeals against the actions of one/several creditor/s commencing before starting of the procedure, and also the civil actions brought in the criminal trials against the debtor".

According to art. 91 of Law no. 85/2014, "(1) the assets alienated by the judiciary administrator or judiciary liquidator, in carrying out its attributes as provided under this law, are acquired free of any encumbrances, such as privileges, mortgages, pledges or detention rights, seizures, of any kind. The precautionary measures ordered in the criminal trial for the purpose of special and / or extended confiscation are excepted from this regime.

(2) By way of exception from the provisions under art. 85 par. (2) of the Civil code, removal from the land book of any encumbrances and interdictions as

provided under par. (1) will be carried out in compliance with the deed of alienation signed by the judiciary administrator or judiciary liquidator."

According to art. 102 par. (8) of the Insolvency code, the claim of a damaged party in the criminal trial falls under the suspensive condition, until the final settlement of the civil action in the criminal trial in favor of the damaged party, by filing a request for registration of the claim. In case the civil action in the criminal trial is not settled until closing of the insolvency procedure, either due to the success of the reorganization plan, or the liquidation, any claims resulting from the criminal trial will be covered by the properties of the re-organized legal person or, where necessary, from the amounts obtained in the action of joint patrimonial liability of the persons having contributed to the insolvency of the legal person, in compliance with the provisions of art 169 and the subsequent ones.

The above provisions, beside the fact they do not settle the issue, are somehow contradictory.

The interpretation of the provisions under art. 75 of the Insolvency code reveals the fact that, the civil action brought in the criminal trial and the insolvency procedure are taking place at the same time, and the insolvency procedure can block any other civil actions on the *establishment of claims* against the debtor's property, *less the civil action initiated in the criminal trial.*

Upon the systematic and grammatical interpretation of the dispositions of art. 91 of the Insolvency code it results that they can sell also the assets under criminal seizure, with only one exception concerning thereof , namely they will not be sold free of encumbrances (respectively precautionary measures ordered in the criminal trials, in view of the special confiscation and extended confiscation)

The text of art. 91 of the Insolvency code is criticizable. We can see that, although art. 75 of this code seems to grant a certain protection to the potential creditor in the criminal trial, which could be the person suffering damage by the offense, in case his claim for damages is accepted, but this can be the state as well, when the special or extended confiscated is ordered, art. 91gives up the protection of the ordinary creditor and preserves solely the right of the state, maintaining solely the seizures established in view of confiscation.

Nevertheless, it is essential to retain that, by maintaining the seizure in favor of the state, even after selling the assets, the lawmaker indirectly admits that the assets can be sold prior to the completion of the criminal trial.

Thus, according to jurisprudence[9], they appreciated that, "establishment of preventive seizure will not prevent selling of the assets in the insolvency procedure, and will not affect the distribution order of claims in the procedure, the only scope of the seizure being preventing the debtor to alienate his property in detriment of creditors, for whom it might be impossible to recover the damage caused by the alleged offense imputed to the debtor.

Blocking the recovery in the insolvency procedure, similarly with blocking the enforcement, would signify non compliance with the principle of proportionality between the demands of the general interest and individual rights imperative defense.

(…). The text of art. 91 of Law 85/2014 refers to the pre-existing situation of alienating, by the judiciary administrator or judiciary liquidator of the assets under seizure, therefore the measures taken in the criminal trial are compatible with the insolvency procedure, and the assets under seizure are not overlooked. The criminal law establishes an interdiction for the suspect, accused or civilly liable party to carry out activities of voluntary disposal of the assets making the object of seizure.

In the hypothesis of the assets under pre- existing warranty, the mortgagee has priority even when there is a preventive seizure established in connection with the asset, noted prior to the mortgage, since the mortgage is a real accessory right granting its holder a pursuing right, whoever is holding it, and a preferential right in order to satisfy his claim against the other creditors (in this respect see also the Decision of the High Court of Cassation and Justice, Criminal section, no. 1392/2013)".

We consider that, in principle, the precautionary measures in the criminal trial should not block the insolvency procedure, nevertheless, when prior to the time of distributing the amounts of money resulted from the liquidation of the debtor's property the criminal trial has not been completed, at least this distribution should be postponed until obtaining an executory title. Otherwise, the persons suffering damages caused by the offense, and the state, in case of confiscation, would be definitively deprived of the right to recover their claims against the debtor, the more so as the law allows that their civil action continue against the debtor under insolvency procedure.

Conditioning the claim settlement of the civil party in the criminal trial by the decision of personal liability of the administrator or the person having contributed to the insolvency of the legal person is opposed to the provisions of art. 75 which allow continuation of the civil action in the criminal trial, since this personal liability is totally unsure, both regarding the existence and the amount thereof.

As regards the opinion expressed in practice, according to which it is impossible to sell the assets under seizures, during the insolvency procedure, taking into account that the state, following the confiscation , would be granted a preferential right, and I consider, being in agreement with the experts in the field of commercial and insolvency law, that such right cannot be granted.

[9] Resolution dated 10.02.2017 of the Court of Appeal Bucuresti, First Criminal Section, delivered on case no. 1022 / 2/ 2017.

Special confiscation and extended confiscation represent economic safety measures , having direct effects on the property regime, and representing a specific way of acquiring properties by the state, as a consequence of Court decisions, and , implicitly, a means to put out the property right of the subject, as of right, suffering this sanction.

There is no legal disposition which confers such preference to the state, the claim acquired by it being a budgetary, tax claim.

3. Preventive measures ordered during the criminal trial

As regards the preventive measures that can be ordered during the criminal investigation, and also during the Preliminary Chamber procedure, and during the trial, against the legal person; there are five measures according to art. 493 of the Criminal Procedure Code and can be ordered:

- if reasonable doubt exists that the legal person committed an action falling under the criminal law;
- solely in order to ensure the good procedure of the criminal trial.

Mention should be made that the law does not condition taking the preventive measure of the nature of the offense, or seriousness thereof, which means that theoretically, the preventive measures against legal persons can be taken for any kind of offenses, solely on the condition that they are necessary for the good performance of the criminal trial.

Unlike the preventive measures taken against natural persons, for which the criminal procedure law provides conditions relating to the seriousness of the offense, resulting from the punishment limits or enumeration of the offenses for which they can order the preventive measures (art. 223 par. 2 of the Criminal procedure code), and the offender's behavior (the defendant ran away, went into hiding, in order to avoid the trial, tried to influence finding out the truth, continued to commit offenses), conditions related to protection of public order – letting the defendant go free may endanger the public order, for the legal persons the lawmaker no longer provided such conditions, and only stipulated that preventive measures can be ordered for the good performance of the criminal trial. According to the modality of setting the conditions, we may draw the conclusion that the lawmaker was more permissive, reagrding the preventive measures against legal persons, which can sometimes lead to arbitrary measures against them and prejudices to the good performance of their activity.

We should point out that, in the case of legal persons, the legal dispositions (art. 493 of the Criminal procedure code) do not provide a maximum limit of the preventive measures, which obviously contravenes the prevention regime that applies to natural persons. Nevertheless, by Decision no. 139/2016, the Constitutional Court turned down the constitutional challenge of the dispositions of art. 493 of the Criminal procedure code, holding that " If a maximum limit up to which they can extend/maintain the preventive measures against the legal person would be set up, then the scope of the criminal action itself is denied, which is to hold the legal person liable for criminal offense, since, by allowing the dissolution, liquidation, merger or splitting thereof, the object of the criminal action, thus defined by art. 14 of the Criminal procedure code, would be left without purpose, Thus, although when the criminal trial has ended, the Court would order the punishment of the accused, this could no longer be held liable for criminal offense, since it lost its identity due to the legal disappearance thereof and removal from the Trade Registry"

Nevertheless, there is a legitimate question arising: what is happening with the activity of a legal person , the accused in a criminal trial, when certain activities thereof have been forbidden, as a preventive measure, and the criminal trial would last for several years. Although the legal person enjoys the presumption of innocence, and theoretically is innocent until being sentenced by final judgment, extended preventive measures may lead to the liquidation *de facto* thereof, prior to being found guilty.

3.1. Interdiction to initiate or suspend the procedure of dissolution or liquidation of the legal person

In fact, this preventive measure includes two hypothesis: first, interdiction to initiate or suspend the procedure of dissolution or liquidation of the legal person, when such procedure was not yet initiated, secondly, suspending the procedure of dissolution or liquidation, when it was already initiated.

Since the terms used are rather clear, I consider the issue refers strictly to the dissolution and liquidation, and not the insolvency procedure, which the lawmaker did not understand to forbid, as a preventive measure, specifically taking into account the declared scope of this procedure.

The reason for which the lawmaker provided this preventive measure is obvious. Any legal person suspected for having committed an offense cannot cease to exist at the time of its investigation, since not only that this would any longer hold the capacity of a legal person, and therefore the passive subject of the criminal action, but it might lose its patrimony as well, and the consequence would be the impossibility to be held liable for a criminal offense, as the case may be.

3.2. Interdiction to initiate or suspend the merger, splitting or decrease of the registered capital of the legal person, which started prior, or during the criminal investigation

The above reason also applies in the case of this preventive measure, since they are interested in preventing the risk that the legal person ceases to exist by merger with other legal person, or by absorption by other legal person, or by distributing the patrimony of the legal person terminating its activity, between two or

among several legal persons that already exist, or which are established as such. The measure does not apply to a legal person under insolvency.

3.3. Forbid certain asset transactions that may cause a significant decrease of the patrimony or the insolvency of the legal person

This is the preventive measure usually taken against the legal persons in criminal trials, leading to many discussions regarding the generic character of the text.

For instance, in a criminal case on the dockets of the Court of Appeal, Bucharest[10], Second Criminal Section, concerning the appeal filed by a trading company, accused in a criminal file, against the Court resolution ruling the extension of the preventive measure of forbidding the asset transactions that may cause the decrease of the patrimony or insolvency of the legal person, for another 60 days, they had ordered against the company investigated for several tax evasion offenses, the preventive measure of forbidding the asset transactions that might cause the decrease of the patrimony or insolvency of the company, without actually specifying which asset transactions were forbidden.

The Judge of Rights and Liberties of the Court of first instance ordered this measure while he actually held by the resolution for extending the preventive measure that the company was already under the insolvency procedure, but that, there was the risk that the company assets were decreased within the general procedure of the insolvency, prior to the final settlement of the criminal trial.

As a consequence of the preventive measure ordered in the case, the company could no longer carry out any kind of activity, or any kind of operations, all the accounts thereof being blocked, and even the salaries could not be paid, on the grounds that all the company's economic and financial transactions had been forbidden.

The legal person appealed against this resolution, by the judicial administrator, who essentially, besides the argumentation on the non existence of guilt in perpetrating the acts of which the company was accused, also showed that the text of law specifically provides that solely those asset transactions that may cause the negative results provided by the law can be forbidden, and not all the economic and financial transactions, and that the legal person carries out solely the activity for which it was established, according to Law no. 31/1990, while totally forbidding the asset transactions will represent the dissolution *de facto* of the legal person, prior to the delivery of the solution on criminal grounds, and by the unlawful deprivation of property, and that it is impossible for the company to perform the preservation and management of the assets, and also to support the legal procedures for the recovery of the claims from its own debtors.

The Judge of Rights and Liberties of the Court, having assessed the resolution against which the appeal was filed, ruled that it did not comply with the legal demands:

"According to art. 493 par. 1 of the Criminal procedure code, the Judge of Rights and Liberties can order, if reasonable doubt exists to justify the reasonable suspicion that the legal person has committed a criminal offense as provided by the criminal law and only in order to provide a smooth operation of the criminal trial, one or several preventive measures be taken, among which forbidding certain asset transactions, that may cause the decrease of the company's patrimony/assets or the insolvency of the legal person (letter c).

According to par. 4 of the same article, the measure can be extended during the criminal investigation, and each extension may not exceed 60 days.

According to par. 5 the preventive measures shall be ordered by the Judge of Rights and Liberties by reasoned judgment; this demand being also provided by art. 203 par. 5 of the Criminal procedure code.

The Court resolution challenged in this case does not meet the prerequisite condition of its motivation, which entails consequences both legally and as regards the impossibility of controlling thereof, in this appeal. The judgment includes solely one motive, which represents the grounds for extending the measure of forbidding the transactions that may cause the decrease for the company's assets or the insolvency of legal person , respectively, "the risk continues that the company assets be decreased during the insolvency procedure prior to the final settlement of this criminal file". This sole argumentation will not cover the non-existing motivation and it is not compatible with the exceptional character of the preventive measures.

(…) The existence of the reasonable doubt that the company committed the offense provided by the criminal law is not sufficient itself to take/extend the measure, but the measure shall be taken solely to assure the good operation of the criminal trials, and this condition was not analyzed at all by the Judge of Rights and Liberties of the Court of First Instance, and no specification was given regarding the reason for which such measure was deemed necessary for the good operation of the criminal trial, and not to what extent the good operation would be prevented in the absence of this measure.

Although in the judgment it was specified that there was the risk that the assets be decreased during the insolvency procedure, the judge did not show the circumstances based on which he concluded that there was the risk of decreasing the assets, and this while preventive measures were applied to the company assets and the insolvency procedure against the company was controlled by the syndic judge.

As regards the other operations, as correctly presented by the accused person in the appeal, such operations were not individualized, since there are many

[10] file 2573 / 93 / 2014.

categories of operations which, in either way, can decrease the assets, yet it is important to know whether they belong to the category of preservation actions, or management or disposition. Forbidding all the operations as a whole equals with the interruption of the company activity, and liquidation in fact thereof, while this is not the scope of the provisions of art. 493 of the Criminal procedure code. No actual specification of the grounds making it necessary, in the opinion of the judge of first instance, extension to the measure, non identification of the operations forbidden for the accused party, make the control of the resolution of the appeal impossible.

In this case, the argumentation of the accused was not at all examined, and the forbidden operations were not specified, and the accused party was thus faced with the impossibility of carrying out its activity any more.

At the same time, we find that the connections between the two procedures in which the accused is a party were not clarified, respectively the criminal procedure and the insolvency procedure, taking into consideration that, according to art. 46 of Law no. 86/2005, all the acts, operations and payments performed by the debtor are null except for the operations and payments authorized by the syndic judge. Therefore, it is not clear, what was allowed by the syndic judge to the debtor and what was forbidden by the judge of rights and liberties"

Consequently, in view of the above considerations, according to art. 282 par. (1) of the Criminal code procedure and art. 6 of ECHR, the Instance – Judge of Rights and Liberties admitted the appeal filed, annulled the court resolution challenged and sent the case for retrial to the same instance.

3.4. Forbid signing of certain legal acts, as established by the judicial body.

This measure is similar to the above one, referring to legal acts strictly determined, and deemed by the judicial body that might influence the proceedings of the criminal trial.

3.5. Forbid activities of the same nature as those on the occasion of which the offense was committed.

This preventive measure seeks to prevent repetition of the material criminal acts, although actually it is an ancillary punishment.

4. Conclusion

The criminal liability of the legal person in general, and of that under insolvency procedure , in particular, represent a rather complex issue, which definitely requires a more accurate regulation, especially concerning the area of confluence of the two procedures , and which, according to the law seem to be parallel although in reality they intermingle with each other and represent an inconvenience for each other.

The preventive measures that may be ordered against the legal persons need revaluation, in order they may not lead to the dissolution *de facto* of the legal person, prior to settlement of the guilt thereof by means of the judgment.

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HEARING AS A WITNESS THE PERSON AGAINST WHOM CRIMINAL CHARGES MAY BE FILED

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Abstract

In the present study we address the issue of hearing as a witness, during the criminal trial, the person against whom, when considering the evidence included in the file, a charge could be pressed for a criminal offense. Referring to this issue, it is necessary to mention that the current Romanian Code of Criminal Procedure, entered into force on 2.1.2014, introduced a new article to the previous regulation which had enshrined the witness's right against self incrimination. As we shall see, however, this new regulation does not apply to the present case. In these circumstances, the solution whereby the person against whom there are reasonable grounds for his/her participating in committing a criminal offense shall not testify as a witness arises from the case law of the European Court of Human Rights (hereinafter ECHR).

Keywords: *witness, criminal charge, the right against self incrimination, the equity of the criminal procedure, the new Romanian Code of Criminal Procedure*

1. Introduction

In criminal proceedings, in order to establish the truth, witnesses' testimony represents crucial evidence, which has led some authors[1] to label the testimonial evidence in the criminal trial as proper, inevitable evidence, as it is the tool to be used in order to find out about the circumstances related to committing the offense. Similarly, in order to emphasize the importance of this type of evidence in criminal proceedings, some authors have called witnesses as *'the eyes and ears of justice'*[2].

In some cases, prescribed by law or, as we shall see, resulting from the case law of ECHR, some persons may not act as witnesses during the criminal trial. As noted in the literature[3], it is not about persons who cannot act as witnesses in any criminal case, but about persons who, in particular criminal cases and in relation to specific facts or circumstances, cannot be summoned as witnesses or about persons who, in certain cases, can be heard only in relation with specific facts or circumstances. In this regard, according to art. 115 and 116 of the Romanian Code of Criminal Procedure (RCCP), the parties and the main subjects, the person unable to consciously report facts and circumstances which are actually certified as accurate, as well as the persons who must keep either secrecy or confidentiality may not be heard as witnesses in the proceedings.

The parties and the main subjects cannot be heard as witnesses, as they are directly concerned in the judgment to be passed regarding the given case. The parties and the main subjects, as stakeholders, cannot become a witness, because no one can testify in his/her own case.

Moreover, it is justified to disqualify as witnesses those individuals who are unable to consciously report facts or circumstances which are actually certified as accurate. This regulation, introduced in the Romanian criminal procedure legislation in 2014, is justified by the actual impossibility of the person concerned to tell the truth.

As for the persons who are bound to keep secrecy or confidentiality, they cannot act as witnesses in the criminal proceedings, provided the following two conditions are met:

1. it has been found that the information considered relevant for the criminal case was obtained while practicing a profession or holding an office involving the obligation of keeping secrecy or confidentiality;
2. the secrecy or the confidentiality are to be opposable to criminal judicial bodies, according to the law.

In our opinion, there is one more category that might be added, besides the already three mentioned: the persons who may be prosecuted in the respective case. In other words, which is the procedural regime of the person who is summoned to testify, considering the fact that, against this person, the criminal prosecution bodies have specific information which shows that the respective person may have taken part in committing the offenses listed in the case file?

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[1] A. Ciopraga, *Evaluarea probei testimoniale în procesul penal* (Assessing testimonial evidence in criminal proceedings), Editura Junimea, Iași, 1979, p. 10.

[2] J. Bentham, *Traité des preuves judiciaires*, Ed. Bassage Freres, Paris, 1823, vol. I, p. 93, *apud* I. Neagu, M. Damaschin, *Tratat de procedură penală. Partea generală* (Criminal Procedure Treatise. The General Part), Editura Universul Juridic, Bucharest, 2014, p. 457.

[3] I. Neagu, M. Damaschin, *ibidem*.

2. Case Study

In the criminal case that resulted in undertaking this study, the Prosecutor's Office ordered the initiation of criminal proceedings for corruption, the referral to the criminal prosecution bodies being made by denunciation. The person who made the denunciation, heard as a witness, told the criminal prosecution authorities that the corruption offenses had been committed due to the complicity of a third party (hereinafter referred to as the *Witness*). Thus, it appears that, at the starting point of the criminal case, the prosecutor was in possession of a piece of information which might have led to allegations referring to the *Witness*'s committing the corruption offenses. In other words, at the beginning of the criminal prosecution, this piece of information could have been considered as reasonable grounds to allow the prosecutor to assume that the *Witness* had participated in committing the offenses being under criminal investigation.

Later, during the criminal investigation, the prosecutor invoked the claims of the denouncer while procedures related to taking preventive measures, and while evidentiary procedures, respectively, were being conducted. Thus, in the application for a writ of execution related to strip search, vehicle search and house search, the criminal prosecution body refers to the denouncer's statement, according to which the corruption offenses were committed with the help of the *Witness*. The probative relevance of this piece of factual evidence comes up from the resolution of the judge for rights and liberties to allow for the search. Also, the prosecutor refers to *Witness's* alleged offenses of material complicity in the draft submitted to the judge for rights and liberties on remand custody for the persons accused in this case.

Thus, it can be seen that the statement of the denouncer on the *Witness*'s alleged offenses of complicity to commit corruption offenses was provided to the criminal prosecution authorities ever since the beginning of the criminal investigation, being, subsequently, invoked while evidentiary procedures, and preventive measures, respectively, were being conducted.

Nevertheless, although invoked during the criminal investigation, these pieces of information do not corroborate other pieces of evidence presented in the case. In other words, when applying the principle of free assessment of evidence, enshrined in art. 103 para. (1) RCCP, considering the possibility for a witness's statement to be divisible, the denouncer's statements are likely to have been ignored by the criminal prosecution authorities.

In this context, the next step of the criminal prosecution proceedings taken by the criminal prosecution authorities was to hear the defendant accused of committing the offense of accepting bribe. In that statement, the defendant stated that the meeting in which the offense of corruption was committed was intermediated by the *Witness*. In a subsequent statement, the defendant reiterated the issues mentioned before, related to the *Witness*'s activity of intermediating the corruption offenses.

One should note that the denouncer's statements on the *Witness*'s offenses of complicity, given at the beginning of the criminal investigation, later invoked by the criminal prosecution authorities, corroborate the defendant's statements, accused of accepting bribe.

In this context, resulting from the evidence produced in the case, although there was enough evidence to consider the *sui generis* capacity of the possible participant in committing the corruption offenses, the criminal prosecution authority proceeded to hearing the alleged intermediary as a *Witness*. During the hearing, the *Witness* stated that he/she arranged the meeting between the defendants accused of corruption offenses. For this statement, the *Witness* was charged with the offense of perjury and criminal prosecution proceedings started herein.

3. Hearing the witness against which there is evidence opening up the possibility to press criminal charges against him/her

As far as the procedure for hearing the witness is concerned, there stands out a very interesting question related to the legality of the evidence in the criminal lawsuit, i.e. which is the manner of hearing a witness who may be criminally prosecuted in the case for which he/she is summoned? Thus, it is essential to determine which the procedural regime of the person summoned to testify as a witness is, given the fact that against this person, the criminal prosecution authorities have specific information which opens up the possibility that the respective person participated in committing the offenses listed in the case file.

Firstly, it is necessary to analyze the provisions of art. 118 RCCP, which enshrines the witness's right against self incrimination. In this sense, *'A witness's statement given by a person who had the capacity as suspect or defendant before such testimony or subsequently acquired the capacity of suspect or defendant in the same case, may not be used against them.'* The legal text, though marginally called 'the right of the witness to avoid self incrimination' primarily focuses on the assumption that a person, initially heard as a witness, is subsequently charged with the offence for which he/she was heard (hence the accusation against that person refers to his/her committing an offense included in the case file, and not the offense of perjury). In this case, the initial witness statement cannot be used against the person accused, since it is an extension of the right awarded to the suspect or the defendant against self incrimination. For these reasons we consider that the provisions of art. 118 RCCP are not applicable to the specific case which led to the preparation of this study.

Secondly, provided that in the case file there is reasonable evidence[4] on the possibility of an offense by a particular person and the criminal prosecution authority does not inform this person about the criminal charge, preferring to engage him/her in criminal proceedings as a witness, legally bound to withhold nothing from what he/she knows and refrain from making false statements, thus placing him/her under the criminal rule provided for in art. 273 of the Romanian Criminal Code, the witness in this case is to choose between the following two procedural conducts:

1. either to state everything he/she knows and, thus, to contribute to his/her eventual indictment by being held criminally liable for the offense which is included in the case file,
2. or not to state what he/she knows or make false statements, thus being held criminally liable for the offense of perjury.

The thesis statement of 'the two options' described above is found in the practice of ECHR[5]. Also, this theory is present in the case law of the Supreme Court of Romania[6], in a different enunciation as 'the theory of the three difficult choices the person is faced with.' Under this thesis statement, it is not natural to require the person against whom there might be pressed a criminal charge to choose between

1. being sanctioned for his/her refusal to cooperate,
2. providing the authorities with self-incriminating information
3. lying and thus risking to be convicted for this type of conduct.

To reduce the incidence of this thesis statement, it is important to identify the answer to the following question: when will one consider that a criminal charge is likely to be pressed against a certain person?

In terms of the provisions of art. 305 para. (2) RCCP, in a criminal case, the charge shall be initiated *in personam* when, considering the existing data and evidence in the case, there shall result reasonable evidence that a particular person has committed the offense for which criminal proceedings have started. In this situation, the prosecutor shall order the criminal prosecution to be carried out against this person, who shall become the suspect.

In a broader interpretation of the concept of 'suspect', ECHR ruled that a person shall become the suspect not starting with the moment when he/she is informed about it, but *once the judicial authorities had reasonable grounds to suspect him/her to have participated in committing a certain offense*.

In this respect, in the case *Brusco v. France*[7], it was decided that the right to a fair trial was violated, by violating both the right against self incrimination and the right to remain silent. Thus, the complainant, suspected of having instigated somebody to commit an assault, was questioned as a witness after having taken an oath. Nevertheless, according to ECHR, he was not a simple witness, but he was in fact the subject of 'criminal charges' and, therefore, benefited from the right against self incrimination and the right to remain silent, as guaranteed by art. 6 para. (1) and (3) of the European Convention on Human Rights.

The *plausible reasons* which may lead the judicial authorities to conclude that a certain person participated in committing an offense are represented by data and proofs that make up the reasonable evidence about the offense being committed. So, in the case file, there should exist data and proofs that are to make up the reasonable evidence. Thus, if the evidence about the possible involvement of the *Witness* in committing the offense is, initially, included in the act of apprehension, and, subsequently, this information is taken over by the judicial bodies, serving as a factual basis for the issuance of procedural measures or for carrying out evidentiary activities, the prosecution may press criminal charges against the *Witness*. Moreover, this conclusion gets weight considering the hypothesis according to which the initial data are confirmed during the investigation by other proofs.

Given these considerations, the witness who is in the position to be indicted in connection with his/her participation in committing one of the offenses which are criminally investigated must be regarded as a suspect and, as such, he/she has the right against self incrimination, in that he/she can benefit from the right to silence.

This theory was expressly enshrined in the case law of ECHR, in the case *Serves v. France*[8], *i*n which this court ruled that against the autonomous nature of the concept of 'criminal charge', the witness has the right against self-incrimination as far as, by means of the statement he/she makes, he/she may contribute to his/her indictment.

A brief examination of the literature leads to the conclusion that the practice of hearing a person against whom there is evidence (reasonable grounds) for having participated in committing the offense which is the subject of the case file violates the right to a fair trial, in terms of violating the right of the person to avoid contributing to his/her indictment. In this regard, it was stated that 'what seems to be even worse is the practice of hearing the perpetrator (or person against

[4] Reasonable evidence is defined in numerous decisions of the ECHR as 'data, information able to convince an objective and impartial observer that a person is likely to have committed an offense.

[5] ECHR Judgment of 08.04.2004 in Case *Weh v. Austria*.

[6] High Court of Cassation and Justice of Romania, Criminal Division, Decision no. 213/2015, available on the website of the Romanian Supreme Court.

[7] ECHR Judgment of 14.10.2010 in Case *Brusco v. France*, available on the website of the Romanian Superior Council of Magistracy.

[8] ECHR Judgment of 20.10.1997 in Case *Serves v. France*, paragraphs 42-47, available on HUDOC, the electronic database of ECHR.

whom there is evidence thereof, AN) as a witness'[9]. This theory is also adopted in other papers, which have analyzed the case law of ECHR, concluding that 'a person may refuse to give statements, to answer questions or to produce evidence that could self incriminate him/her (*nemo debet prodere se ipsum*)'[10].

In conclusion, in the theoretical, as well as the case law related background described above, if in the criminal case file there are reasonable grounds on which charges may be filed against a person, this person, summoned as a witness, has the right to remain silent on issues which might incriminate him/her. Otherwise, hearing a witness – possibly a suspect – can contribute either to self incrimination or to holding him/her criminally liable for the offense of perjury.

4. Consequences of hearing as a witness a person against whom there are reasonable grounds to press a criminal charge

To identify the right solution in such a case, we will analyze a similar possible situation. In this sense, *which are the procedural consequences of hearing as a witness a person by violating that person's right to refuse to give statements as a witness and, subsequently, by indicting the respective person on charges of perjury*? Specifically, we will suppose that the defendant's ex wife, summoned to give a statement as a witness, refuses to testify. For this procedural conduct, the defendant's ex-wife is indicted, under the charge of perjury. Clearly, if the factual situation described here were real, the defendant's ex-wife could not be held criminally liable, and if this process were triggered, then the criminal action would stop, being incident the case referred to in art. 16 para. (1) (d) RCCP, 'there is a justifying cause,' i.e. 'exercising a legal right.' Thus, we believe that the defendant's ex-wife could not be held criminally liable for refusing to give statements as a witness, because exercising a legal right ignored by the judicial body may not constitute a criminal offense, as it is lawful conduct, allowed by law. We appreciate that in this case we may find ourselves in another situation which may lead to reducing the ability to 'exercise a lawful right', which adds to classical assumptions, e.g. practicing a profession, trade, other occupation or sports, the hypothesis of jurisdictional immunities, respectively.

For the same reasons, we believe that the *Witness* who refused to give statements or failed to report to judicial bodies facts and circumstances that could have contributed to his/her own indictment and, who, based on this conduct, was indicted for the offense of perjury, has exercised a right which arises from the practice of ECHR. Consequently, the solution in this case is acquitting the defendant for the offense of perjury, based on the existence of a justifying cause.

5. Conclusions

In conclusion, if in a criminal case there are reasonable grounds on which a person may be indicted, this person, summoned as a witness, has the right to remain silent on issues that might incriminate him/her. Otherwise, hearing the witness – possibly a suspect – may contribute either to self incrimination or to the likelihood of being held criminally liable for the offense of perjury.

With specific reference to the case which served as a basis for this study, we consider that by ignoring the reasonable grounds that could have given support to the criminal charge, the *Witness* was deprived of the right against self incrimination. Under these circumstances, the *Witness*'s hearing was purely formal, since the prosecutor had enough evidence to suspect him/her as a participant in committing the corruption offenses included in the case file. In the case presented, the *Witness* was not a simple witness, heard in connection with the facts and factual circumstances which constituted evidence in the respective criminal case. Against this witness a *de facto* charge was brought, about alleged complicity in corruption offenses, charge which was based on the evidence existing in the file ever since the beginning of the criminal investigation. Basically, the *Witness*'s compliance with the procedural obligations specific for being a witness could have minimized his/her right against self incrimination.

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[9] Viorel Pașca, Aspecte deontologice generate de principiul unui proces echitabil (Ethical issues arising from the principle of a fair trial), in Noile instituții ale dreptului penal și dreptului procesual penal în dialogul interprofesional între judecători și avocați (The new institutions of criminal law and criminal procedure in interprofessional dialogue between judges and lawyers), Editura Universul Juridic, Bucharest, 2015, p. 263.

[10] Mihai Udroiu, Ovidiu Predescu, *Protecția europeană a drepturilor omului și procesul penal român. Tratat* (European protection of human rights and the criminal trial in Romania. Treaty), Editura CH Beck, Bucharest, 2008, p. 664; see also Cristinel Ghigheci, *Principiile procesului penal în noul Cod de procedură penală* (Principles of the criminal trial in the new Romanian Criminal Procedure Code), Editura Universul Juridic, Bucharest, 2014, p. 291.

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- ECHR Judgment of 20.10.1997 in Case Serves v. France.

CONSIDERATIONS ON THE MATERIAL ELEMENT OF THE OBJECTIVE SIDE OF THE CRIMINAL OFFENCE OF PUBLIC ORDER AND TRANQUILITY DISTURBANCE, AS PROVIDED IN ARTICLE 371 OF THE CRIMINAL CODE

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Abstract

These considerations are brought about by Decision no. 9 of 12 April 2016 of the High Court of Cassation and Justice, the Panel for the settlement of matters of criminal law. The panel was called to rule on the following matter of criminal law: "whether the material element of the objective side of the criminal offence of public order and tranquility disturbance provided for in Article 371 of the Criminal Code needs to be directed at several individuals and whether, in the case where the action described above referred to only one person, de-criminalization operates in accordance with Article 4 of the Criminal Code."

Keywords: *objective side, offence of public order and tranquility disturbance, several individual.*

In settling the issue above, the decision emphasizes that, in the legal world, two opinions were manifested:

a) A majority opinion supporting that the material element of the objective side of the criminal offence of public order and tranquility disturbance, as provided for in Article 371 of the Criminal Code is fulfilled even if the defendant's action refers to only one individual, because it also touches on all present individuals, provided that the key requirement that the criminal offence be committed in public is fulfilled;
b) A minority opinion supporting that the material element of the objective side of the crime of public order and tranquility disturbance, as provided for in Article 371 of the Criminal Code, needs to be directed at several individuals, the incriminated wording including the term "individuals";

Having regard to the considerations above, the Panel decided that "the provisions of Article 371 of the Criminal Code shall be enforced, in relation to the criminal offence of public order and tranquility disturbance, in order for the criminal offence to exist, the violence, threats or severe prejudice against dignity need not be committed against several individuals, as it suffices for the violence, threats or severe prejudice against dignity, disturbing public order and tranquility, to be committed in public against a certain individual."

Having regard to the above ruling reached by the Panel of Judges, correct in our opinion, we want to nuance the variant where the severe prejudice against dignity is committed in public, against only one individual, a passive subject of the committed offence.

Public order and tranquility consists, for the members of the society, of important social values, around which social cohabitation relationships occur and develop, in the absence of which a community could not efficiently operate. In principle, social cohabitation relationships established between the members of the community and protected by the State are "habitation relationships between people and other people"[1].

The State needs to protect social cohabitation relationships because, in the absence of such protection, such relationships would be jeopardized or damaged, entailing a negative effect on the society, because the members of the community would no longer have the guarantee of their moral security.

The doctrine emphasized that "social cohabitation relationships in restrictive meaning shall mean the social cohabitation relationships requiring close, direct, frequent contact between people and whose breach result in moral suffering".[2]

The care of the Romanian law-maker to ensure a civilized social cohabitation environment, based on morality and mutual respect between the members of the society materialized in the legal field by the issuance of appropriate laws.

In Romania, the social values consisting of "public order and tranquility" are especially protected by Law No 61 of 27 September 1991 (republished) sanctioning the infringements of social cohabitation rules, public order and tranquility[3] and by the Criminal Code, Article 371, incriminating the offence of public order and tranquility disturbance.

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[1] Ion Oancea, comment in the collective paper Theoretical Clarifications of the New Criminal Code, volume III the special section, Academiei RSR Publishing House, Bucharest, 1972, p. 543.

[2] Idem op. cit. p. 544.

[3] Law no. 61 of 21 September 1991 penalizing infringements of social cohabitation rules, public order and tranquility, was published in Official Gazette of Romania no. 96 of 07 February 2014.

In light of the above-mentioned laws, it follows that, depending on the degree of social jeopardy pertaining to the disturbance of public order and tranquility and on the outcome, the illicit offences in this field may amount, as the case may be, either to contravention or to criminal offence.

Thus, in accordance with Article 2 paragraph (1) item (1) of Law no. 61/1991 (republished), contravention shall be "the perpetration in a public situation of actions, obscene acts or gestures, abusive language, offensive or vulgar expressions, threats of violence against individuals or their property, likely to disturb public order and tranquility or to incite the citizens' indignation or prejudice their dignity and honor or that of public institutions."

Mention is also to be made that, in the case of the misdemeanor referred to above, in respect of the passive subject thereof, the lawmaker employs the plural number, within the meaning that the actions amounting to the material element of misdemeanor shall be able to disturb public order and tranquility or incite the citizens' indignation or prejudice their dignity and honor.

In accordance with Article 371 of the Criminal Code, the criminal offence of public order and tranquility disturbance consist of the "action of an individual who, in public, through violence committed against individuals or their assets or by threats or severe prejudice against personal dignity, disturb public order and tranquility".

As it may easily be noticed, the material element of the contravention provided for in Article 2 paragraph (1) item (1) of Law no. 61/1991 (republished) is similar to that of the offence referred to in Article 371 of the Criminal Code, but there are also differences separating the contravention from the incrimination amounting to criminal offence.

The substantial difference between the contravention referred to in Article 2 paragraph (1) item (1) of Law no. 61/1991 and the offence incriminated in Article 371 of the Criminal Code consists of the fact that, while the contravention is, in its legal configuration, a jeopardy offence, the incrimination provided for in Article 371 of the Criminal Code is an offence of result.

Thus, the misbehaviour provided for in Article 2 paragraph (1) item (1) of Law no. 61/1991 (republished) amounts to contravention, when, in the particular circumstances in which it was perpetrated, it is only able to disturb public order and tranquility, while the offence provided for in Article 371 of the Criminal Code only amounts to a criminal offence when it disturbed public order and tranquility and therefore entailed a particular outcome.

The legal provisions existing before the effective date of the New Criminal Code, when the contravention provided for in Article 2 paragraph (1) item (1) of Law no. 61/1991 (republished) was provided in Article 2 of Decree no. 153/1970, and the criminal offence was provided for in Article 321 of the previous Criminal Code, it was intended to separate the contravention from the incrimination.

In one case, the local prosecutor's office of the town of Roman, county of Bacau, decided by means of an ordinance[4] that the "offence of the individual who, under the influence, made threats against the clients of a restaurant, also breaking a glass, as a result of which the tranquility of the establishment was disturbed, is susceptible to amount to public order disturbance, as provided for in Article 321 of the Criminal Code" (previous, note added).

In the same ordinance, without correlating the offence committed by the law-maker with the contravention provided for in Article 2 of Decree no. 153/1970, the prosecutor reached the conclusion that "having ascertained that the disturbance against the tranquility of the establishment was not of significant proportions, that the perpetrator has a mental disorder, which under the influence determines violent reactions, that he had alcohol by accident that evening, being upset because of family misunderstandings, that, although he has criminal antecedents, his behavior in the society and at his work place is appropriate and that he has proven an intention to complete his training, all of the considerations above should lead to the conclusion that the misconduct does not have the social jeopardy of criminal offence and the Court shall impose an administrative nature, in accordance with Article 18^1 of the Criminal Code" (previous – note added).

In criticizing the decision of the prosecutor, the commentators of the ordinance above have emphasized that "in order to appropriately classify the offences committed by the defendant, the prosecutor should have focused on the distinctive criteria of the criminal offence of indecent exposure and public order disturbance, on the contraventions provided for in Article 2 of Decree no. 153/1970 in letter (a) ("an individual committing, in public, actions, gestures and actions or using indecent, offensive, obscene language, likely to incite citizens' indignation") and letter (d) ("causing scandal in public establishments") and, in light of the criteria above, to classify the offences either in Article 321 of the Criminal Code or in the above-mentioned sections of Decree no. 153/1970[5]."

Between the legal wording stipulating the contravention set forth in Article 2 paragraph (1) item (1) of Law no. 61/1991 and the wording of the offence incriminated under Article 371 of the Criminal Code, there are also interesting differences as regards the description of their legal content.

Thus, while the wording of Article 371 of the Criminal Code, the law-maker refers to "threats or

[4] Please see Ordinance no. 161/B/1976 of the local prosecutor's office of Roman, county of Bacau, notes by I. Pop and Vl. Dumbrava in the Romanian Law Review no. 11/1976, p. 54.

[5] Please see, in that respect, Vasile Papadopol, Mihai Popovici, Alphabetic repertoire of court practice in criminal matters, for 1976-1980, Scientific and Encyclopedic Publishing House, Bucharest, 1982, p. 394.

severe prejudice against personal dignity", in the wording of the misconduct provided for in Article 2 paragraph (1) item (1) of Law no. 61/1991, the law-maker no longer uses the phrase "severe prejudice", on the other hand, it explains the manners in which personal dignity may be prejudiced, in particular: obscene acts or gestures, abusive language, offensive or vulgar expressions, all of which shall obviously be committed in public, provided that they incite the citizens' indignation or prejudicing their dignity and honor.

In comparing the two legal texts, in particular Article 2 paragraph (1) item (1) of Law no. 61/1991 and Article 371 of the Criminal Code, it is revealed that obscene acts or gestures, abusive language or offensive or vulgar expressions, in public, in order to amount to the incrimination provided for in Article 371 of the Criminal Code, need to have a certain intensity amounting to severe prejudice against personal dignity. In our opinion, the wording of Article 371 of the Criminal Code infers that if everything the perpetrator did could not reach a certain amplitude, causing severe prejudice against the dignity of the passive subject, the misconduct shall be qualified as contravention, and not criminal offence. For instance, if the offence consisted of a mere curse or the tendentious reference to a physical flaw of the passive subject, it shall not meet the constituent elements of the criminal offence provided for in Article 371 of the Criminal Code.

In terms of structure of the constituent content, the offence of public order and tranquility disturbance, as provided for in Article 371 of the Criminal Code has an alternative content, as it may be committed as follows:

a) by violence committed against individuals or assets; this is the case most dealt with in court practice;
b) by threats or severe prejudice against personal dignity.

In both regulated methods (a+b), in order to amount to a criminal offence, the action shall be committed in public and disturb public order and tranquility.

In reference to the regulated method specified under letter (a), committed in public, irrespective of whether the offence is committed by several individuals or only one, the offence shall always fall under the incrimination provided for in Article 371 of the Criminal Code, and not contravention, because it reaches an intensity whereby it becomes able to disturb public order and tranquility and hinder the social security environment.

The doctrine emphasized that "public order is a feature of normal social life, where the relationships between people are conducted in a peaceful manner under conditions of mutual respect, personal security of trust in the behavior and actions of others. Public order and tranquility is disturbed when immoral manifestations or behaviors take place in public, when scandal occurs, when people face the risk of being subject to physical or language violence"[6].

As indicated in the beginning of the paper, the Panel for the settlement of matters of criminal law decided that the incrimination referred to in Article 371 of the Criminal Code persists even when the threats or severe prejudice against dignity, disturbing public order and tranquility are committed against only one individual. In connection with this assertions, several clarifications are in order.

As regards the offence of public order and tranquility disturbance, as regulated in the new Criminal Code in the manner of "threats or severe prejudice against personal dignity", the question arises whether the perpetration of threats, acts, gestures, or the use of indecent, offensive, obscene expressions against only one individual (passive subject) in public, in a location where, by its nature or intended purpose, is accessible to public, however, no one is present, satisfies the constituent content of the incrimination provided for in Article 371 of the Criminal Code.

In the court practice preceding the effective date of the New Civil Code, it was decided that the "offence of having an irreverent behavior against an individual who reprimanded the perpetrator because he was singing with others in front of a residential building and plunging his fist against the other's face, causing injury, requiring 12 days' of medical care, does not amount to the criminal offence of indecent exposure and public order disturbance"[7]. The same court practice preceding the effective date of the New Criminal Code decided that the "content of the criminal offence provided for Article 321 of the Criminal Code (previous – note added) is not satisfied as regards the offence of an individual who, after asking permission of the train attendant, enters a 1st class compartment, where he knew there was an individual against whom he had dissatisfaction and uttered offensive words against the latter, also assaulting him"[8].

The doctrine contends that, in case of the offences provided for in Article 371 of the Criminal Code, what is relevant for incrimination is not the number of individuals touched by the author's actions, but the disturbance of public order and tranquility by means of the behavior committed in public and having such characteristics (violence against individuals, violence against assets, threats or severe prejudice against personal dignity)"[9].

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[6] Costica Paun, Comment in the commented New Criminal Code – special section – third issue, revised and supplemented, Universul Juridic Publishing House, Bucharest, 2012, p. 928.

[7] The Supreme Court, Criminal Division, decision no. 1278/1973 in Vasile Papadopol, Mihai Popovici *Alphabetic repertoire of court practice in criminal matters, for 1969-1975*, Scientific and Encyclopedic Publishing House, Bucharest, 1972, p. 427.

[8] County Tribunal of Brasov, criminal decision no. 829/1972, in Vasile Papadopol, Mihai Popovici, op. cit., p. 429.

[9] S. Bogdan, D.A. Serban, D. Zlati, The New Criminal Code, special section – Universul Juridic Publishing House, Bucharest, 2014, p. 716.

The above assertion is accurate, within the meaning that the violence perpetrated in public, even against only one individual or only one asset, meets the constituent elements of the incrimination provided for in Article 371 of the Criminal Code, however, in our opinion, in dealing with threats or severe prejudice against dignity, the number of individuals against which they are performed also matters.

We believe that the threats or severe prejudice against the dignity of only one individual, when committed in public, without any other people in attendance, meet the constituent elements of the misconduct provided for in Article 2 paragraph (1) item (1) of Law no. 61/1991 (thus a contravention) and not of the incrimination provided for in Article 371 of the Criminal Code.

In differentiating the above-mentioned contravention from the offence provided for in Article 371 of the Criminal Code, a decisive element shall be whether public order and tranquility was indeed disturbed. If the offences consisting of threats or severe prejudice against dignity resulted in the disturbance of public order and tranquility, then we are dealing with the incrimination provided for in Article 371 of the Criminal Code, and if the actions were merely likely to disturb public order and tranquility, without actually disturbing it, then we are dealing with the contravention provided for in Article 2 paragraph (1) item (1) of Law no. 61/1991 (republished).

The criterion of whether public order and tranquility has been disturbed or not is decisive in differentiating the contravention from the criminal offence.

Both the criminal law, and Law no. 61/1991 (republished) do not define the meaning of "public order and tranquility disturbance". In its case law, the former Supreme Tribunal deemed that, in order to rule in favor of the existence of public order disturbance, it is required to examine, in reliance upon the evidence submitted, whether the actions committed by the defendant were likely or not to induce strong indignation and disavowal both in the social environment immediately impacted by the perpetration of the offence, and outside it[10].

Considering that the interpretation of "public order disturbance", the extent to which the objective side of the offence provided for in Article 371 of the Criminal Code, in the method of "threats or severe prejudice against dignity" is satisfied should be ascertained, where they are perpetrated in public against only one passive subject, without any other people in attendance. In our opinion, in such a case, the misconduct shall amount to contravention and not criminal offence, because it does not have the intensity required to cause the disturbance of public order and tranquility, insofar as there was no indignation and disavowal by members of the society and there is no increased social jeopardy by the perpetrator.

In the case where the "threats or severe prejudice against dignity" are directed against more than one passive subjects, at the same time and upon the same occasion, in public, without any other people in attendance, we believe that the outcome stipulated by law is caused, in particular, disturbance of public order and tranquility, and the action shall amount to a criminal offence, as the perpetrator proves a higher degree of social jeopardy.

Older court practice also decided that the "stalking, approaching and hitting without any reason, in the street, two individuals, shall amount to a conduct prejudicing good morals"[11].

Conclusion

In our opinion, in order for the misconduct to fall under the scope of the incrimination provided for in Article 371 of the Criminal Code, in the variant of the objective side – "threats or severe prejudice against dignity" – it needs to be directed against more than one passive subjects, because this is the only instance in which the offence has the required intensity for disturbing public order and tranquility.

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[11] The Supreme Tribunal, criminal division, decision no. 3350/1971, in the Vasile Papadopol, Mihai Popovici, Repertoire…., op.cit., p. 428.

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COMPARATIVE STUDY ON THE RIGHT TO HEALTH CARE SYSTEM PRISON LAW INTENDED TO ROMANIAN NATIONAL HEALTH LAW

Florentina Laurenţia GĂIŞTEANU*

Abstract

Health protection represents a protection measure for persons being a guaranteed right in Romania provided by the 34 Article of Romanian Constitution. The state is liable for taking measures of protecting physical and mental health, both for free persons and for those persons serving custodial measures.
Starting from the Recommendation of the Committee of Ministers of the Member States relating to the European Prison Rules Rec (2006) 2, which provides in paragraph 2 of subparagraph 40 – "The organization of health care in prisons"- that health policy from prison will be integrated in national health policy, being compatible with that. That comparative study aims at the implementation of European's recommendations in different medical specialty areas.
During this presentation are highlighted identical or different provisions stipulated in the relevant legislation of both two health systems, concluding that in certain areas of prison system, the state provides extra healthcare legislation.
Comparative study between the right of medical assistance provided by Romanian Prison Legislation and the right of medical assistance provided by Romanian National Health Care System.

Keywords*: health care, legislation, health policy, recomandations, prison*

1. Introduction

Staying healthy is one of the fundamental rights of every person, regardless of race, nationality, religion, gender, sexual orientation, age or social origin.

The World Health Organization has provided since 1946 the definition of health as,, *the good functioning of the body*[1]", requiring each state acceptance of amendments provided for by the Constitution of the World Health Organization, the right to protection health.

In Romania, right of health protection is a measure of protection a person is a right guaranteed, provided by the Article 34 of the Constitution, the rule criminalizing and penalizing any infringements on public health[2].

Also, this law is regulated and in legal norms adopted by Parliament (Law), Government (ordinances, resolutions) and other public institutions that provide the organization and functioning of the health system and the conditions for granting medical assistance (orders, decisions).

With a view to ensuring exerting effective right to health care to citizens of Romania and those who are separated from society for a time imposed a consequence of committing a crime, the State has adopted legal provisions regarding the right to care for persons deprived of liberty under the criminal sanctions enforcement regulations.

The living environment of the prison system is recognized as one with specific medical needs. The aggressive behavior of some detainees, precarious sanitary educatio among them, increased risk of sexual trasnmision disease, poor state of prison conditions in some penitentiaries are factors conditioning the maintenance and health protection of persons deprived of their liberty[3].

Recognise that medical assistance in prisons is important for public health in general has been stipulated in the Council of Europe recommendations on "European Prison Rules" and health policy in Romania had to regulate legal standards for providing medical assistance to private persons freedom, creating for the prison system an own health network that is similar to the public.

National Prison Administration is a public service responsible with the implementation of the detention regimes and ensuring recuperative interventions, but under conditions that guarantee respect for human dignity, helping ensure all necessary rights[4].

Lately, Romanian prison system has faced numerous interpretations concerning about organization and functioning of the healthcare system from the institutions/organizations for human rights, the media and the European Court on Human Rights (ECHR).

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[1] Health Medical Dictionary "site www / sfatulmedicului.ro accessed on 03.16.2017 hour 18.22.

[2] Law 286/2009 Penal Code Art. 352 thwarting disease control, venereal contamination art.353, 354 transmission of AIDS, Art.355 spread of diseases in animals and plants, water Art.356 Infection.

[3] Draft Strategy prison system from 2009 to 2013 - Strategic Objective 3 - quality care for inmates, protecting and promoting health and preventing illness page 10.

[4] Penitentiary system strategy project 2009-2013 - page 8 paragraph Mission.

We live in a society constantly changing and with its evolution we are witnessing a change in perception of the role of the prison service in the community.

Frequently the cases reported by the media on the prison system are focused on presenting inducing flaws of this system induceing in society, a negative image. Communication with all relevant community, transparency decisions and actions with significant impact on the prison system and improve the organizational functioning of this segment are essential for a true penitentiary administration system[5]**.**

The proposed study concerns from the need to highlight the legal provisions developed by the prison system and aims to remove first the concept of division between the two health systems and demonstrate that in terms of regulatory health policy in prison is organized in accordance with national health policy**.**

2. Text content

No doubt over Romania developments, manner of delivering health faced many legislative health reform last being represented by Law no.95 of 2006 Republished. According to the normative act invoked sure patients are divided into social health insurance and uninsured.

Health insurance is the main system of health care financing that ensures access to a basic package for sure[6].

The objectives of the social health insurance system are: protecting policyholders with respect to medical costs in case of illness or accident and protect universally insured, fair and non-discriminatory in terms of efficient use of the single fund health insurance[7].

Article 221 of the Law no.95/2006 *** Republished on healthcare reform provides in para. (1) d) that people are not proof of being insured is not ensured only a minimal package of services that includes health care services, medications and medical supplies only if surgical emergencies and illnesses potentially endemoepidemic, monitoring of pregnancy and child wife, family planning, prevention and care services to community healthcare.

Due to the fact that the right to health care of inmates is a right guaranteed legislature has provided that inmates should have the status of people insured and not uninsured, but with payment of the contribution from other sources, a fact stated in letter c) para. 2, art. 224 of Law no. 95/2006 *** Republished on health reform.

„Are insured persons involved in one of these situations, the duration, the payment of the contribution from other sources, according to this law: a sentence of imprisonment, are under house arrest or in custody and those enforcement measures referred to in art. 109, 110, 124 and 125 of the Criminal Code, as amended and supplemented, which is the period of deferment or interruption of sentence of imprisonment, unless they have income."[8].

Transposition of the aforementioned regulation, legislation is given in the Criminal Execution provisions of the *Order of the Minister of Justice and Minister of Health no.429 / C 125/2012 on healthcare insurance of detainees in the custody of the National Penitentiary Administration.*

Art. 2

Inmates are secured with payment of contribution for health insurance from the state budget through special purpose amounts by National Administration of Penitentiaries budget. „Following these issues, health service costs are paid by the prison unit from the funds available to them. Because the health insurance applies to all prisoners, regardless of their financial situation, resulting consequently that those who, when they were free and not beeing insured, for various reasons, will benefit from health insurance under and in accordance with law.

The process of granting prophylactic and curative healthcare in Romania are represented by the three important levels: primary care (family medicine), specialist outpatient care and hospital care.

Law no.95 / 2006 - Art. 30

(1) preventive and curative health care is ensured through:

a) outpatient medical offices of family physicians and other specialties, diagnostic and treatment centers, medical centers, health centers, laboratories and by other public and private hospitals;

b) public and private hospitals with beds.,,

In order to ensure quality medical care, at least equivalent to the health network public after 2000 prison system has entered into contract with home health insurance (CASAOPSNAJ) and primary healthcare (medical cabinets unit). At that time, entry into contract with CASAOPSNAJ aimed at relieving the Directorate General of Prisons, major financial efforts on providing medical assistance, especially since that legal norms that Law No.23 / 1969 on the enforcement of sentences, require that healthcare to be provided with funds from the state budget.

For understanding the concept of primary healthcare medical specify the following terms and definitions according to Law no. Republished 95/2006 on health reform.

ART. 63

(2) The term defines primary health care providing comprehensive health care, first-contact,

[5] Draft Strategy prison system in June 2009 - Strategic 2013biectiv 4 - Transparency and true picture of the penitentiary system in society, p.11.
[6] Art. 219 para. (1) of the Law no.95 / 2006 republished on health reform.
[7] Art. 219 par. (2) a) and b) of the Law no.95 / 2006 republished on health reform.
[8] Art. 224 para. (2) c) of Law No. 95/2006 Republished on health reform.

regardless of the nature of the health problem in the context of ongoing relationships with patients, disease presence or absence.

(3) Scope defined in par. (2) subject to the specialty of family medicine.

ART. 64

f) family medicine cabinet - private health unit specializes in providing medical services in primary care, organized under the law.

Exceptionally, ministries and institutions with own health network may establish the structure of family medicine cabinets, as public health units;,,

I mention that on 28 April 2006 when Law no.95 take effect, in Article 60 it makes no reference about the establishment of family medicine cabinets for ministries and institutions with own health network. However, to support the work of medical and other institutions including the prison system since 2008, from the legislator courtesy was promulgated Government Emergency Ordinance (OUG) no. 93/2008, which amended article 60 paragraph f) at that time for the purposes of establishing by *exception, as public health units, family medicine cabinets and for ministries and institutions with own health network.*

Following this, national health policy for integration into the prison system has developed legal rules with references to primary health care organization, raised by Decision no. 1897/2006 approving the Regulation implementing Law No. 275/2006 on execution of punishments and measures ordered by the court in criminal proceedings[9] thereafter Decision no. 157/2016 approving the Regulation implementing Law No. 254/2013 on execution of punishments and measures ordered by the court in criminal proceedings[10] and Order of the Minister of Justice and Minister of Health no.429 / C 125/2012 onhealthcare insurance of detainees in the custody of National Administration of Penitentiaries[11].

I mention that for countries like Germany, Norway, Northern Ireland, Holland, Denmark, Latvia, Lithuania, health care is provided entirely by the state budget.

Currently, the difference between nationally family medical care and the penitentiary system is more practical because in 90% of cases, detainees invoke the law enforcement - Article 71 of Law no.254 / 2013 which states that:

Art.71

,,(1) The right to healthcare, treatment and care of sentenced persons is guaranteed without discrimination as regards their legal situation. Right to healthcare includes medical intervention, primary care, emergency care and specialized medical assistance. The right to treatment includes both health care and terminal care.

(2) Health care, treatment and care in prisons shall, trained staff, free of charge, by law, on demand or whenever necessary.

And they require the presentation to cabinet whenever they wish, cabinets registering an estimated 100 presentations to cabinet / 8 hours against a cabinet from public national family health network which is privately and do not accomplish more than 20 presentations to cabinet, programmed according to rules providing medical assistance in social health insurance. Any request to the family doctor's office of public health network over programming is made against cost.

Prisons *Law no.254/2013*	*Health* *(Order no.763/2016*
Health care, treatment and care in prisons shall, trained staff, free of charge, by law, on demand or whenever necessary	*Note no 3* *1.1.1.1 It gives a single visit per person for each emergency situation observed, which was provided first aid or which was resolved at the medical office / home.* *1.1.2.1 For each episode of illness acute / subacute or acute to chronic conditions / insured settles a maximum of two consultations.* *1.1.3. Periodic consultations for the general care of insured persons with chronic diseases - will be done by appointment* *1.1.4 Patient monitoring includes two consultations scheduled which include the evaluation of disease control, screening for complications, patient education, laboratory investigations and treatment and a new monitoring is done after 6 consecutive months, calculated versus where it was performed a second examination of the monitoring previous case management.*

Healthcare specialist

Specialized medical assistance is regulated similarly in both health beeing carried out in accordance with the Contract Framework conditions for granting medical assistance within the health insurance system and the methodological norms for its

[9] Art.25.
[10] Art.153.
[11] Chapter II Section 1 - Organization of primary care.

application[12], which may be granted both in outpatient specialist for the prison system and in outpatient specialized health centers profile public or private homes under contracts with health insurance.

The provision of specialized medical care is contained in Article 155 of Decision no. 157/2016 approving the Regulation for enforcement Law no.254/2013 on execution of punishments and measures ordered by the court in criminal proceedings and Article 37 of the Order of the Minister of Justice and Minister of Health no.429/C-125/2012 on healthcare insurance detainees in custody National administration of Penitentiaries.

The vast majority of investigations recommended in the specialized clinic (ex.computer Scanner (CT), magnetic resonance imaging (MRI)) which are need to be made, many times against cost, in order that the detained person to benefit from making swift them, and not wait for a possible appointment to a date too far removed from the time the recommendation shall be borne by the prison units.

Dental Healthcare

Public health network in over 90% of dental offices are organized privately. Even if there are legal provisions for granting conditions of the minimal basic package of health services in outpatient specialist dentistry (Annex 14 of the Order of the National Health Insurance nr.763 / 2016), the vast majority of dental offices are not in contract with the health insurance fund, so that Romanian citizens even if their insured status, receive dental services only against payment.

In the prison system according to law, stipulated in executional-criminal legislation, detainee persons have secured the services of basic dental, free, and in case of making a dental prosthesis, national house health insurance covers a percentage of 60% and the detained person, if it has cash funds, a percentage of 40%, representing personal contribution. If the detained person lacks the funds to cover his personal contribution, prison unit is forced to cover the person deprived of liberty.

Order no.429 / C-125 on healthcare insurance of detainees in the custody of National Administration of Penitentiaries

ART. 39

(1) Preventive dental health care and dental treatment laid down in the rules for the application of the Framework Contract on conditions for granting medical assistance within the system of health insurance and dental radiographs ensure free and are settled Fund single national health insurance under the terms of the framework contract on the conditions for granting medical assistance within the system of health insurance and methodological norms for its application, the personal contribution unsettled the national fund for health insurance It is borne by the budget unit.

(2) Any other dental treatment, except as provided in par. (1) requested by the inmates will carry a fee.

(3) Prosthetic treatments are provided according to the rules for the application of the Framework Contract on conditions of granting medical assistance within the health insurance system.

(4) The cost of prosthetic treatments personal contribution to be paid by the person deprived of liberty.

(5) Where the person deprived of liberty lost masticatory function in detention with impaired concurrent and function of digestion, and is found in analyzing its income that does not have financial means necessary to pay personal contribution, this falls the unit who was sentenced budget, allocated funds for this purpose or other sources, according to the law.

(6) If the prosthetic treatment is necessary due to an accident when due in connection with the work that was assigned to the detained person or the fault of proven employees of the National Administration of Penitentiaries, consideration therefor shall be,, unit covered by the budget.,,

In the case of dental medical care for inmates, European Court of Human Rights (ECHR) ruled against Romania judgment of violation of Art. 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, retaining as maltreatment cases of delays in providing dentures to certain prisoners who lacked funds and penitentiaries had not provided funds to cover personal contribution to the detained person. (*Fane Ciobanu against Romania no 27.240/03/2012*).

Hospital care

Hospital care for inmates in prisons is performed inpatient hospital and other hospitals of similar homes under contracts with health insurance[13].

Law no. 254/2013 on execution of punishments and measures ordered by the court in criminal proceedings within prisons-hospital Art.12 par. (2) c) as special prisons.

First of all the operation of prison-hospital is primarily and necessary operation of the prison system, which is consistent with the provisions of the Standard Minimum Rules of the United Nations Universal Declaration of Human Rights, which states: *"The medical care were paramount and detainees' health should be a priority in jail. The level of health care in prison and medication must be at least equivalent to those of society.*"

Prisons-hospital are in contract with the health insurance fund (CASAOPSNAJ) empower funds for hospital services provided to inmates, relieving the

[12] Order National Health Insurance House nr.763 / 377/2016.

[13] Article 158 para. (1) GD no.157 / 2016 approving the Regulation implementing Law No. 254/2013 on execution of punishments and measures ordered by the court during the criminal trial.

budget of the National Administration of Penitentiaries of the major financial efforts on healthcare insurance.

So far the health reform law (Law no.95 / 2006) failed to integrate the specificities prison-hospital, they are often required to apply rules that conflict with execution - criminal practice. Following these aspects prison hospital they were considered as any hospital unit in the public system is obliged to secure funding in the first laugh from their own income as required by Article 11 para. (8) of *Decision no.756/2016 organization, functioning and powers of the National Penitentiary Administration and the amendment of the Government Decision nr.652 / 2009 on the organization and functioning of the Ministry of Justice*.

„(8) Prisons-hospital are providing special prisons, law, medical services under the specific conditions of the prison system. Prisons hospital are funded entirely from own revenues through social health insurance system and other own revenue; they may receive money from the state budget under the law„

It must be emphasized that the organization of prison-hospital may not be similar to any hospital unit in the public system or in the system of defense and public order, their work entails obviously a special specific, given the nature of the disease, the risk posed to the staff, specific modalities of action, guard and escort. Regarding financing regime it certainly can not be like other establishments of public health or those of the defense system, as these special prisons do not provide health services surcharge for other people outside the prison system.

Applying the same hospital for prisons specific funding regime in the public hospitals, while the legal status and scope of activity is totally different, which created over time problems financing and operation of these units.

3. Conclusions

Specifics of healthcare in the prison system imposed adapting and harmonization of all regulations which relate both to the execution of sentences and the health care.

A comparative analysis of legal norms underpinning of the right to health care in the prison system to the public health network, health policy highlights that the prison system has made significant progress in recent years. As measures to improve the regulatory framework is necessary for the public health system to accept the specifics of the particular peculiarities prison hospital and to integrate these units in health reform legislation.

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- Decision no.756/2016 organization, functioning and powers of the National Penitentiary Administration and the amendment of the Government Decision nr.652 / 2009 on the organization and functioning of the Ministry of Justice;
- European Court of Human Rights (ECHR) jurisprudence;
- Order National Health Insurance House nr.763 / 377/2016.

FREEDOM OF EXPRESSION AND VIOLENCE AGAINST JOURNALISTS

Radu Florin GEAMĂNU*

Abstract

This study will contain an analysys on the international and regional standards in the field of freedom of expression, as stipulated in the United Nations conventions and in the European Convention of Human Rights.
Further we will establish a link between the breach of the freedom of expression when cases of violence against journalists arise, especially tackling the impunity problem.
The paper will focus on the study of the ECtHR judgements regarding freedom of expression and cases of violence against journalists. Also, we will address the recent recommendations at the Council of Europe level.
Concluding, the study will attempt to express some reccommendations in solving the problem of violence against journalists.

Keywords: *freedom of expression; journalists; violence; United Nations; Council of Europe; ECHR.*

1. Introduction

Freedom of expression can take many forms, encompassing verbal, artistic, and pshycal expression. Freedom of opinion and expression is the cornerstone of any democratic society. However, it is a freedom which, as history attests, has been, and is, compromised in a number of States[1].

The right to freedom of expression, guaranteed both at international level (Universal Declaration of Human Rights, International Covenant on Civil and Political Rights) and regional level (Convention for the Protection of Human Rights), constitutes one of the essentials in a democratic society, ensuring, amongst others, the sound information of the citizens and, if proper implemented, an effective functioning of the rule of law.

So, from this perspective, safeguarding freedom of expression has an even more importance when coupled with the necessity to safeguard the integrity of the jurnalists and to protect them from cases of violence.

Of course, given the expansion of internet-based information, when referring to journalists, one should have in mind a larger interpretation of the notion, rather than the *stricto sensu* one. Thus, the term 'journalists' will include media workers and social media producers who produce significant amounts of public-interest journalism.

At Council of Europe (CoE) level, the term 'journalist' means any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication[2].

Also, ongoing technological developments have transformed the traditional media environment, as described, *inter alia*, in CM/Rec(2011)7 on a new notion of media[3], leading to new conceptions of media and new understandings of the evolving media ecosystem. Advances in information and communication technologies have made it easier for an increasingly broad and diverse range of actors to participate in public debate. Consequently, the European Court of Human Rights has repeatedly recognised that individuals, civil society organisations, whistle-blowers and academics, in addition to professional journalists and media, can all make valuable contributions to public debate, thereby playing a role similar or equivalent to that traditionally played by the institutionalised media and professional journalists[4].

2. Freedom of expression

2.1.International level

At international level, freedom of expression is provided for in art. 19 of the Universal Declaration of Human Rights (1948), which states that *everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers*. Similarry, the International Covenant on Civil and Political Rights (1966) provides,

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[1] R. K.M. Smith, Textbook on International Human Rights, 5th edition (Oxford: Oxford University Press, 2012), 301.

[2] CoE, Committee of Ministers, Recommendation No R(2000)7 on the right of journalists not to disclose their sources of information, adaopted 8 March 2000, accessed March 20, 2017, http://www.inter-justice.org/pdf/Sejal_Parmar_Protection_and_Safety_of_Journalists.pdf.

[3] CoE, Committee of Ministers, **Recommendation CM/Rec(2011)7 on a new notion of media,** adaopted *21 September 2011*, accessed March 20, 2017, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cc2c0.

[4] CoE, Committee of Ministers, **Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors,** *adopted 13 April 2016, no. 9,* accessed March 20, 2017, https://search.coe.int/cm/pages/result_details.aspx?objectid=09000016806415d9#_ftn1.

in article 19 para.2 and 3, that *everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.*

2.2. Regional level

At regional level, freedom of expression is regulated in art. 10 from the Convention for the Protection of Human Rights (ECHR):

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

2.3. Freedom of expression

In an impressive amount of judgments the European Court of Human Rights (ECtHR) has found that the national level of protection of the right to freedom of expression, media freedom and rights of journalists does not meet the requirements of Article 10 ECHR. The Court's case law has emphasized *that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment*, while restrictions and sanctions need a relevant, pertinent and sufficient motivation. An interference with free speech and media freedom can only be justified if there is a pressing social need and insofar as the interference is proportionate to the aim pursued[5].

Any interference with the right to freedom of expression of journalists and other media actors therefore has societal repercussions as it is also an interference with the right of others to receive information and ideas and an interference with public debate[6].

In a democratic system, the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence[7].

In ***Bucur and Toma v. Romania*** the Court considered that the general interest in the disclosure of information revealing illegal activities within the Romanian Intelligence Services (RIS) was so important in a democratic society that it prevailed over the interest in maintaining public confidence in that institution. The Court observed that the information about the illegal telecommunication surveillance of journalists, politicians and business men that had been disclosed to the press affected the democratic foundations of the State. Hence it concerned very important issues for the political debate in a democratic society, in which public opinion had a legitimate interest. The fact that the data and information at issue were classified as 'ultra-secret' was not a sufficient reason in this case to interfere with the whistleblower's right to divulge the information. The conviction of Bucur for the disclosure of information to the media about the illegal activities of RIS was considered as a violation of Article 10 ECHR[8].

2.4. Restrictions

It was noted that at first sight it is remarkable that precifically with respect to the right to freedom of expression, to which Western democracies attach such great value, the restrictions are formulated more broadly than with respect to other rights and freedoms. However, in practice this broad formulation is of little impact[9].

Subject to paragraph 2 of Article 10 [of the European Convention on Human Rights], it is applicable not only to 'information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the

[5] *D. Voorhoof, On the Road to more Transparency: Access to Information under Article 10 ECHR*, 2014, accessed March 20, 2017, http://journalism.cmpf.eui.eu/discussions/transparency-access-to-information-article-10-echr/.

[6] CoE, Committee of Ministers, ***Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors***, *adopted 13 April 2016, no. 2.*

[7] ECtHR, Grand Chamber, 12 February 2008, no. 14277/04, *Guja* v. *Moldova*, § 74. All the ECtHR judgements mentioned in this study are available on the website of the ECtHR - http://hudoc.echr.coe.int and were accesed in March 20, 2017.

[8] ECtHR 8 January 2013, no. 40238/02, *Bucur and Toma* v. *Romania*, in *D. Voorhoof, On the Road to more Transparency: Access to Information under Article 10 ECHR.* In its judgment the Court also relied on Resolution 1729(2010) of the Parliamentary Assembly of the Council of Europe on protecting whistleblowers.

[9] P. van Dijk, F. van Hoof, A. van Rijn, L. Zwaak (editors), Theory and practice of the European Convention on Human Rights, 4th edition (Antwerpen-Oxford: Intersentia, 2006), 793.

population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'[10].

Tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (…), provided that any 'formalities', 'conditions', 'restrictions' or 'penalties' imposed are proportionate to the legitimate aim pursued[11].

Note should be made that, the essential function of the press is always taken into account when an assessment is made whether in the given situation a restiriction of the freedom of expression is permissible or not[12].

Interference by public authority in exercising the rights provided for in Article 10 will only be valid and legal if it meets the requirements of paragraph 2 of Article 10: such interference was *prescribed by law*, motivated by one or more of the *legitimate aims* set out in that paragraph, and *necessary in a democratic society*.

Concluding there are 3 main conditions that have to be met in order to meet the requirements of paragraph 2 of Article 10:

- A measure is *prescribed by the law* if it has, both, basis in domestic law and the national law, and it has a certain quality, meaning that it must be accessible to the person concerned and foreseeable as to its effects[13].
- The interference must purse a *legitimate aim* which justifies the interference with its rights.
- Finally, the interference must be *necessary in a democratic society***.** As set forth in Article 10, this freedom is subject to exceptions. Such exceptions must, however, be construed strictly, and the need for any restrictions must be established convincingly, particularly where the nature of the speech is political rather than commercial. The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts[14].

3. Violence against journalists and the 'chilling' effect

3.1. International level

Journalists play a particularly prominent role in society: when they are threatened, attacked or killed, information flows shrink and entire communities are cowed. Citizens are deprived of the necessary information to develop their own opinions and take informed decisions about their lives and development[15].

The safety of journalists and the struggle against impunity for their killers are essential to preserve the fundamental right to freedom of expression, guaranteed by Article 19 of the *Universal Declaration of Human Rights*. Freedom of expression is an individual right, for which no one should be killed, but it is also a collective right, which empowers populations through facilitating dialogue, participation and democracy, and thereby makes autonomous and sustainable development possible[16].

In July 2011, article 19 was the subject of the General Comment 34 by the Human Rights Committee, which stated that *States parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression. Paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights. Nor, under any circumstance, can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest, torture, threats to life and killing, be compatible with article 19. Journalists are frequently subjected to such threats, intimidation and attacks because of their activities. So too are persons who engage in the gathering and an alysis of information on the human rights situation and who publish human rights-related reports, including judges*

[10] ECtHR, 7 December 1976, *Handyside v. the United Kingdom*, §49.
[11] ECtHR, 6 July 2006, *Erbakan v. Turkey*, §56.
[12] P. van Dijk, F. van Hoof, A. van Rijn, L. Zwaak (editors), Theory and practice of the European Convention on Human Rights, 4th edition (Antwerpen-Oxford: Intersentia, 2006), 775.
[13] ECtHR, Grand Chamber, *Amann v. Switzerland*, no. 27798/95.
[14] ECtHR, 28 June 2001, *VgT Verein Gegen Tierfabriken v. Switzerland*, no. 24699/94, §66, 68.
[15] U.N., *Implementation Strategy 2013-2014 on U.N. Plan of Action on the safety of journalists and the issue of impunity*, 2, accessed March 20, 2017, http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/official_documents/Implementation_Strategy_2013-2014_01.pdf.
[16] U.N., *Plan of Action on the safety of journalists and the issue of impunity*, 2012, 1, accessed March 20, 2017, http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/official_documents/UN-Plan-on-Safety-Journalists_EN_UN-Logo.pdf.

and lawyers. All such attacks should be vigorously investigated in a timely fashion, and the perpetrators prosecuted, and the victims, or, in the case of killings, their representatives, be in receipt of appropriate forms of redress[17].

Also, Resolution 29[18] condemns violence against journalists and calls upon its Member States to uphold their obligation to prevent, investigate, prosecute and sentence those which are commiting crimes against journalists. More to the point, the legislation must provide that the persons responsible for offences against journalists discharging their professional duties or the media must be judged by civil and/or ordinary courts and that there should be no statute of limitations for crimes against persons when these are perpetrated to prevent the exercise of freedom of information and expression or when their purpose is the obstruction of justice[19].

Moreover, Human Rights Council condemned in the strongest terms all attacks and violence against journalists and expressed its concern that there was a growing threat to the safety of journalists posed by non-State actors[20].

While recognizing that investigating crimes against journalists remains the responsibility of Member States, the acts of violence and intimidation (including murder, abduction, hostage taking, harassment, intimidation and illegal arrest and detention) are becoming ever more frequent in a variety of contexts. Notably, the threat posed by non-state actors such as terrorist organizations and criminal enterprises is growing. This merits a careful, context sensitive consideration of the differing needs of journalists in conflict and non-conflict zones, as well as of the different legal instruments available to ensure their protection[21].

Impunity has remained the predominant trend, with few perpetrators of killings or attacks against journalists being brought to justice. Impunity refers to the effect of exemption from punishment of those who commit a crime. It thus points to a potential failure of judicial systems as well as the creation of an environment in which crimes against freedom of expression go unpunished, posing a serious threat to freedom of expression. The practice and expectation of impunity may further encourage violations of numerous human rights besides freedom of expression and press freedom, while also encouraging other forms of criminality. Physically silencing criticism, arbitrary arrests and detention, enforced disappearance, harassment and intimidation have often been aimed at silencing not only journalists, but also intimidating a population towards self-censorship[22].

In other words, impunity remains one of the greatest challenges to the safety of journalists around the world. As violence against and harassment of journalists goes unpunished, the problem persists and even increases. However, if real legal consequences exist, perpetrators may think twice before committing such acts. The problem of impunity for crimes committed against journalists is acute and enduring, and it must be addressed by all stakeholders - especially government and state representatives – in order to have any hope of resolution[23].

The safety of journalists and question of avoiding impunity for acts of violence against them interacts, also, with other relevant provisions from the Universal Declaration of Human Rights, such as: the right to life (Article 2), the prohibition of torture (Article 3), the right to liberty and security (Article 5), the right to a fair trial (Article 6), no punishment without law (Article 7) and the right to an effective remedy (Article 13).

3.2. Regional level

It is alarming and unacceptable that journalists and other media actors in Europe are increasingly being threatened, harassed, subjected to surveillance, intimidated, arbitrarily deprived of their liberty, physically attacked, tortured and even killed because of their investigative work, opinions or reporting, particularly when their work focuses on the misuse of power, corruption, human rights violations, criminal activities, terrorism and fundamentalism. These abuses and crimes have been extensively documented in authoritative reports published by the media, non-governmental organisations and human rights defenders[24].

Protection of journalism and safety of journalists and other media actors must be organized into four pillars: prevention, protection, prosecution

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[17] U.N., Human Rights Committee, *General comment No. 34. Article 19: Freedoms of opinion and expression*, 102nd session, Geneva, 11-29 July 2011, 12 September 2011, no. 23, accessed March 20, 2017, http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf.

[18] U.N.E.S.C.O. (United Nations Educational, Scientific and Cultural Organization), General Conference, Twenty-ninth Session, Paris, 21 October to 12 November 1997, accessed March 20, 2017, http://unesdoc.unesco.org/images/0011/001102/110220E.pdf.

[19] U.N., *Implementation Strategy 2013-2014 on U.N. Plan of Action on the safety of journalists and the issue of impunity*, 24-25.

[20] U.N., *The UN Human Rights Council Resolution A/HRC/21/12 on the Safety of Journalists*, adopted by consensus in September 2012, in U.N., *Implementation Strategy 2013-2014 on U.N. Plan of Action on the safety of journalists and the issue of impunity*, 23.

See, also: *The Belgrade Declaration, 2004; The Medellin Declaration, 2007; The Carthage Declaration, 2012; The San Jose Declaration, 2013, on 'Safe to Speak: Securing Freedom of Expression in all Media' and The Paris Declaration, 2014, on 'Media Freedom for a Better Future: Shaping the Post-2015 Development Agenda'* .

[21] U.N., *Plan of Action on the safety of journalists and the issue of impunity*, 4.

[22] U.N.E.S.C.O., *World Trends in Freedom of Expression and Media Development*, 2014, 87, accessed March 20, 2017, http://unesdoc.unesco.org/images/0022/002270/227025e.pdf.

[23] The International Women's Media Foundation, *An overview of the current challenges to the safety and protection of journalists*, 2016, 4, accessed March 20, 2017, https://www.iwmf.org/wp-content/uploads/2016/02/IWMFUNESCO-Paper.pdf.

[24] CoE, Committee of Ministers, ***Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors****, recitals - no. 1.*

(including a specific focus on impunity) and promotion of information, education and awareness-raising:

- *Prevention:* Member States should put in place a comprehensive legislative framework that enables journalists and other media actors to contribute to public debate effectively and without fear. The legislative framework, including criminal law provisions dealing with the protection of the physical and moral integrity of the person, should be implemented in an effective manner, including through administrative mechanisms and by recognising the particular roles of journalists and other media actors in a democratic society[25].
- *Protection:* Legislation criminalising violence against journalists should be backed up by law enforcement machinery and redress mechanisms for victims (and their families) that are effective in practice. Clear and adequate provision should be made for effective injunctive and precautionary forms of interim protection for those who face threats of violence. State authorities have a duty to prevent or suppress offences against individuals when they know, or should have known, of the existence of a real and immediate risk to the life or physical integrity of these individuals from the criminal acts of a third party and to take measures within the scope of their powers which, judged reasonably, might be expected to avoid that risk. State officials and public figures should not undermine or attack the integrity of journalists and other media actors, nor should they require, coerce or pressurise, by way of violence, threats, financial penalties or inducements or other measures, journalists and other media actors to derogate from accepted journalistic standards and professional ethics by engaging in the dissemination of propaganda or disinformation. State officials and public figures should publicly and unequivocally condemn all instances of threats and violence against journalists and other media actors, irrespective of the source of those threats and acts of violence [26].
- *Prosecution:* Investigations must be effective in the sense that they are capable of leading to the establishment of the facts as well as the identification and eventually, if appropriate, punishment of those responsible. The authorities must take every reasonable step to collect all the evidence concerning the incident. The conclusions of the investigation must be based on thorough, objective and impartial analysis of all the relevant elements, including the establishment of whether there is a connection between the threats and violence against journalists and other media actors and the exercise of journalistic activities or contributing in similar ways to public debate. For an investigation to be effective, the persons responsible for, and who are carrying out, the investigation must be independent and impartial, in law and in practice. Any person or institution implicated in any way with a case must be excluded from any role in investigating it. Moreover, investigations should be carried out by specialised, designated units of relevant State authorities in which officials have been given adequate training in international human rights norms and safeguards[27].
- *Promotion of information, education and awareness raising on the issue of violence against journalists is extremely important, as it is aimed at underlining the necessity to respect the freedom of expression. Also,* training programmes should be organized, as well as putting in place a platform for cooperation between public institutions and civil society.

Regarding the **impunity** problem, it should be stated firmly that impunity represents the general failure of the functions of government and the rule of law.

In recent years a large number of cases of killings and attacks on journalists remain unsolved. The low rate of successful prosecution in cases involving journalists is in contrast with the much higher conviction rate recorded in cases of violent crime where the victim is a nonjournalist[28].

Impunity is a serious barrier to safeguarding a free press. The failure to properly investigate and prosecute crimes against journalists needs to be urgently addressed. By effectively prosecuting criminals, governments can decrease the number of future attacks[29].

In order for an investigation to be effective, it should respect the following essential requirements: adequacy, thoroughness, impartiality and independence, promptness and public scrutiny[30].

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[25] CoE, Committee of Ministers, ***Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors****, no. 2, 3.*

[26] CoE, Committee of Ministers, ***Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors****, no. 8, 9, 15.*

[27] CoE, Committee of Ministers, ***Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors****, no. 18-20.*

[28] O.S.C.E., Safety of journalists guidebook, 2nd edition, 2014, 72-75, accessed March 20, 2017, http://www.osce.org/fom/118052?download=true.

[29] O.S.C.E. - *The OSCE representative on freedom of the media, safety of journalists. Why it matter*s, accessed March 20, 2017, accessed March 20, 2017, http://www.osce.org/fom/101983?download=true.

[30] CoE, Committee of Ministers, *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations.*

When it occurs, impunity is caused or facilitated notably by the lack of diligent reaction of institutions or state agents to serious human rights violations (e.g. in relation with art. 2, 3, 4, 5 paragraph 1, 8 of the Convention). In these circumstances, faults might be observed within state institutions, as well as at each stage of the judicial or administrative proceedings[31].

Combating impunity requires that there be *an effective investigation* in cases of serious human rights violations, whether committed by state agents or private persons. This duty has an absolute character[32].

Where an arguable claim is made, or the authorities have reasonable grounds to suspect that a serious human rights violation has occurred, the authorities must commence an investigation on their own initiative. Although there is no right guaranteeing the prosecution or conviction of a particular person, prosecuting authorities must, where the facts warrant this, take the necessary steps to bring those who have committed serious human rights violations to justice. A decision either to refuse to initiate or to terminate investigations may be taken only by an independent and competent authority in accordance with the criteria of an effective investigation. It should be duly reasoned. Such decisions must be subject to appropriate scrutiny and be generally challengeable by means of a judicial process. Also, States should ensure the independence and impartiality of the judiciary in accordance with the principle of separation of powers. Proceedings should be concluded within a reasonable time. The sentences which are handed out should be effective, proportionate and appropriate to the offence committed. Domestic court judgments should be fully and speedily executed by the competent authorities[33].

Regarding the **positive obligations of the State**, the ECtHR has constantly held that public authorities have *positive* obligations inherent in an effect respect of the rights concerned. Consequently, for a real and effective exercise of certain freedoms the State's duty isn't only *not* to interfere, but also the State has the obligation to take measures of protection. In order to be in line with ECtHR case-law, such positive measures a fair balance has to be struck between the general interest of the community and the interests of the individual and, also, the obligation must not be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities[34].

On the positive obligations of the state which rise under article 10, the Court has frequently stressed the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive (see, for example, *mutatis mutandis*, *Observer and Guardian v. the United Kingdom*, §59, and *Informationsverein Lentia and Others v. Austria*, §38). Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor[35].

The concept of positive obligation assumes greater importance in relation to any violence or threats of violence directed by private persons against other private persons, such as the press, exercising free speech. In this sense, in the *Özgür Gündem v. Turkey* case, the Court *has held that, although the essential object of many provisions of the Convention is to protect the individual against arbitrary interference by public authorities, there may in addition be positive obligations inherent in an effective respect of the rights concerned. It has found that such obligations may arise under Article 8 and Article 11. Obligations to take steps to undertake effective investigations have also been found to accrue in the context of Article 2 and Article 3, while a positive obligation to take steps to protect life may also exist under Article 2. The Court recalls the key importance of freedom of expression as one of the preconditions for a functioning democracy. Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals. In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention*[36].

3.3. Case study: prohibition of torture

- ***Substantial limb.*** The safety of journalists regarding the acts of violence against them interacts, *inter alia*, with Article 3 of the ECHR regulating the principle of pohibitoion of torture.

Article 3 of the ECHR enshrines one of the basic values of the democratic societies whose core purpose is to protect a person's dignity and physical integrity – prohibition, in absolute and unqualified terms, of torture or inhuman or degrading treatment or punishment[37].

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[31] CoE, Committee of Ministers, *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations*, adopted on 30 March 2011 at the 1110th meeting of the Ministers' Deputies, accessed March 20, 2017, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805cd111

[32] CoE, Committee of Ministers, *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations*.

[33] CoE, Committee of Ministers, *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations.*

[34] See, for example, *Rees v. the United Kingdom*, 17 October 1986, §37, and *Osman v. the United Kingdom*, 8 October 1998, §116.

[35] ECtHR, *Research Report. Positive obligations on member States under Article 10 to protect journalists and prevent impunity*, 2011, 4-5, accessed March 20, 2017, http://www.echr.coe.int/Documents/Research_report_article_10_ENG.pdf .

[36] ECtHR, *Özgür Gündem v. Turkey*, no. 23144/93, §42-43.

[37] Article 3 – Prohibition of torture.

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

The unconditional terms of article 3 also mean that there can never, under the Convention or under international law, be a justification for acts which breach the article. In other words, there can be no factors which are treated by a domestic legal system as justification for resort to prohibited behaviour – not the behaviour of the victim, the pressure on the perpetrator to further an investigation or prevent a crime, any external circumstances or any other factor[38].

According to the well-established case-law of the Court, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. In order for a punishment or treatment associated with it to be *"inhuman"* or *"degrading"*, the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment[39].

- From the ***procedural point of view***, where an individual raises an arguable claim that he has been seriously ill-treated in breach of article 3 of the Convention, the member state has an obligation to initiate a thorough, prompt, independent and effective investigation, which should be capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and punishment of those responsible. This means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions. They must take all reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence etc. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or to identity the persons responsible will risk falling foul of this standard. For an effective investigation into alleged ill-treatment by state agents, such investigation should be independent. Thus, the investigation lacked independence where members of the same division or detachment as those implicated in the alleged ill-treatment were undertaking the investigation. The independence of the investigation implies not only the absence of a hierarchical or institutional connection, but also independence in practical terms[40].
- In *Najafli v. Azerbaijan*[41], a journalist had been beaten by the police while covering an unauthorised demonstration in Baku. The Court noted that the role of the press in imparting information and ideas on matters of public interest undoubtedly included reporting on opposition gatherings and demonstrations which was essential for the development of any democratic society. It found in particular that the physical ill-treatment by State agents of journalists carrying out their professional duties had seriously hampered the exercise of their right to receive and impart information. Irrespective of whether there had been any actual intention to interfere with Mr Najafli's journalistic activity, he had been subjected to unnecessary and excessive use of force, despite having made clear efforts to identify himself as a journalist at work. In conclusion, the Court found violations of Article 3 (prohibition of inhuman or degrading treatment) concerning Mr Najafli's ill-treatment, on the procedural limb of Article 3, concerning the investigation into his claim of ill-treatment and also of Article 10 regarding freedom of expression[42].

3.4. Statistics

Pursuant to the International Press Institute, in the period since 2000, more than 900 journalists have been killed as a result of their professional activities. The number of violent attacks against journalists is rising. The increase of targeted killings against representatives of the critical media is particularly alarming. At the same time, the number of resolved cases is appallingly low – around 94% of reported cases are never resolved and perpetrators enjoy impunity[43].

Around 19 journalists were killed in Central & Eastern Europe in 2007-2012. As a comparison, only 3 journalists were killed in the same period in Western Europe & North America[44].

According to UNESCO data, fewer than one in ten killings of journalists have led to a conviction in the past period. The UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression has attributed the root cause of

[38] A. Reidy, The prohibition of torture. A guide to the implementation of Article 3 of the European Convention on Human Rights. Human rights handbooks, No. 6, Directorate General of Human Rights, Council of Europe, 2002, 19, accessed March 20, 2017, http://echr.coe.int/NR/rdonlyres/0B190136-F756-4679-93EC-42EEBEAD50C3/0/DG2ENHRHAND062003.pdf.

[39] See, mutatis mutandis, ECtHR, 20 November 2012, Ghiurău v. Romania, §52-53.

[40] See, mutatis mutandis, ECtHR, 26 January 2006, Mikhenyev v. Russia, §107-108, 110.

[41] ECtHR, 2 October 2012, Najafli v. Azerbaijan, no. 2594/07.

[42] See, CoE, Media coverage of protests and demonstratios. Thematic factsheet, February 2016, accessed March 20, 2017, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805a39cb.

[43] Austria, *Safety of Journalists*, accessed March 20, 2017, http://www.austria.org/safety-of-journalists/.

[44] U.N.E.S.C.O., World Trends in Freedom of Expression and Media Development, 2014, 85.

impunity to the lack of political will to pursue investigations[45].

While the commitment to protect freedom of the media is a noble goal, its implementation has not been successful so far. In the OSCE region, around 30 journalists are estimated to have been killed in the past five years alone. And that number is surpassed exponentially by those who were beaten or whose lives were threatened[46].

3.5. Cases of violence against journalists

- **Romania.** *Reporters Without Borders* invoked the freelance cameraman Christian Gesellmann's violent arrest by police officers while covering an anti-government demonstration in Bucharest on Wednesday 1 February 2017. The police hit Gesellmann and held him for several hours for refusing to delete or surrender the video he had shot of clashes between police officers and hooligans during the protest. Gesellmann was not clearly identified as a journalist and did not have a Romanian press card. But it would not have taken the police long to confirm that he was indeed a journalist, instead of detaining him and confiscating his video recording[47].
- **Croatia.** On 3 November 2010 a court convicted and sentenced six men for the murder of Ivo Pukanić, the director of the weekly Nacional and its marketing director Niko Franji. Both men were killed by a car bomb in 2008; it is hoped that those responsible for ordering the killings will also be brought to justice[48].
- **France.** In France, in January 2011, Michael Szames (reporter for *France 24*) was allegedly the victim of a violent attack. The reporter filed a complaint with the police accusing eight security staff of the National Front Party of having beaten and insulted him as he was covering a party congress[49].
- **Serbia.** The Independent Journalists' Association of Serbia (IJAS) said its records showed that as many as 128 assaults on journalists occurred since 2014: 27 of the assaults were physical. The stable trend of frequent physical and verbal attacks on media and journalists continued in the year behind us, as corroborated by IJAS data, according to which 69 journalists were assaulted in 2016: nine physically[50].

Several death threats have been sent to journalists at the investigative journalism portal insajder.net which is owned by broadcaster B92.The threats have been sent via email to several reporters over a week's time, between 14 and 22 March 2016. They have also been received by Insajder's editor-in-chief Brankica Stankovic and B92's editor-in-chief Veran Matic. Both have been under police protection for years due to serious threats. Due to a pending police investigation no details of the threats have been revealed, according to Veran Matic[51]. According to a reply from the Republic of Serbia provided by the Ministry of Interior (21 Nov 2016)[52], the Department of Criminal Police, Office for combating organized crime, filled criminal charges against persons in respect of whom there is reasonable suspicion of committing a criminal offence *endangering security* (art. 138 Criminal Code). The criminal offence was done by sending (from private e-mail address, via contact form on portal Insajder) several threatening messages to Ms Brankica Stankovic and to all employees of the portal Insajder, as well as threats to Mr Veran Matic.

In another case, the 27-year-old investigative journalist Ivan Ninić was attacked on 27 August 2015 in front of his home as he was locking his car in the parking lot. Two young men beat him with metal rods. The journalist suffered a hematoma under his eye, severe bruising to the thigh bone and an injury to the right shoulder. The incident, which has been condemned by all journalists' organisations in Serbia including the three IFJ/EFJ affiliates, the Association of Journalists of Serbia (UNS), the journalists' union of Serbia (SINOS) and the Independent Association of Journalists of Serbia (NUNS), has been reported to the police[53]. According to a reply from the Republic of Serbia provided by the Ministry of Interior (21 Nov

[45] U.N.E.S.C.O., World Trends in Freedom of Expression and Media Development, 2014, 87.

[46] O.S.C.E., Protection of journalists from violence. Issue Paper, Strasbourg, 4 October 2011 CommDH/IssuePaper(2011)3, 10, accessed March 20, 2017, http://www.osce.org/fom/83569?download=true.

[47] Reporters without Borders, Romania: Bucharest police hit, arrest German cameraman at protest, accessed March 20, 2017, https://rsf.org/en/news/romania-bucharest-police-hit-arrest-german-cameraman-protest.

[48] O.S.C.E., Safety of journalists guidebook, 2nd edition, 2014, 72-75.

[49] O.S.C.E., Protection of journalists from violence. Issue Paper, Strasbourg, 4 October 2011 CommDH/IssuePaper(2011)3, 11.

[50] Belgrade Center for Human Rights, Human Rights in Serbia 2016, Series Reports 28 (Belgrade: The Belgrade Center for Human Rights, 2017), 216.

[51] See CoE, Media freedom alerts, accessed March 20, 2017, https://www.coe.int/en/web/media-freedom/all-alerts/-/soj/alert/15675610. See, also Notable Cases of Journalists and Media Safety Violations, April 11, 2016, accessed March 20, 2017, http://www.slavkocuruvijafondacija.rs/en/notable-cases-of-journalists-and-media-safety-violations/.

[52] See Reply from the Republic of Serbia provided by the Ministry of Interior, https://rm.coe.int/CoERMPublicCommon SearchServices/DisplayDCTMContent?documentId=09000016806bf092, accessed March 20, 2017.

[53] See CoE, *Media freedom alerts*, accessed March 20, 2017, http://www.coe.int/en/web/media-freedom/all-alerts?p_p_id=sojdashboard_WAR_coesojportlet&p_p_lifecycle=2&p_p_state=normal&p_p_mode=view&p_p_cacheability=cacheLevelPage&p_p_col_id=column-4&p_p_col_count=1&_sojdashboard_WAR_coesojportlet_alertPK=12991225&_sojdashboard_WAR_coesojportlet cmd=get_pdf_one &_sojdashboard_WAR_coesojportlet_selectedCategories=11709576&_sojdashboard_WAR_coesojportlet_fulltext=1&_sojdashboard_WAR_coesojportlet_mvcPath=%2Fhtml%2Fdashboard%2Fsearch_results.jsp&_sojdashboard_WAR_coesojportlet_yearOfIncident=0, accessed March 20, 2017.

2015)[54], in assurance with the instructions of the Deputy to the First Public Prosecutor of Belgrade, the Belgrade Police Department is talking all necessary measures to identify and establish whereabouts of persons who attacked journalist Ivan Ninić.

- **Spain.** In January 2011, there was a case in Spain where Fernando Santiago, President of the Press Association of Cadiz, was brutally attacked in response to a newspaper article about the use of public funds to rescue Delphi, a struggling automobile parts company[55].

4. Conclusions

"It is a matter of trust". Trust is something you need to build, both with individuals and institutions - when the trust is broken, serious problems occur – resignations are given, media are covering the story, and the people responsible for the situation stay marked for a lifetime[56].

Impunity – meaning the the failure to bring perpetrators of human rights violations to justice – must be adressed as gives a sentiment of uncertainty and of failure to prserve the rule of law and freedom of expression.

To this sense, in evaluating the legal framework of a country, the main conclusion is that only a comprehensive approach can lead to an improvement of the cases of violence against journalists. By that we mean is of paramount importance to maintain an open dialogue between the institutions and the representatives of the journalist and civil society organisations.

Securing an effective implementation of the existing legal provisions by the states` institutions and the existence of an open and effective dialogue with the media organisations, civil society representatives, States and international organisations constitutes, in our opinion, the pillars that will result in the effective protection of journalists, thus ensuring the freedon of expression, as it was said[57] that the Court has repeatdly emphasized the vital role that freedom of expression, and the free press in particular, have to play in a democratic society.

The safety of journalists and the combating of impunity for crimes against their use of freedom of expression, can only be effectively addressed through a holistic approach: preventive, protective and pre-emptive measures, through to combating impunity and promoting a social culture which cherishes freedom of expression and press freedom[58].

All in all, the relevant institutions and stakeholders must be aware that the rationale is that the safety of journalists is an important prerequisite for achieving freedom of expression, democracy, social development and peace[59].

Although, the international and regional documents recommend that the crimes involving attacks against journalists must be designated as 'aggravated offences'[60], which may attract more severe penalties, and that no statute of limitations should apply to such crimes, we think that before amending the criminal framework, a country must try to tackle the problem of violences againt journalists using the existing legal framework, which usually is enough, if properly enforced, to ensure the punishment of those quilty of violences against journalists.

To this end, some possible solutions can be imagined, other than amending the legislation, but rather aiming at a proper implementation of current legal framework:

- There is a stringent need to effectively investigate murders and other serious violent crimes against journalists; investigations should be carried out promptly and efficiently and that the prosecutors and investigators must be independent, as well as trained and qualified for the job. No political interference should hinder them from doing their work[61].
- There is a need to facilitate capacity-building in state institutions, thus encouraging all the relevant stakeholders to fully respect and implement the existing legal provisions, as the only way of effectively ensuring the reality of a satisfactory level of protection ensured in cases of violence against journalists. To this sense, it was said that State authorities must advocate that the authorities make it their priority to carry out swift and effective investigations, sending a message to society that perpetrators and masterminds of violence against journalists will be efficiently brought to justice[62].
- For the judicial authorities (public prosecutor's office and the court system) is necessary to communicate to the general public, thus increasing the transparency (e.g. by posting on their websites) the evolution and the

[54] See CoE, *Media freedom alerts*, accessed March 20, 2017, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent? documentId=090000168048addb accessed March 20, 2017.

[55] O.S.C.E., *Protection of journalists from violence. Issue Paper*, Strasbourg, 4 October 2011 CommDH/IssuePaper(2011)3, 11.

[56] M. Ivanović, *Investigative Journalism and Corruption - A guide for more efficient reporting -, in Training Manual: Reporting on court processes pertaining to corruption and on investigative journalism*, Belgrade, 2015, accessed March 20, 2017, https://www.coe.int/t /dghl/ cooperation/ economiccrime /corruption/Publications/PACS-Serbia/Manual%20journalists%20eng.pdf.

[57] C. Ovey, R. White, Jacobs & White The European Convention on Human Rights, 4th edition (Oxford: Oxford University Press, 2006), 334.

[58] *U.N. Implementation Strategy 2013-2014 on U.N. Plan of Action on the safety of journalists and the issue of impunity*, 2.

[59] *U.N. Implementation Strategy 2013-2014 on U.N. Plan of Action on the safety of journalists and the issue of impunity*, 2.

[60] See, for example, O.S.C.E., *Safety of journalists guidebook*, 2nd edition, 2014, 71-72.

[61] O.S.C.E., *Protection of journalists from violence. Issue Paper*, Strasbourg, 4 October 2011 CommDH/IssuePaper(2011)3, 4.

[62] O.S.C.E., *Vilnius Recommendations on Safety of Journalists*, 2011, accessed March 20, 2017, http://www.osce.org/cio /78522?download=true.

effectiveness of the investigation on murders and other serious violent crimes against journalists, which shall include the following, in the form of press statements: the fact that investigations respected the needs to be carried out promptly and efficiently; the final decision as given in a particular case by the court; the posting on the website (and periodic update) of the Statistics of cases of violence against journalists (no. of cases, no. of cases still under investigation, no. of solved cases, the criminal provision incident in the case (the type of crime committed against a journalist), if the case is linked or not with the responsible of a journalist.

- As State authorities, namely the law enforcement agencies and media need to jointly establish good practices that can increase the safety of members of the media[63], the publishing of Good practices is a way of levelling the implementation of the legal provisions on violence against journalists and ensuring the necessary transparency that a real content is provided by the national relevant authorities as a way of addressing the violence against journalist issue.
- For the judicial authorities (public prosecutor's office and the court system) is necessary to organise trainings in order to emphasise and make them aware of the importance of bringing everyone responsible for violence against journalists to justice.
- State authorities must ensure that law enforcement agencies be given sufficient resources and expertise to carry out effective investigations in the particular field of the media and to develop practices that respect the legal rights of members of the media.[64]
- Only if evaluating the above solutions the conclusion is that a state does not have a proper and effective system of protecting the journalists of cases of violence, the two solutions amending the criminal legislation can be implemented:
- crimes involving attacks against journalists must be designated as 'aggravated offences', which may attract more severe penalties,
- no statute of limitations should apply to such crimes.

Of course, in this situation, also, there will be a pressing need to ensure effective mechanisms that can ensure the existence of investigations capable of leading to the establishment of the facts as well as the identification and eventually, if appropriate, punishment of those responsible.

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[63] See, *mutatis mutandis*, *OSCE, Vilnius Recommendations on Safety of Journalists*, 2011.
[64] O.S.C.E., *Vilnius Recommendations on Safety of Journalists*, 2011.

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THE USE WITHOUT RIGHT OF THE PRIVILEGED INFORMATION (INSIDE TRADING) – OFFENSE REGARDING THE CAPITAL MARKET

Mirela GORUNESCU[*]

Abstract

This study addresses the particularly complex problem caused by one of the offense that can be committed in the capital market. Naturally, the article also includes an introductory analysis of the field and the regulation of the capital market, aspects that complement the premise of all offenses defined by the Law no. 297/2004, but examines in particular one of the incrimination texts regulated by the same normative act. It is about article 279 paragraph b) and article 245 of the Law no. 297/2004 which, without having a marginal designation, was intended to define the offense of unlawful use of the privileged information.

Keywords: *capital market, privileged information, offenses regarding the capital market, capital market manipulation*

1. Introduction

The capital market field is a highly controversial one because of its novelty in our country, its special technicity it presents, and the seriousness of the offenses already committed within it. For this reason, as well as due to the need to prevent the criminality's import, which is very easy by reference to the specifics of the field, *multiple legislative changes* occurred, with a high celerity which have often determined difficulties in understanding and applying the legal norms, especially the norms of incrimination.

The legislative framework consisted, in turn, in the Law no. 52/1994 regarding securities and stock exchanges, the first with this specific in contemporary Romania, in the Government Emergency Ordinance no. 28/2002 regarding securities, financial investment services and regulated markets, approved with amendments and completions by the Law no. 525/2002, and, currently, in the Law no. 297/2004. This normative act is an ample, complex one, including virtual regulations that came into force at a later moment than the one decided for the entry into force of the Law no.297/2004[1].

As with the previous normative acts, the Law no. 297/2004 as well includes legal norms of incrimination, therefore rules defining crimes[2]. Thus, the article 279 of the Law stipulates : "It is a crime and is punished by imprisonment from 6 months to 5 years and the interdiction of certain rights: a) the deliberate presentation by the administrator, director or executive manager of the company to the shareholders of inaccurate financial statements or unrealistic information about the economic status of the company; b) committing the crimes referred to in articles 245-248; c) intentional access by unauthorized persons of the electronic trading systems, depository or clearing and settlement systems. "

In addition, the article 279[1] of the same normative act states: "Theft of the financial instruments of the customers and / or of the money funds related to them constitutes an offence and is punished in accordance with the provisions of the Criminal Code."

In order to ensure the main rules for the fulfilment of the criminal norms, the Law no. 297/2004 regulates the establishment and the functioning of the financial instruments markets, with their specific institutions and operations, as well as the collective investment bodies, in order to mobilize the financial resources through the investment in financial instruments. This law applies to the above-mentioned activities and operations performed on the Romanian territory. The National Securities Commission is the competent authority that applies the provisions of the special law by exercising the prerogatives established in its statutes. However, the provisions of the Law no. 297/2004 do not apply to money market instruments, regulated by the National Bank of Romania and to government securities issued by the Ministry of Public Finances, if the issuer chooses for trading them a market other than the regulated market defined in article 125.

A *regulated market* is a trading system for financial instruments that:

a) operates regularly;
b) is characterized by the fact that the regulations issued and subject the approval of the Romanian National Securities Commission (C.N.V.M.) define the operating conditions, the market access, the conditions for admission to trade a financial instrument;
c) complies with the reporting and transparency requirements for the protection of the investors being laid down by law as well as with the regulations issued by C.N.V.M. in accordance with EC law.

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[1] Based on article 290 from the Law no. 297/2004, it entered into force 30 days after its publication in the Official Journal of Romania.

[2] For a thorough analysis of all the crimes (offenses) defined by this normative act, see the chapter drafted by the same author in the collective work: Criminal Law of Business (co-authored by *Al. Boroi*), CH Beck Publishing House, Bucharest, 2016.

The provisions of the Law no. 297/2004 do not apply to the management of public debt in which are involved the National Bank of Romania, the central banks of the Member States and other national entities in Member States with similar functions, the Ministry of Public Finances, as well as other public entities.

All offenses defined by the Law no. 297/2004 suppose that those *behaviours described by the incrimination rules must be adopted within or about some operations performed on the capital market. The body with specialized attributions in this field is the Romanian National Securities Commission.*

Originally, the market was the public place in the city where supplies or other items were put up for sale, but through generalisation, currently the market represents a body of persons who are in close business relationships and who perform large-scale transactions in relation to any commodity[3].

The market economy means even interdependence between *four markets*: the goods and services market, the labour market, the information market and *the financial market*.

The one who presents interest for the current analysis is the latter, as the market where the financial assets are traded.

The financial assets are the valuable documents that consecrate current or future financial entitlements of their holder, resulting from their capitalization (interest, dividends, etc.). They differ from real assets which are tangible or non- tangible goods which generate income in the future in the form of monthly rent, rents, profits, but are the money correspondent of the real assets, thus revealing the dual nature of the market economy, consisting of a real economy (the material processes of producing the goods and the services necessary for the individual consumption and the resume of the production) and the symbolic or financial economy (informational type processes, represented by the movement of the money and securities)[4]. The financial asset may be: the exchange value, when the good (viewed as commodity) helps to obtain another good; the investment value (capital) when the good is used to produce revenue in the future.

The financial assets may be: banking assets; non-banking financial assets; capital assets; monetary assets. To this, the hybrid assets (deposit certificates, etc.) are added.

The financial market is composed of three components, depending precisely on the type of financial assets that are traded within it[5]:

1. the banking market - is characterized by transactions with banking assets resulting from banking operations carrying a high level of safety interest.
2. the money market - through it, monetary transactions are made between the residents of a country, using the national currency.
3. the capital market - specialized in the intermediation of transactions with financial assets that have maturities on average terms (1 to 5 years) and long terms (over 5 years). Through this market, the applicants 'capital needs are met by the bidders' capital availability.

The capital market exerts the following functions:

1. issuance and sale for the first time of the financial titles of the issuers or the debtors toward the owners of financial capital who wish to buy financial assets;
2. negotiation of securities, provided that they are sold and converted into liquidities by their first holders and prior to maturity.

The components of the capital market[6] are: the primary market (where the first placement of the securities issue takes place) and the secondary market (where the securities absorbed by the primary market are bought by banks, investors and private individuals).

Article 1 paragraph (1) of the Law no. 297/2004, on the capital market, regulates the establishment and the functioning of the financial instruments markets, with their specific institutions and operations, as well as the collective investment bodies in order to mobilize the financial resources through investment in financial instruments.

2. The offense foreseen in article 279 letter b) and article 245 of the Law no. 297/2004 - the use without right of the privileged information (inside trading)

In accordance with the legal texts previously quoted: “The violation of the provisions of article 245 paragraph (1) constitutes a crime and is punished by imprisonment from 6 months to 5 years and the interdiction of some rights: It is forbidden for any person possessing privileged information to use that information for the acquisition or disposal or for the intention to acquire or dispose of, for himself or for the account of a third party, directly or indirectly, of the financial instruments to which such information relate to”.

Along with other texts of incrimination, the Law no. 297/2004 also includes the one quoted above. The offense so described is thus committed by an act of use for own account of privileged information by the person who knows the information, that results in the acquisition or disposal of financial instruments to which that information relates.

The legal specific object of the offense is to protect the capital market against unfair activities. It is

[3] V. Stoica, E. Ionescu , Capital Markets and Stock Exchanges, 2nd edition, Economica Publishing House, Bucharest, 2002, page14.
[4] I. Popa, The stock-exchange, 2nd edition, volume I, Adevărul Publishing House, Bucharest, 1995, page 28.
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important to ensure that this value is respected as market mechanisms will not function properly and the chances of those involved in trading activities are not equal.

We consider that the crime has no *material object*, since the use to which the incriminating rule refers to consists concretely in trading or the intention to trade securities on the capital market and this activity does not affect the information, but the market share of the securities.

The active subject of the offence is a qualified one. Anyone with privileged information may be in this position:

a) in his capacity as a member of the board of directors or of the managerial or supervisory structures of the issuer;
b) as a result of its holdings in the issuer's share capital;
c) by exercising his / her function, profession or duties;
d) illegally or fraudulently, as a result of criminal activities.

Moreover, the article 247 of the Law no. 297/2004 broadens the scope of the active subjects of the crime we are studying and of the one that follows. This text specifies that the provisions of the article 245 and the article 246 shall apply to any other person who holds privileged information, provided that those persons know or should have been aware that that information is privileged.

Another category of persons who may become active subjects of crimes is the one consisting of persons responsible for executing orders related to trading financial instruments when the information relates to the orders given by clients and not yet executed.

The passive subject is the State, as the holder of the obligation to ensure, through C.N.V.M., the legally functioning of the activity in the capital market field. There may be a natural or legal person injured by the market abuse, as a secondary subordinate subject.

The material element consists in a commissive behaviour to use the privileged information under conditions other than those lawfully admitted. In this way, the crime is to use in the unauthorized ways indicated by the incriminating norm of the privileged information, which due to its specificity can lead to abuse of the capital market. In concrete terms, it will be about the use of such information for the acquisition or disposal of or for the intention to acquire or dispose of, on its own account or on the account of a third person, directly or indirectly, of the financial instruments to which this information relates to.

In order to achieve the objective content of the offense, however, we appreciate the need to meet the following *essential requirements*:

a) *there is an activity of using the privileged information*. The use may take the form of securities trading activities on the capital market (e.g. - an information is known about the imminence of the state of insolvency of the patrimony of a company whose shares are held by the person who has access to this information. The shares are immediately sold at the usual trading price and financial loss caused by the disclosure of the information is avoided).

In the legal interpretation provided by the article 244 of the Law no. 297/2004, *privileged information* means the information of a precise nature which has not been made public and which relates directly or indirectly to one or more issuers or to one or more financial instruments and which, if publicly disclosed, could have a significant impact on the price of those financial instruments, or on the price of related derivative instruments.

When referring to commodity derivatives, "the privileged information" shall mean the information of a precise nature which has not been made public and which relates directly or indirectly to financial derivatives and which the participants in the markets on which those financial derivatives instruments are traded are expected to receive it, in accordance with the accepted market practices.

For the persons in charge with the execution of orders for the trading of financial instruments, "the privileged information" means as well the accurate information sent by a client about his orders that have not yet been executed, relating directly or indirectly to one or more issuers or to one or more financial instruments, information which, if made public, could have significant effects on the price of those financial instruments or on the price of the derivative financial instruments with which they are related.

b) *the activity must be performed by the person who knows such information*. The requirement concerns the circumstance in which, when the use is made by another person, even at the instigation of the person who knows the privileged information, the act committed will be the one provided for in article 279 letter b) and article 246 of the Law no. 297/2004.
c) the third essential requirement is that it *is mandatory for transactions not to be made*, considering that the person engaged in such transactions had a contractual obligation to acquire or dispose of financial instruments and that this contract was concluded before the respective person had the privileged information. If the requirement is not met, we will be faced with a cause of special justification.

According to article 12 of the Law no. 78/2000 on the prevention and sanctioning of the corruption, the following actions shall be punished by imprisonment from one to five years, if they are committed for the purpose of obtaining for themselves or for another money, goods or other undue advantage: a) performing financial operations, as acts of commerce incompatible with the function, the duty or the assignment of a person

or the conclusion of financial transactions, using the information obtained by virtue of his or her function, duty or assignment; b) the use in any way, directly or indirectly, of information that is not intended to be advertised or to allow unauthorized persons to have access to such information.

On the other hand, by article 245 of the Law no. 279/2004 any person possessing privileged information is forbidden to use that information for the acquisition or the disposal or in order to acquire or dispose, on his own account or on behalf of a third party, directly or indirectly, of financial instruments to which that information relates.

By comparing the two legal texts, it can be easily observed that the difference between them is due to the existence of an additional condition in article 12 of the Law no. 78/2000[7]. Apparently, the two criminal norms [article 279 of the Law no. 297/2004 and article 12 letter b) of the Law no. 78/2000] are identical, refer to the same situations and are therefore concurrent. This simple analysis, however, does not resist when performing a legal, literary, rational and systematic interpretation, with the observance of the strict interpretation of criminal laws, but without extending them.

Thus, the offense under the law regulating the capital market refers to "own advantage or the advantage of third parties", a much narrower concept in its content than the wording of the Law no. 78/2000 – "for the purpose of obtaining for himself or for another money, goods or other undue benefits". In the first case, we face a hypothesis of a facility in relation to the other participants in the capital market operations, being an unfair speculation. The condition regarding the purpose within the regulation of article 12 of the Law no. 78/2000 largely exceeds the previous case, as it implies a very elaborate volitional process that seeks to obtain undue use of a certain benefit, asset or money, that is not legally due and cannot be procured otherwise than in violation of the law[8] .

Thus, the action of any *person holding privileged information insider* who purchases or sells for himself or for another, directly or indirectly, movable assets or other rights related thereto of the issuer in respect of which he holds the respective privileged information, or makes use of the information in any other way and transmits them or facilitates their publication for the benefit of themselves or of third parties, is sanctioned under the law of the capital market.

The *immediate consequence* of the offense is to jeopardize the proper conduct of the business in the capital market. The causality link results from committing the material element.

The form of guilt with which the offense is committed is the intention. We appreciate that each time the mode of intent will be the direct one.

Given the provisions of article 16 paragraph (6) Criminal Code, we appreciate that the intention is the form of guilt with which is committed the offense provided for in article 279 letter b), article 245 of the Law no. 297/2004 and in the hypothesis regulated by article 247 of the Law no. 297/2004 which considers the situation of committing the offense by another person who has acquired the privileged information. It is noted that engaging in a trading activity on the capital market before the information is made public makes the content of the offense only if those individuals know or ought to have known that that information is privileged. This last formula, "ought to have known" is characteristic from the intelligible point of view of the guilt without provision. However, if there is no mention of committing the act with guilt, it follows the common rules, being mandatory to be committed with intent. In fact, it can happen that the person learns about the privileged information before being advertised and that the person performs a trading activity, being in fault regarding the specific nature of the information he uses in this way. There is thus a contradiction between the indication of the intentional nature of the non-compliance with the obligations imposed by the law and the specific attitude of the form of fault. However, we interpret the text in the sense that the act will always be committed with direct intent, the information being used with the clear representation of its privileged character.

The motive and the purpose are elements of individualisation of the punishment.

The offense is with intent (wilful) and, for this reason, it may also know atypical modes of the acts of preparation and attempt. Neither the former nor the latter are sanctioned by the criminal law.

The primary *punishments* that may be applied for committing this crime are imprisonment from 6 months to 5 years and the interdiction of certain rights.

Where the privileged information is used by a legal person, the interdiction shall also apply to the natural person who took part in the decision to execute the transaction on the account of that legal person.

3. Conclusions

The capital market is of great importance, and because of its specificity it is difficult, if not impossible, to be protected to an effective extent by the risk of having within it antisocial behaviours being committed whose gravity would justify the intervention of the criminal law. By the completion norms it provides, but also by the incriminating rules it regulates, the Law no. 297/2004 has taken on the difficult role to prevent and combat, at least at the virtual level, the criminal deeds that could be committed in this context and which could disturb it in a serious way.

[7] D. Ciuncan, Corruption Offenses. Regulations apparently parallel, R.D.P. no. 3/2005, p.78.

[8] See P. Nariţa , Criminal investigation in causes that are in the jurisdiction of the National Anti-Corruption Prosecutor's Office regarding offenses within the market of financial instruments (capital market), Documentary Bulletin no. 3/2004 of P.N.A. / D.N.A. (http://www.pna.ro).

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CONSIDERATIONS ON THE PRINCIPLE OF LEGALITY OF CRIMINALISATION

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Abstract

Although the new Criminal Code made a series of amendments to the criminal legislation, the regulation of the principle of legality of criminalisation has not been significantly changed, but only from the point of view of the structure of governing rules.

Thus, while the previous Criminal Code regulated through a single provision both the legality of criminalisation and the legality of criminal penalties, the new Criminal Code has split the content of the principle of legality of criminalisation and criminal penalties into two principles - the legality of criminalisation and the legality of criminal penalties, by allocating them two separate articles in Chapter I of Title I of the General Part.

In this article, we aim to examine the theoretical side of the substance of the principle of legality of criminalisation and to analyse some of the most important legal issues concerning the application of this principle in the case-law.

Keywords*: Legality, legality of criminalisation, foreseeability of criminal law, retrospective effect of criminal law, continuing effect, application of the more favourable criminal law.*

1. Introduction

In a democratic regime based on the **rule of law**, the state's **right to punish** (*jus puniendi*) **is restricted**, therefore the latter must punish only those acts which constituted criminal offences at the time when they were committed and impose solely the penalties existing in the system of penalties at the time when the criminal offence was committed, except when a more lenient criminal law enters into force before the criminal relationship of conflict ceases. Although the principle of legality is a basic rule of the entire legal system, it is also a fundamental principle of criminal law and should be dealt with in a special manner, because the legality in the field of criminal law has a particular nature, has some distinctive features. The specific features of legality in the field of criminal law are given by two components: the legality of the regulation of the act which constitutes a criminal offence and the legality of penalties. The principle of legality is expressed in the well-known adages: *nullum crimen sine lege* și *nulla poena (sanctio) sine lege*.

In this article, we aim to examine the theoretical side of the substance of the principle of legality of criminalisation and to analyse some of the most important legal issues concerning the application of this principle in the case-law.

The new Criminal code has no longer compressed the principle of legality of criminalisation and the principle of legality of criminal penalties in a single article, as they were regulated by the 1969 Criminal code, but it has reserved an article to each of the two principles, namely Articles 1 and 2. According to Article 1 of the Criminal code, having the *nomen juris* **the legality of criminalisation**: "*(1) Criminal law defines the acts that constitute offences.*

(2) No person can have criminal liability for an act that was not covered by criminal law at the date of its commission"[1].

One can note that the legislator has expressed two fundamental ideas in the two paragraphs dedicated to the principle of legality of criminalisation: **the compulsory existence of the criminalisation rule** (*nulum crimen sine lege*) **and the non-retrospective effect of the criminal law criminalising *ex novo*.**

We specify that the provision found in Article 1 paragraph (2) of the Criminal code, according to which: "*No person can have criminal liability for an action that was not covered by criminal law at the date of its commission*" is, in fact, taken in another form from the provisions of Article 11 of the previous Criminal code[2].

According to Article 2 of the Criminal code, having the nomen juris **the legality of criminal penalties**: "(1) Criminal law establishes applicable penalties and educational measures that can be ruled against persons who committed offences, as well as security measures that can be ruled against persons who committed actions covered by criminal law.

(2) No penalty, educational or security measure can be ruled that was not stipulated in criminal law at the date when the violation was committed.

(3) No penalty can be ruled and enforced outside the law's general limits".

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[1] As regards the fact that Article 1 paragraph (2) of the Criminal code mentions the penalty and not the criminalisation, the doctrine has specified:"the consistency specific to a thorough legislative technique would have required a more coherent expression of the idea, by making recourse to a slightly different wording, avoiding the explicit reference to the penalty and sending a direct message concerning the concept of criminalisation" (See M.-I. Michinici and M. Duinea, in T. Toader, M.-I. Michinici, R. Răducanu, A. Crișu-Ciocîntă, S. Răduleț, M. Duinea, The New Criminal Code. Commentaries on articles, Hamangiu Publishing House, Bucharest, 2014, p.5).

[2] According to Article 11 of the previous Criminal code: "Criminal law shall not apply to any act which did not constitute a criminal offence at the time when it was committed".

Giving efficiency to the requirement of clarity and foreseeability of criminal law (*in claris non fit interpretatio*), the new Criminal code lays down *expressis verbis*, in the legal provision dedicated to the principle of legality of criminal penalties, **all three categories of criminal penalties: penalties, educational measures and security measures.**

Also, the new Criminal code provides that the educational measures may be taken only against **persons who have committed criminal offences**, while in respect of security measures it provides that these may also be taken against the **persons who have committed mere acts provided for by criminal law**, which do not fulfil the elements of criminal offences.

Then, in Article 2 paragraph (2) of the Criminal code, the legislator emphasizes the idea of non-retrospective effect of criminal law, by laying down the prohibition according to which no penalty, educational or security measure can be ruled that was not stipulated in criminal law at the date when the violation was committed.

Finally, Article 2 paragraph (3) of the Criminal code lays down a provision unmatched in the 1969 Criminal code, according to which **no penalty may be imposed and enforced outside the general limits thereof.**

2. Analysis of the principle of legality of criminalisation

The legality of criminalisation is a fundamental principle of criminal law, intended for the legislator and the judicial bodies, according to which only the acts defined by criminal law at the time when they were committed constitute criminal offences and may be punished by criminal law[3].

It is normal to be so because the recipient of the law must relate his behaviour to the legal rules in force at the time when the conduct is carried out. The legality of the criminal offence means the clear and precise description of the acts which constitute criminal offences (*nulum crimen sine lege certa*). The determination of acts which constitute criminal offences must be carried out by using an everyday and accessible language, in order to avoid the risk of avoiding the law by analogy and the misunderstanding of the criminalisation rules. If technical or special terms are used, the legislator must contextually interpret them[4].

The legality of criminalisation was criticized on the ground that the criminal law founded on this rule cannot keep pace with social evolution, because the social relationships constantly change. If the new illegal acts committed in society cannot be foreseen, then acts dangerous to the social values would remain unpunished and only acts whose elements do not require anymore the application of the criminal constraint would be punished[5]. On the other hand, the principle of legality does not protect the recipient of the criminal law in the case where tyrannical laws are adopted, because observing such a law amounts to the acceptance of the abuse.

This point of view may not be accepted, for the arguments summarised below.

First of all, individuals guide their behaviours by the legal rules in force at the time when they engage in conduct. A subject of law may not be required to anticipate the future criminalisations.

Secondly, the legality of criminalisation guarantees that no discrimination or inequality in the legal treatment arise from the application of criminal law in similar cases. There are many cases of unequal application of criminal law by the use of the institution laid down in Article 18^1 of the previous Criminal code (the act does not pose a danger to society). Using the models provided by comparative laws, in particular the French criminal law, the new Criminal code provides, for example, that in the case of acts punishable by imprisonment of not more than one year, the court may waive the punishment of the defendant who has no criminal records and proved that he can be rehabilitated even without punishing him.

On the other hand, if the principle of legality is not regulated, the powers of the judiciary would partially overlap with those of the legislative, which may not be accepted in a state governed by the rule of law, even if it is accepted that separation of powers does not mean their isolation.

In order to be the basis for the imposition of the criminal penalty, the act must constitute an offence under criminal law not only at the time when it is committed, but also at any time after that date, until the final judgment which solves the criminal relationship of conflict is rendered.

The first coherent theoretical approach of legality of criminalisation is found in the work of Cesare Beccaria, *Dei delitti e delle pene*[6]. Beccaria said that "*the laws only can determine the punishment of crimes, and this authority can only reside with the legislator, who represents the whole society* (...)"[7]. More than a

[3] See M.A. Hotca, P. Buneci, M. Gorunescu, N. Neagu, R. Slăvoiu, R. Geamănu, D.G. Pop, Criminal law institutions, Universul Juridic Publishing House, Bucharest, 2014, p.11.

[4] The Strasbourg Court has stated in its case-law: "Article 7 paragraph 1 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law" (*Kokkinakis vs Greece*, 1993).

[5] *G. del Vecchio*, Essais sur les principes généraux du droit, Paris, 1938, p. 78; *T. Vasiliu, G. Antoniu, Ş. Daneş, Gh. Dărîngă, D. Lucinescu, V. Papadopol, D. Pavel, D. Popescu, V. Rămureanu*, The Commented and Annotated Criminal Code, Scientific Publishing House, Bucharest, 1972, p.18.

[6] *C.Beccaria*, On crimes and punishments, Rosetti Publishing House, Bucharest, 2002.

[7] Ibidem, p. 39.

century after Cesare Beccaria had stated and argued the principle of the legality of criminalisation, the latter has been enshrined for the first time in a regulatory act, the Declaration of the Rights of Man and of the Citizen, adopted following the 1789 French Revolution. Article VIII of this regulatory act provided that: "*no one can be punished but under a law established and promulgated before the offence and legally applied.*"

The principle of legality of criminalisation is very important for criminal law, because criminal law is the law area which imposes the most severe legal liability in the society. History, even the recent one, tells us what might happen if this principle is not regulated. The transposition of the principle of legality of criminalisation in the social life also implies that the legislator criminalises only those antisocial acts which might substantially harm the social defence relationships. Thus, the legislator must decriminalise certain acts which are irrelevant from the viewpoint of criminal law, namely to remove from the scope of criminal offences those acts which do not pose the social danger required for criminal repression.

In another train of thoughts, the legislator must monitor the dynamique of social relationships in order to intervene promptly and to criminalise new dangerous acts, whenever this is necessary.

The principle of legality of criminalisation is regulated by many international, universal or regional treaties. For example, by Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Art.15 of the International Covenant on Civil and Political Rights enshrines the principle of legality in the following terms: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed".

In Romanian law, all previous criminal codes, including the 1923 Constitution, have enshrined the legality of criminalisation.

We specify that the application of temporary criminal law, after it ceases to be in force, to the acts committed during the period in which it was in effect is not a derogation as such from the principle of effectiveness of criminal law (the academic literature uses the wording **improper continuing effect**), but it is rather a particular application thereof (*tempus regit actum*). Possible derogations from the rule of effectiveness of criminal law are the retrospective effect and the continuing effect of criminal law.

De lege lata, **the continuing effect of criminal law** as such has no practical relevance, because it would mean that a previous law, which ceased to be in force before a criminal offence was committed, still applies to an act committed after the previous law has ceased to be in effect, although it was not in force on the date when the act in question have been committed.

The retrospective effect of the more favourable criminal law is allowed on the basis of constitutional provisions. Indeed, according to Article 15 paragraph (2) of the Constitution: *"(2) The law shall only act for the future, except for the more favourable criminal or administrative law".* It follows from the provisions of Article 15 paragraph (2) that the retrospective effect of criminal law is an exception from the rule of non-retrospective effect of criminal law, but which may be restricted by the legislator.

The principle of legality of criminalisation imposes five standards, and in the absence of any of them one cannot speak of ***legality*** within the meaning of the principle we are dealing with here. Indeed, a criminal law complies with the principle of legality if it is:

a) **Written** (*lex scripta*);
b) **Certain** (*lex certa*);
c) Non-retrospective (*lex pravevia*);
d) **Strict** (lex stricta);
e) Adopted according to the Constitution[8].

1. Lex scripta

Thus, an inherent requirement for the existence of the criminal offence is the definition of the elements of the act deemed criminal offence by a written law (*lex scripta*). Romanian law - member of family of the Romano-Germanic law system - does not accept, as a rule, other formal sources (custom, settled case-law).

This requirement does not need special discussions, because criminal laws are always written laws[9]. **Only written laws have to ability to comply with the requirement of** accessibility of criminal law. **The European Court of Human Rights has held that, in order to be imposed by the coercive force of the state, the law must be sufficiently accessible, in the sense that any person must be able to have information on the legal rules applicable in a given situation**[10].

The Constitutional Court also agreed to this standard of quality of the law. According to the Constitutional Court, from a formal viewpoint, the accessibility of law concerns the information of the public on the infra-constitutional legal acts and their entry into force, which is carried out under Article 78 of the Constitution, meaning that the law is published in the Official Journal of Romania, Part I, and enters into force 3 days of the date of the publication or on a further date provided for by it.

The Constitutional Court has specified that:"*But, in order to meet the requirement of accessibility of the law, it is not enough for a law to be brought to the attention of the public, but it is necessary that the regulatory acts governing a specific field are both logically connected so as to enable the recipients thereof to determine the content of the regulated field and identical from the point of view of their legal force.*

[8] See F. Streteanu, *Criminal Law*. *General Part,* Rosetti Publishing House, Bucharest, 2003, p.49.
[9] The academic literature also mentions several exceptions. For example, the custom (see F.Streteanu, op.cit., p.110).
[10] Criminal law must be sufficiently accessible (see the case Sunday Times v. Great Britain, 1979).

It cannot therefore be allowed a scattered regulation of the field or which is a result of the correlation between regulatory acts with different legal force. In this respect, the legislative techniques rules concerning the integration of the project in the entire body of legislation state that the regulatory act must be organically integrated in the system of legislation, for which purpose the regulatory act must be correlated with the provisions of regulatory acts of higher level or of the same level to which it is connected with (Article 13 letter (a) of the Law No 24/2000). The reference provision (Article 16, second sentence of paragraph 1 of the Law No 24/2000), which always operates between regulatory acts with the same legal force shall be used for the purpose of emphasizing certain legislative connections"[11].

2. Lex certa

The law, in general, and the criminal law, in particular, must be foreseeable. The European Court of Human Rights has held that a law should be not only accessible, but also foreseeable, meaning that it is formulated with sufficient precision to enable the citizen to regulate his conduct[12]. In another case, the European Court of Human Rights has held that the law should accessible to the person concerned and foreseeable as to its effects. For a law to be foreseeable, it must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference[13].

The certain nature of criminal law is related to the **foreseeability** of this law, which must be, par excellence, a clear and precise law (*in claris non fit interpretatio*). Giving effectiveness to the principle of legality of criminalisation, the Constitutional Court has declared unconstitutional several criminalisation rules on the ground of failure to meet the **clarity** requirement[14].

By way of example, we mention Decision No. 363/2015 and Decision No. 603/2015, by which the provisions of Article 6 of the Law no. 241/2005, Article 301 of the Criminal code and Article 308 of the Criminal code have been declared unconstitutional.

In the grounds of the Decision No. 363/2015, the Constitutional Court has held the following: "*the achievement by the state of specific objectives, even when they are of general interest and necessary, may only be made in compliance with the Constitution, which, according to Article 1 paragraph (5), is mandatory. Thus, a subject of law may not be required to comply with a law that is not clear, precise, foreseeable and accessible, whereas he is not able to adapt the conduct according to the normative assumption of the law; this is precisely why the legislative authority, the Parliament or the Government, as the case may be, has the obligation to lay down rules which comply with the features shown above*"[15].

In the grounds of the Decision No. 603/2015, the Constitutional Court has held: "the words 'commercial relationships' found in the provisions of Article 301 paragraph (1) of the Criminal Code are lacking clarity and foreseeability, preventing the precise determination of the elements of the offence of conflict of interests.

This lack of clarity, precision and foreseeability of the words 'commercial relationships' found in the provisions of Article 301 paragraph (1) of the Criminal Code is contrary to the principle of legality of criminalisation provided for in Article 1 of the Criminal Code and in Article 7 of the Convention for the protection of human rights and fundamental freedoms, and, consequently, to the provisions of Article 1 paragraph 5 of the Constitution, that refer to the quality of the law"[16].

However, the precision of criminal law should not be understood in an absolute manner. The wording used by the legislator is, however, a general one, which concerns indefinite persons and the behaviours prohibited by the rules of criminalisation must be described by sufficient elements so that the recipients are able to understand the contents of the law, even if sometimes they need to make recourse to experts. In other words, the legislator admits a margin of discretion of judicial bodies in assessing the contents of the law.

In this respect, the European Court of Human Rights has held that a law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess,

[11] See Decision No 363/2015.

[12] See, for example, the judgment rendered in Sunday Times v. Great Britain, 1979. In this case, the Strasbourg court has held that: "*The citizen must have enough information on the legal rules applicable in a given case and be able to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. In short, the law must be accessible and foreseeable at the same time.*"

[13] See the Judgment of 4 May 2000, rendered in Case Rotaru versus Romania, paragraph 52. The ECHR has also stated the rule of foreseeability in the Judgment of 25 January 2007, rendered in the Case Sissanis versus Romania, paragraph 66.

[14] See: Decision No. 189 of 2 March 2006, published in the Official Journal of Romania, Part I, No. 307 of 5 April 2006, Decision No. 903 of 6 July 2010, published in the Official Journal of Romania, Part I, No. 584 of 17 August 2010, or Decision No. 26 of 18 January 2012, published in the Official Journal of Romania, Part I, No. 116 of 15 February 2012, etc.

[15] Published in the Official Journal No 495 of 6 July 2015. By this decision the Constitutional Court has held that: "the provisions of Article 6 of the Law no.241/2005 on the prevention and fighting of tax evasion are unconstitutional".

[16] Published in the Official Journal No 845 of 13 November 2015. By this decision, the Constitutional Court has held that the words: "commercial relationships" found in the provisions of Article 301 paragraph (1) of the Criminal code (...)

"or within any legal person" found in the provisions of Article 308 paragraph (1) of the Criminal code, by reference to Article 301 of the Criminal code" are unconstitutional.

to a degree that is reasonable in the circumstances, the consequences which a given action may entail[17].

The Strasbourg Court has held that **legal rules cannot be drafted with absolute precision.** One of the standard regulation techniques consists of rather making recourse to general categories and not to exhaustive lists. Thus, many laws necessarily use more or less vague wordings, whose interpretation and application depend on the case-law. However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Although the certainty in drafting the law is desirable, this could lead to an excessive rigidity or the law must be able to adapt to changing circumstances. The decision-making role conferred to the court aims precisely at removing the doubts persisting in relation to the interpretation of rules, the progressive development of the criminal law through judicial law-making as source of law being a well-entrenched and necessary part of legal tradition of the Member States. Consequently, Article 7 paragraph 1 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen[18].

3. Lex praevia

Criminal law may not be retrospective, except for the more lenient law (*mitior lex*) and may not be applied by analogy[19].

The application of law by analogy means the extension of the scope of this law to acts not prescribed by the law. The analogy was regulated by the 1936 Criminal code and it was repealed by the Decree no.102/1956. In the inter-war period, the analogy was laid down even in the codes of certain western states with a democratic tradition; for example, in the 1930 Danish Criminal code.

According to the provisions of Article 3 of the Criminal code:"*Criminal law shall be applicable to offences committed when it is in force*"[20].

According to Article 4 of the Criminal code:"*Criminal law does not apply to actions committed under the applicability of the previous law, if such actions are no longer included in the new law. In such case, the serving of sentences, the educational and security measures ruled on under the previous law, as well as all criminal consequences of court judgments concerning those actions, shall cease once the new law comes into force*"[21].

According to Article 5 paragraph (1) of the Criminal code: "*In case one or several criminal acts have been enacted between the time the violation was committed and the final judgement in a case, the more favourable stipulation shall apply*".

According to the provisions of Article 6 paragraph (1) of the Criminal code: "*Whenever, between the time of the final judgement in a criminal case and the time the sentence is fully served, a law is enacted that stipulates a lighter penalty, the original sentencing shall be reduced to the special maximum of the new sentencing if the previous one exceeded that special maximum*".

Finally, according to Article 15 paragraph (2) of the Constitution: "*The law shall only act for the future, except for the more favourable criminal or administrative law*".

More favourable interpretative laws, the decriminalising laws and the more favourable laws *stricto sensu* fall within the scope of the more favourable criminal laws[22].

Criminal law may have retrospective effect only if it is:

- a decriminalising law;
- a more favourable new criminal law (including

[17] This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity entails. (Judgment of 15 November 1996, rendered in Case Cantoni v. France, paragraph 35; Judgment of 24 May 2007, rendered in Case Dragotoniu and Militaru - Pidhorni versus Romania, paragraph 35; Judgment of 20 January 2009, rendered in case Sud Fondi SRL and others versus Italy, paragraph 109).

[18] See the Judgment of 22 November 1995, rendered in Case S.W. versus Romania, paragraph 36. See Decision No 405/2016 of the Constitutional Court of Romania.

[19] The application of law by analogy and the retrospective effect are two legal monstrosities. All dictatorships have made recourse to these "institutions" in order to achieve their totalitarian purposes and eliminate the "uncomfortable" persons. The fascist, Nazi and communist states of the 20th century have trampled on the principle of legality of criminalisation which is violated by the dictatorial states of today.

[20] The corresponding text of the previous Criminal code is laid down in Article 10 and has the following content: "Criminal law shall be applicable to offences committed when it is in force".

[21] According to Article 4 of the previous Criminal code: "(1) Criminal law shall not apply to actions committed under the applicability of the previous law, if such actions are no longer included in the new law. In such case, the serving of sentences, the educational and security measures ruled on under the previous law, as well as all criminal consequences of court judgments concerning those actions, shall cease once the new law comes into force. "

(2) The law prescribing security or educational measures shall also apply to criminal offences which have not been the subject of a final judgment until the entry into force of the new law".

[22] The laws concerning the regime of execution of criminal penalties may not have retrospective effect. By the Decision no.214/1997, the Constitutional Court has supported this point of view. According to this decision: "In the case of the institution of conditional release, the transitional situation is also created on the date when the criminal offence is committed and lasts until the penalty of life imprisonment or of imprisonment is executed or deemed executed. The intervention, during this period, of a criminal law which amends the institution of conditional release, as it is the case of the Law no. 140/1996, renders the determination of the applicable law subject to the rules contained in Article 15 paragraph (2) of the Constitution and Article 13 paragraph (1) of the Criminal Code, irrespective of the date on which the ruling of conviction has remained final.

Therefore, the provision of paragraph (1) of Article II of the Law no.140/1996, which refers to the applicability of the law to acts committed before its entry into force, violates the provision of Article 15 paragraph (2) of the Constitution of Romania."

the interpretative law);

- a procedural law (which shall apply immediately, irrespective of the date when the act was committed).

The **subsequent interpretative criminal law** may also decriminalise, if its content narrows down the sphere of facts deemed criminal offences by the previous jurisprudence of judicial bodies or if it determines a more favourable legal qualification. For instance, by reference to the provisions of the 1969 Criminal code, Article 183 of the Criminal code constitutes a subsequent more favourable interpretative criminal rule[23].

The subsequent interpretative criminal law is the law by which the legislator defines certain terms or expressions used by the criminal law after the entry into force of the interpreted law (rule).

4. Lex stricta

The principle of legality requires that the result of interpretation of the law is in line with the will of the legislator, i.e. it should be construed neither extensively, nor restrictively (*lex dixit quam voluit*). The extensive interpretation (*lex dixit minus quam voluit*) or the restrictive interpretation (*lex dixit plus quam voluit*) must not be admitted in criminal law.

In this context, the question is: how can one construe the criminal law in the cases where this is not clear, is equivocal or incomplete?

Although no express legal rule, which answers to this question, is prescribed, it follows **from the essence of the principle of legality that in such cases and in any other cases of unsatisfactory regulations, the criminal law shall be interpreted restrictively** - *lex poenalia est strictissimae interpretationis et aplicationis; poenalia sunt restringenda*.

The practitioner may not create criminal rules, may not extend the application thereof to unforeseen cases and must interpret any result of this operation in a strict manner, if the rule interpreted is unfavourable to the offender.

In the case of criminal rules with doubtful meaning, the adage "*in dubio mitis*" and not "*in dubio pro reo*" must be applied. This last adage is applicable only to the assessment of evidence during the criminal proceedings, because it is founded on the principle of the presumption of innocence[24].

It was held in the academic literature that "the rule of strict interpretation may not require the judge to confine the application of criminal law only to those hypotheses laid down by the legislator, when the careful analysis of the cases brought before the court prove that the latter fulfil all the elements of the criminal offence, but could not be foreseen at the date of criminalisation"[25].

5. Adoption of criminal law according to the Constitution

According to Article 73 of the Constitution: *"Organic laws shall regulate (...):*

h) criminal offences, penalties, and the execution thereof;

i) the granting of amnesty or collective pardon".

According to Article 115 paragraph (4) of the Constitution:

"*(4) The Government can only adopt emergency ordinances in exceptional cases, the regulation of which cannot be postponed, and have the obligation to give the reasons for the emergency status within their contents*".

According to Article 173 of the Criminal code:

"*Criminal law means any criminal stipulation included in organic laws, emergency ordinances or other regulatory acts which, at the date they were adopted, had legal power*".

It follows from the abovementioned legal and constitutional provisions that there are two categories of legal acts by which criminal rules may be prescribed, namely the organic laws and the emergency ordinances.

We conclude that criminal law may only be regulated by organic laws and emergency ordinances.

3. Conclusions

The legality of criminalisation is a fundamental principle of criminal law, intended for the legislator and the judicial bodies, according to which only the acts defined by criminal law at the time when they were committed constitute criminal offences and may be punished by criminal law.

The principle of legality of criminalisation imposes five standards, and in the absence of any of them one cannot speak of legality within the meaning of the principle we are dealing with here. Indeed, a criminal law complies with the principle of legality if it is: written (*lex scripta*); certain (*lex certa*); non-retrospective (*lex pravevia*); strict (*lex stricta*); adopted according to the provisions of the Constitution.

Criminal law may only be regulated by organic laws and emergency ordinances.

[23] Moreover, Article 146 of the 1969 Criminal code was amended several times and every time the scope of acts with "very serious consequences" was narrowed down.

[24] *I.Neagu*, Criminal procedure law. Treatise, Global Lex Publishing House, Bucharest, 2002, p.88-93; *G. Bettiol*, Diritto penale, Cedem Publishing House, Padova, p. 112.

[25] *N. Giurgiu*, Criminal law and criminal offence, Gama Publishing House, Iași, p.82.

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CIVIL ACTION SETTLEMENT IN CRIMINAL PROCEEDINGS THE DANGER RELATED CRIMES

Andrei-Viorel IUGAN[*]

Abstract

Article 1357 para. (1) Civil Code stipulates that "one that causes harm to another by an unlawful act committed with guilt is obliged to repair it". In this study, we propose to analyze whether and to what extent, a danger related crime can generate a prejudice, and if for committing such a crime, civil action may be exercised in criminal proceedings.

Keywords*: civil action, danger related crimes, criminal proceedings, moral damage, patrimonial damage.*

1. Introduction

Article 1357 para. (1) Civil Code stipulates that "one that causes harm to another by an unlawful act committed with guilt is obliged to repair it". The conditions are therefore tort: wrongful act, injury, causation between them and guilt. When the wrongful act committed is not only a civil offense but also a crime, the legislator created the possibility for the injured person to seek compensation for the damages encountered due to the criminal act subject matter of the criminal proceedings[1]. In this regard, Article 19 para. (1) Criminal Procedure Code shows that "civil action pursued in criminal proceedings is meant to hold accountable those responsible for tort in line with the civil law, for the damages caused by the act subject to criminal proceedings".

As it is rightly shown in the literature"the exercise of the two actions in one single process has advantages both for justice and for the persons concerned. Thus, justice means a saving of time and material resources when the two actions are performed in the same criminal case and settled by the same court, thereby avoiding the separate administration of relevant proof for the same offense/crime and the same perpetrator and avoidance of contradictions that could intervene in the decisions of two different courts. For the person aggrieved by the offense/crime it constitutes an easier and faster way to obtain compensation for the damages suffered, with reduced expenses. For the defendant, there is the possibility to concentrate its defense at the same time on both criminal and civil parts of the action, which reduces the costs that he would have to bear"[2].

2. The danger related crimes. Notion of.

Depending on the immediate consequences produced, crimes have been classified as regular crimes and crimes resulting from danger[3].

Danger related crimes are those offenses which are not implemented immediately through a concrete result, into a change in the surrounding reality, but the immediate result is a state of danger to the social value protected by the incrimination rule. In this regard, this type of crimes are for example traffic offenses, offenses of breach of the regulations on ammunition and weapons, offenses of forgery, breach of the measures on child custody, bigamy, incest, electoral related crimes, treason, etc. In these cases, the crime is consumed simply by taking action or inaction banned by the incrimination rule, not being necessary to also produce any concrete results.

Instead, in the case of regular crimes - result related, the immediate consequence is an actual result, and it is actually necessary to have some tangible changes in the surrounding reality. The regular result related crimes are: murder, manslaughter, interruption of birth, fetal injury, personal injury, fraud. In these cases, by simply committing the action or inaction that constitutes the material element of crime, is not sufficient for the existence of the crime itself to be considers as consumed, it is always necessary to produce a certain result.
In the majority opinion of the doctrine there is an overlap between the categorization of offenses in result related or danger related and in material crimes or formal crimes[4]. Such an overlay has been criticized, however, showing that "categorization of crimes as formal or material is made proportionally against the

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[1] I. Neagu, M. Damascin, *Tratat de Procedură Penală. Partea Generală,* București, Ed. Universul Juridic, 2014.

[2] G. Theodoru, *Tratat de Drept Procesual Penal,* București, Ed. Hamangiu, 2008, p. 114-115.

[3] F. Streteanu, D. Nițu, *Drept Penal. Partea Generală*, vol. I, Ed. Universul Juridic, București, 2014, p. 294-295, T. Dima, *Drept Penal. Partea Generală*, București, Ed. Hamangiu, 2014 p. 156-157, L. L. Lefterache, *Drept Penal. Partea Generală*, București, Ed. Hamangiu, 2016, p. 159.

[4] T. Dima, *op.cit.* p. 156-157, L. L. Lefterache, *op.cit*, , p. 159, C. Mitrache, Cr. Mitrache, *Drept Penal Român. Partea generală,* București, Ed. Universul Juridic, 2010, p. 130-131.

existence or absence of a physical object as a constituent element of the crime"[5].

Starting from this criterion of classification between formal crimes and material crimes, the author points out that there are many danger related crimes that have a material object and numerous regular crimes that do not have a material object. Such a distinction between danger related crimes and formal ones is not the subject matter of this work. In this study, we propose to analyze whether and to what extent, a danger related crime can generate a prejudice, and if for committing such a crime, civil action may be exercised in criminal proceedings.

3. Exercising civil action for danger related crimes. Jurisprudential highlights

In the guiding decision no. 1/1969 issued by the former Supreme Court show that crimes of danger are not causing harm through themselves and, as such, for such offenses, the trial court vested with the criminal proceedings is not competent to settle joint criminal and civil action. However, in our opinion, this rule should not be generalized, but analyzed reported to the issue with which was the subject matter of the reported guiding decision. Specifically, through that decision, the former Supreme Court has shown that when the person driving on the public highway a motor vehicle without a driving license, commits also other acts, through a committed or omitted action, causing material damage by degradation or destruction of property by negligence, and may be ordered by the criminal court to pay civil damages to repair the damage unless those facts, distinct from the offense of driving on public roads a vehicle without driving license, fall under other provisions of criminal law and the perpetrator was prosecuted for committing them.

Incidentally, five years later, in a decision of this case covering committing offenses of forgery and use of forgery, the Supreme Court stated that the fact that the existence of ,,crimes of forgery and use of forgery is not conditional on the occurrence of material injuries and does not exclude the possibility that, in fact, these are generating claims, either exclusively or involved in an antecedent causal complex and, as such, there is no denying the injured party the right to pursue civil action in criminal proceedings against their author, since - in this situation - a civil action has its source in the same material acts as the criminal proceedings and these material facts constitute crimes"[6].

The High Court of Cassation and Justice was also seized to decide on the path of appeals on such points of law, namely on the possibility of exercising civil action in connection with crimes of danger.

By decision of 2 June 2008, published in the Official Journal, Part I no. 230 of 08.04.2009, the High Court stated that – "the trial court vested with the criminal action in case of driving a motor vehicle on public roads by a person that doesn't have a driving license will not resolve also the civil action exercised by the owner of the damaged or destroyed vehicle during road offense". The decision showed in its justifications that "as long as the criminal court referral is made only for the offense of driving on public roads by a person not possessing a driving license, offense which by its nature is not generating injury, the party injured by the effects of other acts of the defendant committed on the same occasion, is not entitled to also proclaim itself as a civil party in the case and to join action for both civil and criminal liability. To consider otherwise would mean admitting to the possibility of exercising and joining any civil proceedings to the criminal proceedings, without deriving from it, which would be contrary to the principles governing the criminal process.

Indeed, it should be noted in this respect that the offense of driving a motor vehicle on public roads by a person without a driving license is not causing material damages by itself, because for such damages to occur, the driver would have to commit either through a committed or omitted action, at least one act to result in the damage. Therefore, in such a situation where the driver has committed another action, committed or omitted, generator of the damage, the claim cannot be accepted by the criminal court if that act that produced the damage is not incriminated under by criminal law.

In another appeal on points of law, the High Court of Cassation and Justice has shown that "the criminal court vested with the prosecution of offenses under article. 84 of Law no. 59/1934 on checks, as amended and supplemented, does not have competence to solve the civil action joint to the criminal action, as such its ruling rejected as inadmissible the civil action."

In support of decision no. 43/2008, published in the Official Journal, Part I no. 372 of 03.06.2009, the High Court showed that "essentially such crimes are: issuing a check without the authorization of the drawee; issuing a check without sufficient availability pulled, issuing a check with a false date, issuing a check which lacks an essential element or is issued in favor of the person issuing it. The aim of the incrimination of such facts is to primarily prevent the issuing of bad checks when the bank account does not have the required reserve for completing the operation to other ways that would harm the recipient. The offenses covered by Law no. 59/1934, amended and supplemented, called in the doctrine as formal, jeopardize the civil circuit in the broad sense. Their existence does not require the production of consequences to property because these protect the social relationships related to transactions with checks in order to ensure the credibility of these payment instruments, holding a particular role in trade/commercial relations. In case of committing such

[5] F. Streteanu, D. Nițu, *op.cit*, p. 294-295.

[6] Tribunalul Suprem, decision no. 1.527/1974, in V. Papadopol, M. Popovici, *Repertoriu alfabetic de practică judiciară în materie penală pe anii 1969-1975*, Editura Ştiinţifică şi Enciclopedică, București 1977, p. 26.

acts, the passive subject is the banking institution whose credibility has been compromised by the action of issuing a check without observance of the legal requirements, and not the beneficiary of the check that was issued in violation of the law.

As a result, the crimes stipulated under article 84 of Law no. 59/1934, as amended and supplemented, are crimes of danger and the purpose of their incrimination under the criminal law is to determine the correct issuing of checks and not to cover any damage. It is further noted that in the case of the crimes covered by the provisions of art. 84 of Law no. 59/1934, as amended and supplemented, the situation-premise is given by the existence of a legal report of a contractual nature, in which the check as a payment instrument represents a guarantee for the obligations of borrowers through commercial contracts concluded. Therefore, in case of committing such acts, the harm made to the creditor as injured party is determined by non-performance of the obligation assumed by the debtor-defendant in line with the concluded commercial contract and not by the subsequent issuing of the check in breach of criminal law.

It is natural, therefore, that in such cases, in order to cover the damages suffered, creditors have available only the separate civil action as means od redress, stemming from the contract and not a civil action based on tort law, in which joint civil and criminal liability can be encountered."

In practice there have been many controversies also with regards the possibility of exercising civil action in the criminal offenses of forgery.

Being endowed with a request for a dispensation of law matters, the High Court of Cassation and Justice dismissed as inadmissible the complaint by decision no. 16/2015, published in the Official Journal, Part I no. 490 of 07/03/2015.

In the reasoning of the judgment, the High Court of Cassation and Justice showed that "in the present case the subject of the referral is the aspect which falls within the scope of the rules on civil action having as subject matter the obligation to pay pecuniary and moral damages to the defendant prosecuted for the offense of forgery of private documents. Examining the conclusion brought before the High Court of Cassation and Justice, it was found that the court does not require the interpretation of legal provisions in the abstract, but to rule on the admissibility of the civil action exercised in a criminal lawsuit, jointly with the criminal law action. The method of settlement of a civil action exercised in criminal proceedings is the exclusive prerogative of the court seized with such an action.

As such, the question that can be address to the High court should only cover issues of interpretation of the law, not facts, the analysis of which being the exclusive prerogative of the respective court."

Having examined the case law it is found that the possibility of formulating civil action for crimes of forgery received different interpretations. For example, one court "re-analyzing the civil claims brought by the civil part, in accordance with the first court stated that the crime of forgery in general and the crime of forging documents under private signature in particular are danger related crimes and not outcome/ result related ones. In other words, if the case of such crimes, the crime is considered as consumed when there is a danger to the protected social relations and is not connected with the production of a detriment.

Therefore, these crimes are not by themselves causing material damage but favoring their cause. (...) It should be noted that the crime of forgery of private documents is not causing material damage by itself, whereas for their production the defendant was required to commit at least a commissive or omissive act for which to be prosecuted and sent to court and that would have had the damage as an outcome.

For these reasons, we will not accept any ground of appeal from the civil party requesting an order binding the defendant to pay material damages, because there is no causal link between the act of the defendant (which is a danger related crime) and the alleged pecuniary damage sustained by the civil part, consisting of expenses and loss of profit. Concerning moral damages, the judge wrongly considered that through the criminal act moral damage was caused to the civil party, due to stress and the need to withdraw from the authorized accounting expert profession. The crime of forging documents under private signature is a crime of danger and the aim of its incrimination as such is to defend those social relations whose training and normal development depend on public trust given to private documents and not that of coverage of any material or moral damage. Of course it would have been a different assumption if the defendant would have been prosecuted and sentenced for the offense of forgery of private documents, as a crime of danger, along with other crimes with an end result (eg. Fraud), case in which the civil action may be joint with the criminal action.

But in this case the criminal proceedings have as subject matter the crime of forgery of private documents so that civil action may not be made jointly with the criminal action"[7].

To the contrary, for the moral damages, another court showed that "with regards moral damages (40,000 euro - f. 19 folder background), from reading the constitution of the civil party as such, it follows that these claims are related, inter alia, to the use of the forged document in the civil lawsuit, act which falls into content of the offense committed by the accused. In the Court's view, the use of the forged document is capable of producing to the opposing side frustration, anguish, this part being aware that there is a risk to lose the lawsuit, through the use of illegal methods by the other party. Therefore, use of forged document in order to produce legal consequences (whether these

[7] Curtea de Apel Târgu Mureș, decision no. 36/A/28.01.2016, unpublished.

consequences occurred or not) is likely to produce a moral injury, so claims covering damages are admissible. Regarding their amount, the Court considers that the sum of 2,000 euros is a fair compensation, given (mostly) the relatively large time (several years) in which the civil parties were deprived of fair proceedings (civil) due to the crime committed by the defendant."[8].

With regard to the facts in the two cases, in the first case the defendant was prosecuted because she used the stamp of an expert accountant to forge several balance sheets of several companies, while in the second case, the defendant falsified a document which afterwards used in a civil lawsuit.

The solutions are not uniform nor as regards the possibility of pursuing civil action for other danger related crimes.

For example, in one case of the offense of failure to comply with measures regarding child custody, the Court findings showed that "first court concluded erroneously that in line with the nature of the case before hand, it is not justified and it is not possible for one to establish itself as a civil party for the granting of material and moral damages, conclusion that is manifestly erroneous in relation to the actual data of the case. Thus, it is observed that the injured party, also civil party in the case, made dozens of failed trips at the residence of the defendant to perform parental care of the child, which generated obvious expenditure evidenced by relevant proof and whose repayment is required, seeing the damage thus created is in direct causal link with the act of the defendant.

At the same time, preventing the civil party for a long time to get in touch with his son, created a sharpened mental suffering, considering that the second son of only 4 years of age cannot meet with his brother G. At the same time the negative attitude manifested by the defendant also affected the civil party's reputation in society - against which different claims not to reflect reality were expressed, which were also capable of deepening the state of distress and negative moral due to effective inability to enforce the provisions contained in the definitive judgment, fulfillment of which was supported by local authorities with responsibilities in child protection and by the police, but all these actions failed. In those circumstances, the Court considers that admission of the civil action was necessary and admissible and ordered the defendant under Art. 19 reported to Art. 397 paragraph 1 of the Criminal Procedure Code corroborated with Art. 998 Civil Code prior, to pay material damages in the amount of 6,600 lei representing the transport for the 17 failed trips on the route B-M, in line with the documents attached as proof to the request for establishment of the civil and moral damages assessed by the Court and the amount of 15,000 lei to cover non patrimonial related damages, as such admitting the civil party's appeal under Art. 421 para 1 item 2nd letter a Criminal Procedure Code"[9].

With regards the crime of perjury, in practice it has been shown that "the crime of perjury is a crime of danger, and by incriminating such action, the legislator is aiming at protecting the ordinary course of justice, so it is not possible to formulate a civil action. The crime of perjury is not liable to cause damage seeing the legislator doesn't care if it led or not, specifically, to an unjust solution, namely if the state of danger materialized or not"[10].

In another case, however, with regards the offense of misleading the judicial bodies (slanderous denunciation according to the old Penal Code) to the person against whom the denunciation was filed and against who the concocted evidence has been used, there was admitted as moral damages payment of the sum of 100 000 euro (the person concerned had been in custody unlawfully for more than one year as a result of that denunciation)[11].

On appeal, the amount of punitive damages were reduced to 30 000 euro. The court of judicial control showed that "on the civil side of the case, the appellate court does not deny the serious consequences produced by committing the acts of the defendant B, the main impact occurred in the victim's life by deprivation of liberty on the basis of false evidence, but it believes that the damages awarded should not be disproportionate and would constitute a means of unjust enrichment of the civil party. Therefore, given the amounts set by the ECHR in finding a violation of the right to liberty and security, by way of analogy (in this case is not about the responsibility of the state for this violation since at the time of arrest against the victim there were serious indications such as to convince an objective observer that he may have committed the acts, based on the evidence the defendant B products, breach is caused due to a particular action), the Court considers that the amount of 30,000 euros is sufficient to cover moral damage suffered by the civil party. In determining the amount, the appellate court took into account the principle of full compensation for the damage caused, principle that basically excludes consideration of the material situation of the defendant as a criterion"[12].

4. Conclusions

As for us, we believe that the possibility of pursuing civil action for the cases of danger related crimes must be analyzed on a case by case basis. In this regard, the court must examine whether the offense for

[8] Curtea de Apel Timișoara, decision no. 607/A/8.06.2015, unpublished.
[9] Curtea de Apel Ploiești, decision no. 481/7.05.2014, unpublished.
[10] Tribunalul Bucuești, decision no. 548/A,/9.05.2005 in *Tribunalul București. Culegere de practică judiciară în materie penală 2005-2006*, București, Ed. Wolters Kuver, 2006, p. 422-427.
[11] Tribunalul București, sentence no. 673/03.08.2012, unpublished.
[12] Curtea de Apel București, decision no. 402/A/18.12.2012, unpublished.

which the defendant is being prosecuted and trialed (even if it is a danger related crime) produced, in particular, any patrimonial damage to any other person. In the event that the damage had really occurred, it should be considered whether the injured person has any other possible way to recover the damage, except of course the formulation of a separate civil court action.

For example, if a person falsifies a document and uses it to proceed with a judicial action, the defendant may recover the expenses incurred in carrying out the lawsuit in a dispute settled by a civil court, according to Art. 451- 453 Civil Procedure Code.

If an innocent person is prosecuted following a complaint made in bad faith by the injured party, he/she will be able to recover expenses incurred from the perpetrator that mislead the judicial organs, in line with Art. 275 Para.5 Criminal Procedure Code.

If the person against whom the complaint was made is not prosecuted, it is natural for him/ her to be able to recover the expenses incurred to prove his innocence in the criminal case in which the perpetrator prosecuted for misleading the judicial bodies has the capacity of defendant. The same reasoning should be applied to the person injured by the offense of perjury.

Also we have to bear in mind that making a false complaint or any deceptive statements made by a witness can often affect the prestige and reputation of a person. In these circumstances we find no reason why those whose interests were affected could no seek justice through a civil action. Even if the offenses of perjury or misleading the judicial bodies are danger related crimes and belong to the category of crimes against justice, it must be taken into account that the unanimous doctrine considers that the person harmed as a result of false testimony or against whom the complaint or denunciation has been made has the capacity of secondary passive subject.[13] In our opinion these persons may exercise the civil action in criminal proceedings to the full extent if they prove the existence of actual damage.

We consider pertinent the arguments of the High Court of Cassation and Justice on the inability of pursuing a civil action (as determined in appeals on points of law mentioned above) in such cases as the ones connected to traffic offenses or offenses under the "Law of the check" provisions, but this cannot be extended in respect of every danger related crime. It remains the task of the Court to review on a case by case basis if the danger related crime subject matter of that judgment produced any damage and whether the claims of the civil party are founded.

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[13] V. Dobrinoiu, N. Neagu, *Drept Penal. Partea specială. Teorie şi practică judiciară. Conform Noului Cod Penal,* București, Ed. Universul Juridic, București, 2011, p. 365-366 și 341, M. Udroiu, *Drept Penal. Partea Specială,* București, Ed. C.H. Beck, 2016, p. 363 și 339.

THE JUDGE'S ROLE OF SURVEILLANCE OF DEPRIVATION OF LIBERTY IN THE EXECUTION OF THE CUSTODIAL PENALTIES

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Abstract

In this study, I decided to analyze the activity of the judge of surveillance of deprivation of liberty in relation to the amendments made by Law no. 254/2013 on the execution of sentences and custodial measures ordered by the court during the criminal trial, published in the Official Gazette no. 514 of August 14, 2013.
I will also analyze its role, both in terms of the powers of an administrative nature, especially those with administrative-jurisdictional nature in establishing and changing the arrangements for enforcement and custodial, educational measures for the solving of the complaints regarding the disciplinary sanctions and the complaints regarding the exercise of the rights provided by Law no. 254/2013;

Keywords*: judge, surveillance, deprivation of liberty, powers, administrative, administrative-jurisdictional, Law 254/2013.*

Introduction

The domain covered by the theme of the study is the judge's institution of supervision of deprivation of liberty in relation to the amendments made by Law no. 254/2013 on the execution of sentences and custodial measures ordered by the court during the trial.

The importance of the proposed study lies in the fact that the institution of the Judge of surveillance of deprivation of liberty has a huge impact in terms of the rights of persons deprived of their liberty, as well as of establishments and arrangements for enforcement that is applied in one form or another to all detainees, both those who are serving a penalty applied by a final judgment, as well as persons against whom preventive detention was ordered.

It should be noted that the institution of the delegated judge is a relatively new Romanian law, the first time being regulated by Law no. 275/2006, it has the powers which, in a lesser or greater extent, have an administrative character (either purely administrative - as if refusing food or participation in the commission of parole from the prison, either mixed, administrative and judicial, as if resolving complaints made by prisoners or prison administration).

The objective of the study is the presentation of the work of the delegated judge for supervision of deprivation of liberty, his contribution to the rights of persons deprived of freedom, censorship, according to functional competence, of the mode of establishment and individualization regimes and changes during the execution of punishment, the solution of the complaints having the object of disciplinary sanctions for the detainees and other administrative tasks with a direct impact on how relationships are established in case of life imprisonment.

Since preparing the detained person for release must be made on the first day of detention, and this is the goal of all actions undertaken, following the fundamental objective of increasing the capacity of the convicted person of social reintegration, to facilitate the rehabilitation of the prisoner to life in freedom, to an attitude of compliance and respect for societal values, the role of the judge regarding the surveillance of deprivation of liberty, through the tasks he performs, is essential to respect the rights of the convicted persons but also in reference to the progressive changes, during the detention, of the enforcement regime in one sentence less severe, which has a special importance in reaching this goal.

In the first section of the study I will present a brief history of the institution of the Judge regarding the surveillance of deprivation of liberty, including the Romanian relevant legislation, and in the second part I will present the role of the judge in the surveillance of deprivation of liberty, the way of appointing the report by the prison administration.

The base of the study will be established in the third section of the presentation of the judge's duties regarding the surveillance of deprivation of liberty, including on the interpretation of the European Court on Human Rights, on field art. 3 and 6 of the Convention.

1. Brief history of the judge's institution for the supervising of deprivation of liberty. Legislative provisions.

The institution of the delegated judge (now called in the Romanian legislation, judge of surveillance of deprivation of liberty) first, in history, appeared in Brazil in 1923 and the first European country to implement it was Portugal in 1924 through the creation

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of the Court of Enforcement of penalties, but his duties were limited to safety.

In Italy, the institution of the delegated judge, appears in 1930 and was not adopted by the Anglo - Saxon countries nor in the Scandinavian and Eastern European countries, including in Romania was published into law after the fall of the Iron Curtain.

As regards the legal nature of the powers of the delegated judge there are three guidelines. The first relates to purely administrative duties, the second to the exclusive jurisdictional nature and the third to the mixed.

For example, the Execution Italian Criminal system adopted as a model the administrative judge, while in the French system, although it was inspired by the Italian model, the judge has more powers, in that it disposes the deprivation of liberty, decides matters of parole, sets when the sentence is considered served, or controls the safety periods after the release.

The Romanian legislation, by Law no. 275/2006, adopted predominantly the mixed doctrine regarding the powers of the delegated judge, which is a guarantor of the rights of persons deprived of their liberty, but not their lawyer.

By Law no.254 / 2013 on the execution of custodial sentences imposed by judicial bodies during the criminal trial was proposed a new name - the judge of surveillance of deprivation of liberty, which as shown in the explanatory memorandum to the bill, is a name more concise and suggestive, for the judge who, being employed in prisons, arrest and detention centers, remand centers, educational and detention centers, has as main attribution the supervision and control of the legality of the execution of punishments and measures of deprivation of liberty, whether in prisons or other places of detention or arrest.

Concurrently, unlike the previous law, through the current framework law regarding the execution of penalties, were listed explicitly all the powers that it has, separating clearly the work of its management activity from the administrative-jurisdictional activity, the distinction is meant to end controversies after the entry into force of the previous law, regarding the legal nature of the activity of the judge: custody surveillance.

2. The Judge's oversight role regarding the deprivation of liberty, the way of appointing and the report with the prison administration.

Through the execution of sentences are pursued goals established by Law 254/2013, focusing on preventing the committing of crimes by applying criminal coercion.

The subsidiary aim would be of an individual order and refers to the formation of an attitude to the rule of law, to the rules of social coexistence and to work to reintegrate into society of persons detained or interned[1].

The Criminal proceedings are the activities regulated by law, the work carried out by the competent authorities, with the participation of parties and other persons[2], and the procedural rules are designed to ensure the effective exercise of the powers of judicial bodies to guarantee the rights of parties and other participants in criminal proceedings.

The Criminal proceedings distinguish several stages, of which, important for this paper work is the phase of enforcement of criminal judgments that became final, resulting in the achievement of the purpose of criminal law and criminal procedure law.

Thus, during sentencing, the judge's role to oversight the imprisonment, highlights the relationship between the judiciary power and the administration of execution penalties, between the enforcement of a final judgment and the taking of the steps to enforce specific content of mandate of imprisonment or other educational measures of deprivation of liberty. The executory effect of sentence gives birth, for the penitentiary institution or educational center, to the right to enforce sanctioning provisions and convict must obey these provisions[3].

The Institution of the judge for the surveillance of deprivation of liberty comes to reinforce and express the option of the Romanian legislator for effective control of how people are deprived of freedom, and on the line to improve and streamline the work of these judges, but also for the practical delimitation of their activity by the one held by the prison administration, the framework law contains rules on the appointment of replacements and some clerks, and the obligation of the competent state institutions to provide the necessary means to carry out the activity under optimum conditions.

In relation to the manner of appointment, according to art. 8 and 9 of Law no. 254/2013 and the provisions of art. 8- 9 of the judgment of the Superior Council of Magistracy no. 89/2014 for the approval of the organization of the activity of the judge of surveillance of the deprivation of liberty[4], in every such units are annually appointed one or more judges from courts across the court of appeal, and several alternates judges who will exercise their powers of those designated judges during the period in which they are unable to perform their duties. Appointment is made with the written consent of the judge concerned, from

[1] The law 254/2013 - art. 3.

[2] Ion Neagu, *Criminal Procedure Treaty. General Part*, Third edition, revised and enlarged, Universul Juridic Publishing House, Bucharest, 2013, p. 19; Mihail Udroiu, *Penal Procedure. The General Part. The special part*, The Second Edition, C.H.Beck Publishing House, Bucharest, 2011, p.1.

[3] Nicolae Volonciu, Raluca Moroşanu, *The Penal Procedure Code Commented. Art. 415-464. Execution of penal resolutions*, Hamangiu Publishing House, Bucharest, 2007, p. 3-6.

[4] Published in The Official Gazette, **Part I no. 77** of 31st of January 2014.

those who had this quality or were part of the court's criminal chamber executions.

To ensure smooth conduct of business of the supervision judge for the deprivation of liberty, the president of the appeal court annually appoints clerks and alternates clerks needed for the registration and registry office.

Concurrently, during the exertion of the duties regarding the surveillance of the execution of penalties and of the custodial measures, the judge of surveillance of the deprivation of liberty can not carry out other activities in which the court has been designated.

In art. 3 of the Higher Magistrates Council Resolution no. 89 of 31.01.2014 it is stated that in the exercise of its attributions, the supervising judgeof deprivation of liberty is independent, impartial and is subject only to the law.

The Regulation provides many more cases of incompatibility, respectively the situation in which the judge of surveillance of deprivation of liberty has to resolve complaints or requests concerning the spouse, relative or his in-laws, or up to grade IV inclusively, or may be located in a different situation from those set out in art.177 of Law no. 286/2009 on the Criminal Code, as amended and supplemented, or on who we believe would be affected impartiality, they shall be settled by alternate judge. The existence of such circumstances shall be immediately informed to the President of the Court of Appeal in whose territorial jurisdiction is the place of detention.

These provisions shall be applied accordingly and where the hearing or the research aim a misconduct committed in the presence of the judge of supervision of deprivation of liberty.

Regarding its activity, should be noted that the judge of surveillance of deprivation of liberty may hear any convicted person or working in the prison system, may request information or documents from the administration of the detention, can make spot checks and has access to individual file of prisoners, to records and any other documents or records necessary to fulfill the duties provided by law, with the respecting of confidentiality and professional secrecy, obligation incumbent to the Registrar appointed by the President of the court of appeal.

Concurrently, any person, organization, institution or authority is obliged to respect the independence of the judge supervisory of imprisonment and to provide it with requested documents and information. Space available to judge of surveillance of deprivation of liberty must be equipped with furniture and cabinets for storage of archives, IT equipment and to enable him access to the Internet, the program legislation and computerized system of registration of persons deprived of freedom in detention.

Consequently, the prison staff is bound to support the office of the judge of surveillance of deprivation of liberty, by forwarding all complaints and appeals made by inmates to communicate closings, to submit files to the court, to notify those concerned about receiving in audience, or for other hearings to resolve complaints.

Regarding the logistical conditions in which must operate the judge of surveillance of deprivation of liberty and the delegated Registrar, the penitentiary administration or, where appropriate, of the center of detention and arrest, of the Centre of arrest, of educational center or detention center, is bound to provide the judge of surveillance of deprivation of liberty with the space arranged to enable the conduct of its work in good conditions and are used exclusively by it.

In order to implement these provisions in most places of detention such requirements are met, the judge and the clerk being given one individual desk that they use exclusively, located in the building related to the prison administration; Each office is equipped with appropriate furniture and IT equipment (computer, printer) with Internet access, the legislative program and the ANP database - records of detainees.

Also, the consumables necessary to the work of the Office of the judge, shall be provided by the prison administration, and the hearing of the persons sentenced by the Judge of surveillance of deprivation of liberty takes place in a room made available to this effect by the administration, located inside of the prison.

3. The powers of the judge of surveillance of the deprivation of liberty in relation with the amendments brought by The Law no. 254/2013

It can be said after analyzing the legal duties that the primary role of the judge of surveillance of deprivation of liberty is to monitor and control the execution of sentences and ensuring the legality of custodial measures and the respecting of the rights of convicted persons.

1. The main **judicial administrative duties** of the judge of surveillance of imprisonment provided for in art. 9, paragraph. (2) of Law 254/2013, as follows:

handles complaints of prisoners on exercise of the rights provided by this law;

2. handles complaints regarding the establishment and changing of regimes for enforcement and educational measures involving deprivation of liberty;
3. resolve complaints from prisoners regarding disciplinary sanctions; In art. 9 para. (2) of Decision Of the Superior Council of Magistracy No. 89/2014 are provided also the administrative duties of the judge of surveillance of imprisonment respectively: provides audiences to the detainees; exercise the powers provided by the law on the procedure for refusal of nourishment; participates as chairman at meetings of the commission for parole; participates as president, in the procedure to replace the measure admission to the detention center or educational center with daily assisting

educational measure; participates as president, in the procedure for granting the release from the educational or detention center; participates as president, in the procedure to continue the execution of the educational measure of imprisonment in the penitentiary; grants approval for collection of biological samples for testing convicted person, if there are indications that it has consumed drugs, alcohol or toxic substances or ingested without prescription drugs likely to cause behavior disorders; carries out spot checks in places of detention. "

The difference between these functions is that the duties of administrative jurisdiction are exercised within the special procedures prescribed by law and are terminated by an administrative-jurisdictional act called closing and the closings of the judge of surveillance of deprivation of liberty that became enforceable according to the law, are required.

Since the procedure is an administrative judicial one and the conclusion was not a judgment, it is not necessary that it contains all the specific judgments (*for example: pending, at the roll call, pronounced in open court; pronounced in the council chamber of ....*).

In addition to the mention expressly made in the law, another argument that the procedure completed by a judicial-administrative conclusion and not a judgment is that it has a special regulation established by Law no. 254/2013, different from the hearing of the criminal procedure code.

Thus, first, the hearing requires the compliance with rules and principles that can not be applied in the procedure of the delegated judge that takes place in prison (ex: officialdom, contradictory, advertising, provide legal assistance, etc.);

Concurrently, in the prison in which is operating the judge of surveillance of deprivation of liberty, often is not possible the managing of evidence in terms of the Criminal Procedure Code (ex. Hearing of witnesses under oath, the bringing before the court of people who are not in prison, for hearing, etc.; as a matter of fact, the law does not use the terms of witnesses or parties);

This conclusion is based on the fact that the detained person unhappy with the solution of the judge given in this procedure, can make an appeal in the court, where he will have all procedural guarantees specific to hearing.

As a way of working, the complaints are submitted by the prison authorities through the secretariat, with an address and a registration number from the computerized application and at their receipt, the complaints are registered in the general register, in the register of administrative-judicial complaints and in the alphabetic list, in the order they were received.

After registering the complaints in the records, the file is formed, which received number in order to highlight the register of complaints with an administrative-judicial character and on the cover of the file is specified the file number, the name of the complainant, the subject of the case, and after settling the complaint, number and date of conclusion.

After the managing of evidence, the judge of surveillance of deprivation of liberty shall prepare a reasoned conclusion that resolves the complaint, which has two parts. The first part includes: case number, the name of the judge of surveillance and the name of the prison, number and date of conclusion of the proceedings, the object of the case and the date of notification, the name of the person deprived of liberty, the pleas and the evidence, the facts retained, the motivation of the solution and the presentation of the grounds of law justifying the solution.

Part two includes: the rendered outcome, the mention that this is subject to appeal, the deadline until the appeal can be filed and the court to whom is addressed, date of delivery, the signature of the judge.

The decisions handed down by the Judge of surveillance of deprivation of liberty receive a number from the register of conclusions in the order of delivery. Date and number of conclusion are listed in the register for administrative-judicial claims. The conclusion is drawn up in 5 copies. Of these, one copy is kept at the map of conclusions, one is lodged in the case file, and the other three copies shall be communicated to the prison administration to ensure that a copy will be forwarded to the representatives of the prison in exercising the right to appeal the decision, another to be handed to the person deprived of liberty and the last to be submitted to the individual file of the prisoner.

Appeals against the solutioning of complaints shall be forwarded by the penitentiary administration by address (with proof of communication of the conclusion) to the Judge of surveillance of deprivation of liberty, who mentions on the address, the date of receipt of the appeal, and after registering in the registry for complaints with an administrative-judicial character, the disputes shall be submitted to the competent court, along with the case file (bonded, sealed and numbered) within two days of receiving them, based on address, through the Secretariat / mail of the penitentiary administration.

The Shipping data of the files is referred by completing the relevant headings in the register of complaints with administrative-judicial character and in the delivery-receipt of correspondence Register(ledger), where the employee of the prison signs.

As regards the deadlines for dealing with complaints by the judge for supervision of imprisonment, according to art. 39 para. 6 and art. 56 para. 7 of Law no.254 / 2013, the judge is obliged to settle the complaint within 10 days of its receipt (in case of complaint against the establishment or modification of the regime for penalty) or 15 days (in case of complaint concerning the respecting of the rights of the sentenced persons) and by the pronounced conclusion, he will be able to dispose one of the following solutions:

a) allows the complaint;
b) rejects the complaint if it is unfounded, late or inadmissible and / or devoid of purpose;
c) notes the withdrawal of the complaint.

From the formal point of view, after the solution of the complaints regarding the duties provided for in art. 9 paragraph. 2 letters a-c of Law 254/2013, the conclusion of the custodial surveillance judge shall be communicated to the convicted person and to the penitentiary administration within 3 days from the date of delivery thereof, and against the conclusion, the convicted person and the prison administration can make an appeal to the court in whose jurisdiction is located the prison, within three days or five days from notification, as appropriate.

The legislator has provided this remedy for respecting the constitutional principle of free access to justice and the censorship by a court of an administrative decision, as the one of the committee establishing or modifying the regime of execution or enforcement of a disciplinary sanction, constitute an additional guarantee to the convicted person.

The appeal does not suspend the execution of the conclusion and is examined in open court, summoning the convicted person and the prison administration and the convicted person is brought to court only when ordered by the court, in this case being heard. Legal aid is not compulsory, and if the prosecutor and the prison administration participate in the trial, they make conclusions and the court will pronounce a definitive sentence.

Regarding the Administrative Judicial attribution of solution of the Complaints of the inmates regarding the application of the disciplinary sanctions, should be noted, (in terms of fairness and of the reasonable duration of the disciplinary proceedings of detainees in relation to the interpretation of the European Court on Human Rights, on the field of the art. 6 of the Convention for the subject of this study, although the article in question refers explicitly only to the "criminal" allegations), that the Court made three criteria governing the conditions under which Article 6, along with its safeguards, is applied in disciplinary proceedings in the execution of custodial sentences.

The Court first established that should be considered the classification of the offense in domestic law and even if it is not a crime but is classified only as a disciplinary offense, in the proceedings, the Article 6 may be used, being the situation in which the offense can be equated with a criminal offense, in terms of its nature and by this principle, the Court sought to prevent from the start the removal of procedural guarantees stipulated in Article 6 for some misbehaviors, based on internal classifications.

Thus, the court established, independently of the autonomously, internal law, what is meant by the accusation "criminal" and investigating the facts that, under national law, are not criminal offenses, if they can be equated to an offense, in terms of their nature. Also, the Court examined whether the imposed penalties can be equated to a criminal penalty, in terms of the nature and severity (see ECHR, June 8, 1976, Engel and others / Netherlands, no. 5100/71, 5101/71, 5102 / 71, 5354/72, 5370/72, pt. 81.82), and in this respect, recognizes the particular context which characterizes the internal disciplinary procedures in prisons.

The Court considered that there may be practical reasons and fundamental considerations, to determine the need for a special system in prisons to maintain discipline, a system that should not be considered as a procedure of accusation "criminal" in this category being found the considerations safety, public order, a rapid resolution of cases of inappropriate behavior of inmates, the existence of sanctions tailored to the this sector and the obligation of management of the place of detention to take responsibility for safety and order in the place of detention (see ECHR June 28, 1984, Campbell and Fell ./. United Kingdom, no. 7819/77, 7878/77, pt. 69)

However, in The European court's sense, the guaranteed right to a fair trial is a fundamental principle of a democratic society. Despite the particular context of internal discipline in prisons, stating that "dividing line" between the disciplinary measures that do not fall under Article 6 and the "criminal" accusations under Article 6, shall be determined having regard to the intentions and purposes of this article.(ECHR, June 8, 1976, Engel and others ./. The Netherlands, no. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, pt. 81, 82; ECHR June 28, 1984, Campbell Fell ./. United Kingdom, no. 7819/77, 7878/77, pt. 69)

Thus, the Court specified all these in its case in the cause Campbell and Fell v United Kingdom, that the plaintiffs protested the mistreatment of other detainees, sitting down in the corridor of the prison and refusing to get out of there, being lift by force. Campbell and other inmates were disciplined for mutiny or incitement to mutiny. It should be noted that at the time, in the United Kingdom, if it was pronounced a sentence of imprisonment for a limited period of time, each person deprived of liberty had the automatic right to a sentenced reduced by one third, and the penalty was imposed to several prisoners, including Campbell, in disciplinary proceedings, and the sanction consisted of denying the right to release before the deadline, given that one of the persons concerned, could benefit from a total reduction of the sentence of 570 days and this was, in the light of the Court, a serious consequence for the duration of the penalty, so that this penalty must be classified, under the Convention, as a criminal charge, although technically, the punishment was not directly imprisonment.

Regarding the administrative-jurisdictional task of the judge of surveillance of imprisonment, provided for in art. 9 paragraph. (2) of Law 254/2013, to solve the complaints of prisoners on exercise of rights under this Law, should be noted that the legal rights of detainees are set out in art. 56-80 of Law no. 254/2013,

and any person is not allowed to restrict the exercise of these rights more than does the law or the Constitution.

In the execution of this task, the judge sees over the respecting of the rights of detainees, to assess the conditions of detention and the magistrate must take into account the cumulative effects of these conditions also considering the period during which a person is held under those special conditions.

Given that the acute shortage of space in the cells of prisons from Romania has an increased share, this should be considered in particular by the Judge of surveillance of deprivation of liberty at the time when the complaints are analyzed, following to determine whether the conditions of detention may be considered degrading, including in terms of art. 3 of the Convention. Art. 3 of the European Convention on Human Rights enshrines one of the most important values of democratic societies categorically prohibiting torture or inhuman or degrading treatment or punishment. Incident to be applied treatments must meet a minimum threshold of gravity, and in this context, the state is assigned two types of obligation: a negative, overall one, not to subject a person within its jurisdiction to treatment contrary to Article. 3:01 and substantial positive obligation, to take preventive measures to ensure the physical and moral integrity of detainees, such as the provision of minimum conditions of detention and adequate medical treatment.

The European Court has admitted on several occasions that it was a violation of Article 3 if the detention rooms were small, overcrowded or unbearable renovation conditions and hygiene.

Thus the cause of Kalashnikov against Russia, the detention room was permanently overcrowded. Each person had only 0.9 to 1.9 m2, two or three people had to share a bed, and thus can only lie flat sequentially. The detaining room was light during the day and night. The 18 to 24 inmates were continuously producing noise, the smoking was allowed, no ventilation, and the prisoner was entitled to spend only two hours a day outside the detention room. At the same time, the sanitary equipping was poor, there was no disinfection, and in the four years of detention in these circumstances, there was a substantial worsening of his health. Considering these aspects, the Court held that it is a degrading treatment within the meaning of Article 3 (ECHR, 15 October 2002 Kalashnikov./ Russia, no. 47095/99, §. 92-103).

At the same time the Court held in the case Iacov Stanciu against Romania, application no. 35972/05, paragraph 166, that custodial measures applied to a person can sometimes involve an inevitable element of suffering or humiliation but, nevertheless, suffering and humiliation involved must not go beyond the inevitable element of suffering or humiliation connected with some form of treatment or punishment with legitimacy.

With respect to detainees, the Court showed already in previous cases that a prisoner does not lose, through the mere fact of his incarceration, his rights guaranteed by the Convention. On the contrary, people in detention have a vulnerable position and the authorities are obliged to defend them, and under art. 3, the state must ensure that a person is detained in conditions compatible with respect for his human dignity, that the manner and method of execution of the measure are not subject to distress or hardship for the detain person, exceeding the unavoidable level of suffering inherent in detention and that, given the practical needs of imprisonment, his health and well-being are adequately secured.

According to art. 48 para. 5 of Law 254/2013, the minimum binding rules on conditions for accommodation of sentenced persons shall be established by the minister of justice. According to art. 1 para. Annex 1 of the Order of the Minister of Justice no. 433/2010, spaces for the accommodation of detainees must respect human dignity and must meet minimum standards of health and hygiene, taking into account the conditions and climates, especially the living space, air volume, lighting, heating and ventilation. In terms of the living space, art. 3 letter b of the same law provides that the accommodation rooms from the existing prisons must ensure at least 4 square meters per person deprived of liberty, framed in incarceration regime or maximum security regime.

In its jurisprudence, (*Iacov Stanciu, par. 168),* The Court decided that, in the causes in which the applicants were given less than 3 m² of living space, it found that overcrowding was severe enough to justify, itself, the violation of art. 3 of the Convention.

Regarding the administrative attribution of the judge of supervision of the deprivation of liberty, to participate in the refusal of food is found that the refusal constitutes a severe form of protest of detainees, which can cause health consequences or consequences regarding their lives, but also with respect to the execution of custodial sentences, because during detention, convicts are in state custody, who has the duty to enforce penalties. For this reason, essential duty of the state is to ensure the conditions for the execution of penalty and to ensure the protection of life, health and bodily integrity of the detainees.

According to art. 54 of Law 254/2013, in the situation in which, a convicted person intends to refuse food, notifies the supervising agent, verbally or in writing and submits to it any written claims on the reasons for refusal of food, and if the convicted person refuses to receive three consecutive meals, notifies the prison's director.

At the same time, the director of the prison, hears the convicted person stating the reasons for refusal of food, notifies the judge of surveillance of imprisonment, about reasons of the refusal to eat of the prisoner and his decision to continue to be in denial of food. From the moment when the judge of surveillance is notified, it is considered that the prisoner is in refusal of food and in some cases, the judge of surveillance has the obligation to hear the prisoner and and to resolve by conclusion the notified aspects.

After hearing, if convicted person keeps refusing food, the Judge of surveillance of deprivation of liberty may make proposals to the prison's director.

In this context, it is very important that the judge of surveillance of deprivation of liberty to identify and analyze the reasons that led the person to enter into refusal of food, and whether they are within its fold or in the prison's administration fold, to order the appropriate measures.

The refusal of nourishment shall be recorded in an established special register, entitled 'Register of refusal of food "and notices and work done is kept in chronological order, in the file of refusal of food, but there are cases when are made folders for each referral.

In most cases, they proceed to the hearing by the judge of the person deprived of liberty, the issues shown by it being recorded in a statement written either by the prisoner or by the delegated Registrar or delegated judge or typed and signed by person in the refusal of food, the delegated judge and the clerk.

Regarding the place for the hearing of inmates entered in the refusal of food, this is done inside the prison or detention center and even in the court when the judge fulfills other duties within it.

From the practice of the delegated judges, was revealed that in some cases, the detainees resort to this form of protest only in order to gain access as soon as possible to judge without respect for the audience program.

Conclusions

With the implementation of judge institution of supervision of the deprivation of liberty, in the Romanian legal system appeared certain animosities and struggles of egos between magistrates and directors of prisons, and the latter, following the transfer of administrative duties to the judge, found that there was a decrease of their authority in the eyes of their subordinates, or even the inmates.

The Judge of surveillance of the deprivation of liberty does not have organizational attributions, though to verify aspects shown by the persons convicted regarding the conditions of detention, can make checks in the prison, and the administration of the prison is obliged to provide the necessary support for such actions.

If upon inspection resulted in deficiencies to be rectified, the findings of the supervisory judge of imprisonment, shall be notified by address, to the director of the prison and the judge may make proposals on the measures it considers necessary to remedy the situation.

However, the judge is not the director of the prison nor above him, he must be impartial and be a guarantor of the rights of persons deprived of liberty without turning into an advocate for them.

Between the judge and the prison management is not beneficial to have a relationship of rivalry, because they must work together to find solutions for prevention of occurrence of discontent among the detainees on the application and enforcement of laws, and to limitate the complaints made often in bad faith by some inmates.

However, although the new legislative provisions are generous in terms of the judge's role of surveillance of deprivation of liberty, which has a predominant role in the observance of the rights of detainees, in the establishment and modification of the regimes of enforcement, the Romanian prison system is still in crisis, suffering from overcrowding and underfunding detention places and application of the new provisions of Law no. 254/2013 is a costly undertaking that transfers crime problems especially to prisons and to a lesser extent even to the judge of surveillance of custody.

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THE EXCLUSION OF EVIDENCE IN CRIMINAL PROCEEDINGS – A COMPARATIVE APPROACH

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Abstract

The present paper examines the exclusion of evidence within the criminal proceedings, as regulated in the Romanian legislation as well as in other legal systems, pertaining both to the common law and to the civil law major legal traditions. The focus shall be placed upon the configuration of this procedural institution in the two aforementioned categories of legislation, namely of the exclusionary rule specific to the former and the exclusion of evidence by means of the nullity sanction, which is likely to be encountered in the latter, while also revealing the elements of approximation between them, as presented especially in the national legal paradigm, including in the relevant case-law. Further consideration shall be given to the European standards having a bearing on the matters in question, provided both by the European Convention of Human Rights and the case-law of the European Court of Human Rights, and the European Union, with regard to the need to achieve a common set of principles in the application of the exclusionary mechanism.

Keywords*: common law and civil law legal traditions, criminal proceedings, the principle of legality, the exclusion of evidence, nullity.*

1. Introduction

The legal systems throughout the Western world are deeply rooted in a specific legal culture based on two major traditions, namely *the Romano-Germanic or civil law tradition* and *the Anglo-American or common law tradition*.

The aim of the present paper is to illustrate the specific traits of the two traditions as they are reflected in the evidence law within the criminal proceedings of several states belonging to both traditions, by placing a special focus upon the exclusion of evidence.

This outline becomes especially relevant for the analysis of the Romanian criminal procedure law, belonging to the civil law family of legal systems, as, in the process of reforming the criminal justice system carried out, among other measures, by the lawmakers' adopting new codes of substantial and procedural criminal law, in effect as of February 2014, the common-law legal institutions have served as a recurrent source of inspiration. Such is the case of the newly-introduced procedural sanction of excluding unlawfully or disloyally adduced evidence.

By building upon the Romanian and foreign literature and case-law, the underlining idea of the present study is that the provisions regulating the exclusion of evidence within the Romanian criminal proceedings represent in fact a synthesis of some apparently incompatible traits of the two traditions.

Consequently, the present study is anchored in the scholarly endeavour to further deepen the novel nature of the exclusion of evidence procedural mechanism, which, in order to be fully understood and uniformly applied in practice, requires a proper knowledge of the origins, general configuration, and mutations of this institution, in the legal systems belonging to both aforementioned legal traditions as well as by considering the relevant European instruments.

1.1. The Criminal Proceedings as Developed in the Two Major Legal Traditions

One of the main traits of the civil law tradition is codification, which determines the proceedings to unfold under very strict rules, as opposed to the common-law tradition, based on judicial precedent, where the established case-law is the driving force of legal development[1]. Also, it has been noted that while the former is "person-centered", the latter is "centered on adjudication"[2].

The structural differences that shape these two paradigms also become apparent in the configuration of the criminal proceedings.

For instance, there are several differences in the legal treatment of evidence law according to the two legal traditions. In general, in common-law jurisdictions, the judge rules on issues of law, controlling the procedural aspects and instructing the jury thereof, while the lay jury is in charge of determining the facts, whereas in civil law jurisdictions, the evidence gathered during the

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[2] Mar Jimeno-Bulnes, "American Criminal Procedure in a European Context", *Cardozo Journal of International and Comparative Law* 21 (2013): 410, http://www.lawschool.cornell.edu/research/lay_participation_in_law/upload/MarJimeno-Bulnes.pdf.

prosecution phase is collected in a *dossier*, which forms the basis for the trial phase[3].

Moreover, in the common-law systems, the review of the ruling rendered by the court of first instance tends to focus on issues of law, while, in the civil law systems, the appeal has a broader scope, also dealing with the findings on facts[4].

1.2. The Inquisitorial and the Adversarial / Accusatorial Models of Criminal Proceedings

There are two models of criminal proceedings, largely corresponding to each of the two legal traditions: the inquisitorial model, representative of the civil law legal systems and the adversarial or accusatorial model, specific to the common-law legal systems.

Within the adversarial adjudication process, the parties play a central, active part by presenting their arguments and suggesting evidence in accordance with their position before a decision-maker who has no prior knowledge of the case; conversely, in the inquisitorial adjudication process, the judge's role is more prominent, not being a mere recipient of the information in a packaged form, but actively overseeing the unfolding of the proceedings[5].

As the scholars rightly argue, there is no purely inquisitorial or purely adversarial criminal procedure[6]. What is more, the dichotomy is considered by a part of the literature as "limited or even outdated", considering the set of common values shared by both models[7].

2. The Exclusion of Evidence in the Common-Law Legal Traditions

2.1. The Exclusionary Rule in the Legal System of the United States of America

The exclusion of evidence in the North American proceedings is closely connected to the Fourth, Fifth, and Sixth Amendments to the U.S. Constitution, as a remedy against violations of the provisions regulating search and seizure, self-incriminatory statements, and the defendants' right to counsel, respectively[8].

The scope of the *Fourth Amendment* is to safeguard a person's right to liberty and security as well as the right to private life against arbitrary arrests and invalid searches or various forms of surveillance[9].

The adoption of the USA PATRIOT Act (its full title being Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001), as a reaction to the 9/11 terrorist attacks, has represented a challenge for the issues pertaining to the exclusion of evidence in the context of the necessity to comply with the constitutional guarantees provided for under the Fourth Amendment. In this regard, it may seem paradoxical that the act allowed for significant restrictions placed upon the fundamental rights and freedoms with the exact purpose of protecting them (for example, by eliminating the probable cause standard required to legitimise the intrusive acts of the state authorities or the obligation to notify the person targeted by a search)[10], which is liable to create an imbalance between the public interest of protecting the national security and the private interest of exercising the fundamental rights[11].

The application of the *Fifth Amendment* in criminal matters relates to the right to a grand jury, the interdiction of "double jeopardy" (an institution similar to the *ne bis in idem* principle in civil law systems), as well as to some guarantees regarding the fair nature of the proceedings (protection against self-incrimination, "due process of law")[12].

As far as the privilege against self-incrimination is concerned, the U.S. Supreme Court has ruled that the evidence obtained in violation of what has come to be commonly known as the "Miranda rights" or the "Miranda warning" are to be excluded. These legal concepts derive from the well-known decision rendered in the *Miranda v. Arizona* case, whereby, in 1966, the Supreme Court ruled on the exclusion of the statements provided by the defendant Ernesto Miranda before the police body, admitting to committing the offences he had been charged with, namely kidnapping and rape, without his being properly informed beforehand of the right to remain silent and the right to an attorney and without the judicial body ensuring that the accused has understood these rights and the consequences of waiving the exercise thereof[13].

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[3] Howard L. Krongold, "A Comparative Perspective on the Exclusion of Relevant Evidence: Common Law and Civil Law Jurisdictions", Dalhousie Journal of Legal Studies 12 (2003): 100-102, https://ojs.library.dal.ca/djls/article/download/4452/3970.

[4] Krongold, "A Comparative Perspective on the Exclusion of Relevant Evidence: Common Law and Civil Law Jurisdictions", 102.

[5] Ellen E. Sward, "Values, Ideology, and the Evolution of the Adversary System", *Indiana Law Journal* 64 (1989): 312-314, http://www.repository.law.indiana.edu/ilj/vol64/iss2/4.

[6] Jimeno-Bulnes, "American Criminal Procedure in a European Context", 423.

[7] Andrea Ryan, Towards a System of European Criminal Justice: The Problem of Admissibility of Evidence (London: Routledge, 2014), 76.

[8] "Exclusionary Rule", Cornell University Law School, Legal Information Institute, https://www.law.cornell.edu/wex/exclusionary_rule.

[9] "Fourth Amendment", Cornell University Law School, Legal Information Institute, https://www.law.cornell.edu/constitution /fourth_amendment; "Fourth Amendment--Search and Seizure", Justia US Law, http://law.justia.com/constitution/ us/amendment-04/.

[10] Brian Duignan, "USA PATRIOT Act", *Encyclopædia Britannica*, January 25, 2017, https://www.britannica.com/topic/USA-PATRIOT-Act#ref1123177.

[11] Christian Halliburton, "Leveling the Playing Field: A New Theory of Exclusion for a Post-PATRIOT Act America", *Missouri Law Review* 70 (2005): 550, http://digitalcommons.law.seattleu.edu/faculty/380.

[12] "Fifth Amendment", Cornell University Law School, Legal Information Institute, https://www.law.cornell.edu/constitution /fifth_amendment.

[13] Steve Mount, "The Miranda Warning", *U.S. Constitution Online,* January 8, 2010, https://www.usconstitution.net/miranda.html.

The literature[14] also suggests an innovative interpretation of the "Miranda rights", by arguing that the hearing of a suspect in custody raises issues including from the perspective of the Fourth Amendment, in the sense that the judicial body must obtain the voluntary consent of the accused before "searching" his mind and "seizing" his answers, the protection being applicable regardless of whether the statements have a self-incriminatory nature or not.

The *Sixth Amendment* comprises the following rights of defendants in criminal proceedings: the right to a public trial without undue delay, the right to a lawyer, the right to an impartial jury as well as the right to be informed of the accusers and the nature of the charges and evidence against the accused; the application of this legal text in practice includes cases of terrorism and issues of jury selection or witness protection[15].

Considering that the exclusionary rule has been shaped by the judiciary in the course of decades, especially by the case-law of the Supreme Court, which established, among other aspects, that the rule should not only be applied within the federal system but also at state level, the rationale of exclusion has gradually suffered a mutation, by shifting from being a remedy to becoming a means of deterrence, aiming at discouraging the improper conduct of the judicial body[16].

This shift of perspective allowed for several exceptions to the exclusionary rule to be enshrined, as follows:

1. *the good faith exception*, preventing the exclusion of evidence if officers reasonably relied on a search warrant subsequently proven as invalid (this exception was addressed in cases such as *Arizona v. Evans*, 1995; *Herring v. U.S.*, 2009; *Davis v. U.S.*, 2011);
2. *the independent source doctrine*, which implies that initially unlawfully obtained evidence may still be admissible if it is subsequently obtained by means of a constitutionally valid search or seizure (addressed in *Maryland v. Macon*, 1985);
3. *the inevitable discovery doctrine*, allowing for evidence to be admissible if it would have been obtained irrespectively of the unlawful means;
4. *the attenuation doctrine*, implying the admissibility of evidence if its relationship with the unlawful means of discovery is considerably attenuated;
5. *evidence admissible for impeachment*, aiming at questioning the credibility of defendants' testimonies but which cannot be used in order to prove guilt; or
6. *qualified immunity*, protecting the officers from legal action if it is reasonably thought that they have acted in good faith[17].

On June 20, 2016, the Supreme Court rendered its judgment in the *Utah v. Strieff* case, settling the issue of law consisting in determining whether the exclusionary rule applies when a police officer takes knowledge, during an unlawful taking into custody of a person, of the existence of an arrest warrant issued against that person, proceeds to enforcing the warrant, and discovers incriminatory evidence during the search relating to the arrest (in this case, there were drugs found in the person's pockets). The court found the evidence thus obtained to be admissible, by noting the good faith of the judicial body as well as by stating that the causal link between the unconstitutional act consisting in the unlawful deprivation of liberty and the discovery of the evidence had been attenuated by the existence of a valid arrest warrant, which ultimately may be interpreted as yet another departure from the traditional view on the "fruit of the poisonous tree"[18].

2.2. The Exclusionary Rule in the Legal System of the United Kingdom

With reference to the theoretical justification of the exclusion of evidence, the case-law of the British courts reflects various points of view[19]: thus, according to *the* – rather controversial – *reliability principle*, which is based on a clear-cut distinction between the judicial functions, the rationale of the exclusionary rule itself is under debate, the main argument being that the unlawfully obtained evidence (especially the material evidence) may be as reliable as the evidence obtained lawfully, the evidentiary value being the same, regardless of the manner in which they were adduced. According to *the deterrence principle*, the purpose of the exclusionary rule is to increase accountability among the criminal investigation body, preventing violations that may compromise the prosecution. From the perspective of *the protective principle*, the exclusionary rule is aimed at safeguarding the rights of the accused. *The judicial integrity principle*, taken from

[14] Timothy P. O'Neill, "Rethinking *Miranda*: Custodial Interrogation as a Fourth Amendment Search and Seizure", *UC Davis Law Review* 37 (2004): 1124, http://ssrn.com/abstract=543502.

[15] "Sixth Amendment", Cornell University Law School, Legal Information Institute, https://www.law.cornell.edu/constitution/sixth_amendment.

[16] Halliburton, "Leveling the Playing Field: A New Theory of Exclusion for a Post-PATRIOT Act America", 520-521.

[17] "Exclusionary Rule".

[18] Orin Kerr, "Argument Preview: *Utah v. Strieff* and the Future of the Exclusionary Rule", February 3, 2016, *SCOTUSblog*, http://www.scotusblog.com/2016/02/argument-preview-utah-v-strieff-and-the-future-of-the-exclusionary-rule/, and "Opinion Analysis: The Exclusionary Rule Is Weakened but It Still Lives", June 20, 2016, *SCOTUSblog*, http://www.scotusblog.com/2016/06/opinion-analysis-the-exclusionary-rule-is-weakened-but-it-still-lives/. The full text of the decisions is available online at: http://www.supremecourt.gov/opinions/15pdf/14-1373_83i7.pdf.

[19] David Anthony Brooke, Confessions, Illegally/Improperly Obtained Evidence and Entrapment under the Police and Criminal Evidence Act 1984: Changing Judicial and Public Attitudes to the Police and Criminal Investigations (London: University College, 1999), http://discovery.ucl.ac.uk/1349807/1/367012.pdf, 242-260.

the 1961 *Mapp v. Ohio* case pertaining to the application of the Fourth Amendment to the U.S. Constitution, rejects the absolute separation of the judicial functions, by means of the argument that the investigative and trial phases are connected both from the procedural point of view and in the public perception, so as the infringement of the rights occurring in the incipient phase of the proceedings may threaten the integrity of the justice dispensing mechanism.

The relevant provisions regarding the exclusionary rule within the jurisdiction of the United Kingdom of Great Britain and Northern Ireland are to be found in the following acts: *the Police and Criminal Evidence Act 1984* (PACE), which comprises criminal procedure provisions regarding the powers of the police in England and Wales, as well as codes of practices relating to the exercise of those powers; similar provisions are encountered in the *Police and Criminal Evidence Order 1989* (PACE NI) applicable in Northern Ireland, and *the Criminal Procedure Act 1995*, applicable in Scotland[20].

Section 76 paragraph (2) of PACE 1984[21] provides that the confessions made by an accused person that, as is represented to the court, have been or may have been obtained by oppression or in consequence of anything said or done which was likely, in the circumstances existing at the time, to render them unreliable are not allowed to be given in evidence against him except insofar as the prosecution proves to the court, in accordance with the probative standard *beyond reasonable doubt*, that the confession – notwithstanding that it may be true – was not obtained as aforesaid.

The circumstances determining a confession to be unreliable have been broadly interpreted by the Court of Appeal in the 1987 *R v. Fulling* case, to include the following: confessions obtained as the result of an inducement, such as a promise of bail or a promise that a prosecution would not arise from the confession; hostile and aggressive questioning; failure to accurately record the statement, to caution, to provide an appropriate adult where required, to comply with the Code of Practice in relation to the detention of the accused (for example, not allowing sufficient rest prior to an interview) or to act properly in the capacity of a defence solicitor or appropriate adult[22].

According to paragraph (4) of Section 76 of PACE 1984, the exclusion of a confession, wholly or partly, shall not affect the admissibility in evidence of any facts discovered as a result of the confession or where the confession is relevant as showing the particularities of his way of speech, writing or expression, of so much of the confession as is necessary to show such issues.

Section 78 of PACE 1984 is entitled "Exclusion of unfair evidence" and, in the two component paragraphs, this legal texts provides for the general possibility of a court to refuse to allow evidence on which the prosecution proposes to rely to if it appears to the court that, having regard to all the circumstances, including the ones in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that it should not be admitted. It is further stated that nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.

The fairness of the adduction of evidence has been successfully challenged so far as a result of invoking breaches of the European Convention of Human Rights, breaches of the Codes of Practice issued under PACE or bad faith on the part of the police[23].

3. The Exclusion of Evidence in the Civil Law Legal Traditions

3.1. The Exclusion of Evidence in the German Legal System

In the German legislation, the procedural institution of the exclusion of evidence dates from the 1950s, borrowing some elements from the American model, such as the exclusionary rule, the "fruit of the poisonous tree" doctrine or the attenuation doctrine[24].

The regulation pertaining to excluding evidence is not provided for at constitutional level and *does not operate with the notion of nullity*, the exclusionary rules provided by law being scarce and lacking general applicability. There are several *statutory exclusionary rules* (*gesetzliche Beweisverwertungs-verbote*) under the German Code of Criminal Procedure – one example of a statutory rule is the exclusion of evidence obtained following the judicial body's failure to inform the suspect of the rights provided for under Section 136 paragraph (1) second sentence of the Code of Criminal Procedure[25], namely the right to respond to the charges or to remain silent, and the right, at any stage, even prior to his examination, to consult with his chosen defence counsel – but, in the majority of cases, the court shall decide in these matters based on *non-standardised exclusionary rules* (*nicht normierte*

[20] "Police and Criminal Evidence Act 1984", Wikipedia, https://en.wikipedia.org/wiki/Police_and_Criminal_Evidence_Act_1984.

[21] The full text of the act is available online at: http://www.legislation.gov.uk/ukpga/1984/60/contents.

[22] "Confessions, Unfairly Obtained Evidence and Breaches of PACE", the Crown Prosecution Service (CPS), http://www.cps.gov.uk/legal/a_to_c/confession_and_breaches_of_police_and_criminal_evidence_act/.

[23] "Confessions, Unfairly Obtained Evidence and Breaches of PACE".

[24] Krongold, "A Comparative Perspective on the Exclusion of Relevant Evidence: Common Law and Civil Law Jurisdictions", 128-129.

[25] The English translation of the 1987 German Code of Criminal Procedure, with subsequent amendments, is available online at: https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p1117.

Beweisverwertungsverbote), especially in cases of a manifest violation of rights[26].

Other classifications of the exclusionary rules distinguish between, on the one hand, independent exclusionary rules (selbständige Beweisverwertungsverbote) and dependent exclusionary rules (unselbständige Beweisverwertungsverbote) and, on the other hand, between obligatory exclusionary rules (absolute Verwertungsverbote), implying a strict exclusion of evidence, and relative exclusionary rules (relative Verwertungsverbote), which are left to the discretion of the judge. The two categories are intertwined, as independent exclusionary rules are generally obligatory, while dependent exclusionary rules, based on serious violations of evidence adduction rules may be either obligatory or relative[27].

The exclusion of evidence is closely connected to some of the principles applicable in the German criminal proceedings, as indicated in the literature[28]: the case-law acknowledges a certain margin of discretion in assessing whether *the principle of proportionality* (*Grundsatz der Verhältnismässigkeit*) should apply, aiming at removing any arbitrariness concerning the investigation and balancing the individual's interest of exercising the constitutional right to privacy with the public interest of fighting crime. Under Section 244 paragraph (2) of the German Code of Criminal Procedure, *the principle of establishing the truth* is enshrined, allowing the court to extend the taking of evidence, *proprio motu*, to all facts and means of proof relevant to the decision; however, as noted by the Federal Court of Justice, this principle is not absolute, being limited by the necessity to comply with the standards of protecting human rights. At the same time, *the principle of the free assessing of evidence* (*freie Beweiswürdigung*) is acknowledged, requiring that the judge eliminates, within his evaluation, the factual elements derived from excluded evidence.

According to Section 244 paragraph (3) of the same Code, an application to adduce evidence shall be rejected if the adduction of such evidence is inadmissible, so the court must dismiss such an application if the evidence was obtained unlawfully[29].

3.2. The Exclusion of Evidence in the French Legal System

Although the regulation pertaining to the exclusion of evidence in France has undergone a long history (its apparition may be identified around 1910), it has been observed that it has not been accompanied by a consistent case-law in the course of time, the cases whereby the exclusion of unlawfully obtained evidence is registered to having been ordered being quite rare[30].

According to the French legislation in force, similarly to the Romanian law, *the invalidation of unlawful evidence takes place through the nullity sanction*, the relevant provisions being set out under articles 170-174 of the French Code of Criminal Procedure[31], entitled "*Des nullités de l'information*", representing the equivalent of the exclusionary rules in the Anglo-Saxon law[32].

Thus, according to article 170 of the French Code of Criminal Procedure, throughout the investigation, the investigation chamber may be referred for the annulment of a procedure act by the investigating judge, by the prosecutor, by the parties or by an assisted witness.

Under article 171 of the same Code it is provided that the nullity sanction intervenes when the breach of an essential procedural condition has interfered with the parties' interests it concerns. The party in respect of whom the breach of an essential procedural condition has occurred may waive the invoking thereof and, consequently, cover the irregularity; the waiver must be explicit and made in the presence of an attorney or where the latter has been duly summoned (art. 172).

In accordance with the provisions set out under article 173 paragraph 5 of the French Criminal Procedure Code, one of the rulings that may be rendered within the investigating chamber is to find the application inadmissible, by an unappealable order, for the reasons pursuant to this legal text or for the lack of providing reasoning thereof, in which case the file is returned to the investigating judge, and, in other cases, it is transmitted to the general prosecutor.

Article 174 of the French Criminal Procedure Code states that, when the investigating chamber is referred, pursuant to the provisions set out under the previous article, all grounds for nullity transmitted to it must be invoked, without prejudice to the possibility of their being invoked *ex officio*. Should the parties fail to comply with this condition, they will no longer be able to invoke them, except for the case when these grounds could not have been known. The investigating chamber shall decide whether the annulment must aim all vitiated procedural acts, be limited to a part thereof or extend to all or part of the subsequent proceedings. The annulled acts are withdrawn from the investigation file and kept with the registrar of the court of appeal (by contrast, in the Romanian proceedings, the annulled

[26] Sabine Gless, "Truth or Due Process? The Use of Illegally Gathered Evidence in the Criminal Trial – Germany" (January 19, 2010): 2-3, http://ssrn.com/abstract=1743530.

[27] Gless, "Truth or Due Process? The Use of Illegally Gathered Evidence in the Criminal Trial – Germany", 3-4.

[28] Gless, "Truth or Due Process? The Use of Illegally Gathered Evidence in the Criminal Trial – Germany", 4-6.

[29] "Exclusionary Rule", IBJ Criminal Defense Wiki, http://defensewiki.ibj.org/index.php/Exclusionary_Rule#Germany.

[30] Krongold, "A Comparative Perspective on the Exclusion of Relevant Evidence: Common Law and Civil Law Jurisdictions", 131-132.

[31] The full text of the French Code of Criminal Procedure (consolidated version until March 2, 2017) is available online at: https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006071154&dateTexte=20170320.

[32] Karim. A. A. Khan, Caroline Buisman, Christopher Gosnell, eds., *Principles of Evidence in International Criminal Justice* (New York: Oxford University Press, 2010): 73.

acts or excluded evidence are not physically removed from the file). As regards the partially annulled acts, prior to the annulment, a certified true copy thereof is drawn-up and kept with the registrar of the court of appeal. Any drawing of information against the parties of the annulled instruments or procedural documents or parts thereof is prohibited, under penalty of disciplinary action brought against the attorneys or magistrates.

4. Milestones for Interpreting Evidence Law as Set Out in the Relevant Case-Law of the European Court of Human Rights

The case-law of the European Court of Human Rights in matters of evidence law is extremely vast, the decisions rendered thereby addressing various issues relating to the exclusion of evidence, such as evidence obtained in the following circumstances: by applying torture or by way of inhuman or degrading treatment, as a result of entrapment, deception or constraint exercised by state authorities, by means of wiretapping and other technical covert surveillance methods, by a *de facto* hearing of suspects not in the custody of the judicial body, or by using undercover investigators or informers[33].

As highlighted by the European Court of Human Rights, although the provisions of the European Convention of Human Rights guarantees the right to a fair trial in article 6, it does not cover the admissibility of evidence as such, which is a matter that first and foremost belongs to the national law, so the Court shall not be able to exclude the admissibility of evidence adduced in breach of the national law[34]. This interpretation reflects *the principle of subsidiarity*, preventing the Court from acting as a "court of fourth instance"[35].

Therefore, the role of the Court is to determine whether the proceedings as a whole, including the way in which the evidence was obtained, were fair and, in this process, special consideration must be given to the manner in which the rights of the defence were respected, particularly to assess whether the applicant was given the opportunity to challenge the authenticity of the evidence and to oppose its use. Another relevant factor is the quality of the evidence, by determining whether the circumstances in which it was obtained cast any doubt on its reliability or accuracy[36].

If a conviction ruling rendered in the national law is mostly based upon evidence obtained in breach of the principles enclosed in article 6, it results that the proceedings as a whole are considered unfair. Nevertheless, as a rule, the national courts' taking into consideration of evidence obtained by breach of another article of the Convention (e.g. article 8) does not automatically hinder the fair nature of the proceedings as per article 6 of the Convention[37], except for the evidence obtained in serious violation of one of the absolute rights, such as article 3, which shall raise issues of fairness at all times, even if that piece of evidence was not decisive in the rendering of the conviction[38].

5. The Treatment of Evidence in the Context of EU Judicial and Police Cooperation in Criminal Matters

As reported in the literature, the cultural differences between the adversarial and inquisitorial models constitute a major impediment to the development of the criminal law of the European Union, both from the substantial and from the procedural perspective. In the Euro-skeptical circles, especially in the British environment, there have been fears that a uniform system of criminal justice based on the inquisitorial tradition may be imposed, which would prove significantly flawed as far as the guarantees of ensuring a fair trial acknowledged under the adversarial model are concerned, by ignoring that, within the Union, the modern criminal proceedings of each Member State encompass elements belonging to both legal traditions. Although it is relatively premature to speak of a European criminal procedure, it cannot be denied that the EU law has a deep influence on the regulations of the national legal systems, including over the evidence law[39].

According to Article 82 paragraph 1 of the Treaty on the Functioning of the European Union (TFEU)[40], judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 of Article 82 – mutual admissibility of evidence between Member States, the rights of individuals in criminal procedure, the rights of victims of crime, and any other specific aspects of criminal procedure which the Council has identified in advance by a decision – as well as in Article 83, referring to minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with

[33] John. D. Jackson and Sarah J. Summers, *The Internationalisation of Criminal Evidence. Beyond the Common Law and Civil Law Traditions* (Cambridge: Cambridge University Press, 2012): 158 et seq.

[34] ECHR, *Dumitru Popescu v. Romania no. 2*, decision of April 26, 2007, paragraph 106, published in the Official Journal of Romania no. 830 of December 5, 2007.

[35] Dovydas Vitkauskas and Grigoriy Dikov, *Protecting the Right to a Fair Trial under the European Convention on Human Rights* (Strasbourg: Council of Europe, 2012): 72, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007ff57.

[36] ECHR, *Beraru c. Romania*, decision of March 18, 2014, paragraphs 74-75, available at: http://hudoc.echr.coe.int.

[37] Dovydas Vitkauskas and Grigoriy Dikov, Protecting the Right to a Fair Trial under the European Convention on Human Rights, 71-72.

[38] ECHR, *Cēsnieks c. Latvia*, decision of February 11, 2014, paragraph 65, available at: http://hudoc.echr.coe.int.

[39] Catherine Barnard and Steve Peers, eds., *European Union Law* (Oxford: Oxford University Press, 2014): 754-755.

[40] Published in the Official Journal of the European Union no. C 202 of June 7, 2016.

a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

Regarding the provisions set out under Article 82 paragraph 2 of the TFEU, it is mentioned that, to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules with respect to the aforementioned areas and that such rules shall take into account the differences between the legal traditions and systems of the Member States. Moreover, the adoption of these minimum rules shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.

The provisions pertaining to police cooperation set out under article 87 et seq. TFEU, which involve all the Member States' competent authorities, including the police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences imply, among other aspects, the establishing of measures concerning the collection, storage, processing, analysis and exchange of relevant information as well as common investigative techniques in relation to the detection of serious forms of organised crime.

6. The Exclusion of Evidence according to the Romanian Criminal Procedure Law

In Romania, the relevant provisions that regulate the exclusion of evidence are essentially contained in article 102 of the New Criminal Procedure Code, in force as of February 2014, consisting of four paragraphs, with the following content:

Firstly, as a reflection of the absolute right enshrined under article 3 of the European Convention of human Rights and the standards of protection developed by the Court in Strasbourg[41], it is stated in an unconditional manner that the evidence obtained by way of torture as well as the evidence deriving therefrom cannot be used within the criminal proceedings.

Secondly, the legal text further states that the evidence obtained unlawfully cannot be used within the criminal proceedings.

In this context, one of the most visible and controversial issues of law has been determined by a decision rendered by the Constitutional Court[42] relating to the covert surveillance techniques, whereby it has been found that the phrase allowing the enforcement of such techniques by "other specialised body" was unconstitutional. The legal text concerned thereby – article 142 paragraph (1) of the Criminal Procedure Code – has been since amended. But, as of this decision, the courts have witnessed a wave of pleas, submitted throughout all stages of the proceedings, requesting the exclusion of evidence thus obtained, the vast majority of them being dismissed either in first instance or before the review courts on different grounds, starting from the inadmissibility of exclusion in the stages of the proceedings exceeding the preliminary chamber to the inability to prove any procedural harm caused by such potential violation that would justify the application of the relative nullity rules, etc.

The concept of *unlawfully* obtained evidence, by means of a broader interpretation[43], also comprises the evidence adduced in breach of *the principle of loyalty* governing the evidence law, enshrined under article 101 of the Criminal Procedure Code, forbidding the use of coercive means or incentives, of hearing methods or techniques affecting a person's capacity of remembering and consciously and voluntarily recounting the facts, or of provocation in order to obtain evidence. As shown in the relevant national case-law[44], the loyalty principle, deriving from the right to a fair trial, implies a form of "judicial morality" of the criminal prosecution body in the activity of evidence adduction, there existing *a presumption in favour of the good-faith of the judicial body* (similar to the common-law view on the matter), which can only be overturned by indicating some elements of proof regarding the application of one of the situations falling within the scope of article 101 of the Criminal Procedure Code.

Thirdly, the nullity of the act whereby the adduction of evidence was ordered or authorised or whereby the evidence has been adduced determines the exclusion of the evidence. By explicitly referring to the nullity sanction, this provision shows that the legal design of regulating the exclusion of evidence cannot be separated from that of nullities. Although, initially, some scholars or even legal practitioners were tempted to promote the theory of a clear-cut dividing line between the two sanctions, this controversy has been put to rest by the Constitutional Court of Romania. Thus, by Decision no. 383/2015[45], the Court has established that the sanction provided for under paragraph (3) of article 102 mandatorily requires the application of the nullity rules, either absolute or relative, as the case may be, pursuant to articles 280-282 of the Criminal Procedure Code.

Finally, as explained in the Memorandum accompanying the Project of the New Criminal Procedure Code, the last paragraph of article 102

[41] "Guide on Article 6 of the European Convention on Human Rights. Right to a Fair Trial (Criminal Limb)", Council of Europe, the European Court of Human Rights (2014): 26, http://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf.

[42] Decision no. 51/2016, published in the Official Journal of Romania no. 190 of March 14, 2016.

[43] Nicolae Volonciu and Andreea Simona Uzlău, coord., *Noul Cod de procedură penală comentat* (București: Hamangiu, 2014): 238.

[44] The Cluj Court of Appeal, the Criminal and Minor-Related Division, rulings no. 86 and no. 88 of April 12, 2016, available at: www.rolii.ro.

[45] Published in the Official Journal of Romania no. 535 of July 17, 2015.

transposes the "fruit of the poisonous tree" doctrine, providing that the derived evidence is excluded should it be directly obtained from the unlawfully obtained evidence and if it could not have been gained otherwise. For instance, in a case put forward in the literature[46], the preliminary chamber judge ruled on the exclusion of a witness statement made by a person that has later been turned into a defendant in the same file, and, by finding that all other evidence – with the exception of a couple of witness statements – were directly connected to this statement excluded as a result of it being deemed a disloyal practice, they have also been invalidated due to the extensive effect of nullities (it must be mentioned, though, that this view is not unitary among the judicial body).

Diachronically speaking, prior to the regulation currently in force, there has been no well-established tradition of excluding evidence in the Romanian legislation, as the previous national regulation of criminal proceedings, pursuant to article 64 paragraph (2) of the 1968 Criminal Procedure Code, inserted by Law no. 281/2003, provided solely for a broad principle of exclusion, namely that the evidentiary means obtained unlawfully cannot be used within the criminal proceedings. At the time, some commentators[47] criticised this legislative solution, arguing that this input, inspired from the common-law tradition, had been poorly integrated into the Romanian regulation, in an oversimplified manner, lacking an adequate procedural mechanism of invalidating evidentiary means which were unlawfully or disloyally adduced. This is exactly what the new legislation brought forth.

The Government Decision no. 829/2007 for the approval of the preliminary theses of the Criminal Procedure Code project provided that, with respect to the general rules of evidence, the following proposal is addressed: to consolidate the regulation of excluding unlawful evidence, a specific sanction in matters of evidence law whereby the most powerful guarantee of complying with the legal provisions is ensured. With this aim in view, a clear regulation of the exclusionary mechanism was being pursued, having a twofold preoccupation, namely the establishment of the application conditions and the application procedure in each phase of the criminal proceedings. There is also mention made to the exclusion of evidence deriving from the unlawfully obtained evidence, when they are closely dependent on the main pieces of evidence.

Subsequently, in the Explanatory Memorandum accompanying the Project of the New Criminal Procedure Code, the exclusion of evidence has been described as being taken over from the common-law tradition as well as by considering the relevant case-law of the European Court of Human Rights.

Furthermore, the Memorandum mentioned the appropriation into national law of *the theory of legitimacy*, which places the focus on the long-term public impact of the judicial decision-making process or on the moral value of the judicial rulings, which implies that a possible conviction judgment based on unlawfully obtained evidence would undermine the status of the court as this would mean that it simultaneously tolerated and sanctioned the breach of law – a certain balance being necessary in this respect, considering that not all violations of the legal provisions determine the exclusion of evidence[48].

In the course of the three years run as of implementing the reforming provisions regarding the criminal justice system, the judicial body has addressed the issues pertaining to the exclusionary rules in a variety of cases, especially within the preliminary chamber phase.

7. Conclusions

By adopting the New Romanian Criminal Procedure Code, numerous adversarial elements, representative of the Anglo-American legal paradigm, have been inserted in the national legislation, including with respect to evidence law, but, as far as the exclusion of evidence is concerned, the lawmakers' preference for a mixed procedural design can be clearly observed, as it is not completely separated from the classical regulation of nullities, which generally applies to the continental legal systems. Although this latter approach lacks, in some respects, the flexibility and dynamism of the adversarial proceedings, it has the merit of conferring certain coherence to the regulation, thus avoiding the inadequate impact of these proceedings in practice. All things considered, the exclusion of evidence under the national legislation is undoubtedly a living and evolving procedural institution.

At the same time, it is appropriate to emphasise that, beyond any shadow of a doubt, the exclusion of evidence cannot be conceived outside the framework of the guarantees enshrined in the relevant case-law of the European Court of Human Rights and, at the EU level, the principle of mutual recognition and the harmonisation of the legislation with regard to judicial and police cooperation in criminal matters imply common procedural standards by progressively attenuating the legal and jurisprudential differences among the national legal systems.

[46] Cătălin Lungănașu, "Din nou despre camera preliminară: posibila neconstituționalitate a dispozițiilor art. 346 alin. (4) CPP", July 4, 2016, https://www.juridice.ro/453425/din-nou-despre-camera-preliminara-posibila-neconstitutionalitate-a-dispozitiilor-art-346-alin-4-cpp.html.

[47] Gheorghiță Mateuț and Diana Ionescu, "Inadmisibilitatea utilizării ca mijloc de probă în procesul penal a proceselor verbale și a actelor de constatare obținute în procedurile administrative de control", *Caiete de drept penal* 1 (2005): 23, quoted in Mihail Udroiu and Ovidiu Predescu, *Protecția europeană a drepturilor omului și procesul penal român. Tratat* (București: C.H. Beck, 2008): 792.

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THEORETICAL AND PRACTICAL CONSIDERATIONS REGARDING THE PROCEDURE OF PRELIMINARY CHAMBER

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Abstract

The paper addresses from the theoretical point of view, but also taking into consideration some practical references, one of the most controversial procedures covered by the Code of Criminal Procedure in force - namely the procedure of preliminary chamber. The study notes that since the entry into force of new criminal legislation and until its writing, this procedural stage has undergone many modifications and adjustments, in particular through the unconstitutionality decisions it invokes and analyses briefly. At the same time, issues of judicial practice resulting from the recent jurisprudence of the national courts facing different problems caused by the causes brought to their attention are also discussed.

Keywords: *criminal trial; Preliminary Chamber; the lawfulness of the conduct of criminal prosecution acts; the object of the preliminary chamber.*

1. Introduction

Animated by the desire to have more celerity in the progress of the Romanian criminal trial, the legislator wanted to speed up its various procedural stages or phases through some of the new institutions included in the Code of Criminal Procedure that came into force on February 1st, 2014. Among the institutions through which this objective would have been achieved is also the procedure of preliminary chamber. In the very explanatory statement accompanying the draft of the new Code of Criminal Procedure, it is stated that "through the institution of the preliminary chamber, the project aims to meet the requirements of legality, celerity and fairness of the criminal process"[1]. The same document presents the preliminary chamber as a "new, innovative institution, which aims at creating a modern legislative framework that would remove the excessive length of proceedings in the trial phase."

At the same time, the stated purpose of regulating this procedure is to "resolve the issues of the lawfulness of the referral and of the lawfulness of the administration of the evidence, ensuring the premises for the speedy resolution of the case". The authors of the explanatory memorandum are even convinced that by regulating the procedure of preliminary chamber: "some of the deficiencies that led to the conviction of Romania by the European Court of Human Rights for violating the excessive length of the criminal trial are eliminated."

The Explanatory Memorandum foresees that it will: "have a direct, positive effect on the speedy resolution of a criminal case" ... by the fact that "the project aims to meet the objective of improving the quality of the act of justice, through punctual regulation, both in terms of the term (maximum 30 days from the registration of the case and not less than 10 days from the same date) in which the preliminary judge of the case is ruling, as well as under the conditions in which he orders the commencement of the judicial inquiry".

As presented, the institution of the Preliminary Chamber offered special positive perspectives on the effects it would have on the pace of the criminal proceedings, implicitly on the duration the criminal trial was going to have under the new Code for Criminal Procedure. However, animated by the desire to have more celerity in the progress of the criminal trial (at any cost we might say), the authors of the new Code for Criminal Procedure have failed to create safeguards to preserve some categories of human rights consecrated at the international level.

As it stands, the doctrine noted that, in order to ensure the celerity expected in the field of the preliminary chamber, the legislator provided a maximum period for the implementation of this stage, it determined that its specific aspects are solved in the council chamber (meaning in the non-public sittings) without the participation of the prosecutor and the parties, the conduct of the procedure taking a predominantly written form[2]. In the same way, we even showed immediately after the entry into force of the new Code for Criminal Procedure that there are some problems regarding how the procedure for preliminary chamber was regulated in this new Code. In particular, we have shown that precisely one of the features characterizing it - the preponderantly written character - casts doubt on the real and effective contradictory (controversial) feature, since neither the

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[1] https://www.senat.ro/legis/PDF/2013/13L010EM.pdf.

[2] B. Micu, AG Paun, R. Slăvoiu, Criminal Procedure, Hamangiu Publishing House, Bucharest, 2014, page 224.

defendant nor the prosecutor have the opportunity to express their views directly before the judge[3].

Given this backdrop of criticisms brought by doctrine and by the judicial practice as well, it came to the situation where the texts governing the procedure for preliminary chamber were subject to constitutional control, and many of them were identified as being in contradiction with the principles enshrined in the Constitution or with internationally accepted standards in the field of human rights protection[4].

Synthetically, the Constitutional Court noted that the rule governing the procedure for the preliminary chamber procedure: a violation of the principle of equality of arms[5] - by that that it provided the prosecutor's exclusive access to the claims and exceptions made by the defendant; by not communicating to the other parties the claims and the exceptions made and by excluding from the course of the procedure for the preliminary chamber the civilly responsible party, the injured party and the civil party. In the same way, the Constitutional Court found a violation of the contradictory (controversial) and oral principles, the proceedings being conducted exclusively based on the documents filed by the parties without summoning them, as well as an obvious breach of the rights of defence by not allowing to administrate other evidence beside the documentary evidence. Equally, the restriction of the prosecutor's participation in the proceedings of the preliminary chamber was deemed to be in breach of the provisions of article 131 of the Romanian Constitution.

In this way, the whole philosophy of the organization and functioning of the preliminary chamber procedure was forced to be rethought and put on the benchmarks that the Constitutional Court set out. This approach was made by the legislator, through the Government Emergency Ordinance no. 82/2014 for the amendment and the completion of the Law no. 135/2010 on the Code of Criminal Procedure[6], respectively, of the Law no. 75/2016 for the approval of the above-mentioned Emergency Ordinance[7]. Therefore, comparing to the initial characteristics, the preliminary chamber appears as radically modified.

The doctrine noted that through the Decision no. 641/2014 of the Constitutional Court the preliminary chamber procedure has radically changed, being much closer to the ECHR's view of a criminal proceedings before a judge, even if it does not end with a ruling on the substance of the criminal charge. In this context, the quoted author characterizes the modification operated by the Law no. 75/2016 on the preliminary chamber procedure as a step forward in the attempt to transform it into a fair procedure[8].

2. About the current regulation of the preliminary procedure for the chamber

Regarding the preliminary chamber procedure, it is appreciated, in some opinions, that it does not have the nature of a distinct procedural phase for the following arguments: the judicial function it involves does not refer to the merits of the case, it does not have the capacity to stop by itself the criminal trial, it only has an intermediate character, it does not have the nature and the size of a procedural phase[9] .

Differently, in other opinions, it is considered that the preliminary chamber procedure is a "new phase of the criminal trial (and not a procedural phase of the trial phase) in which the judge sitting in the preliminary chamber achieves a precisely determined objective, namely, he analyses the lawfulness of the administration of the rules of evidence, of the court's referral through the indictment and of the acts performed by the criminal prosecution bodies, thus preparing the next stage of the criminal trial, that of the trial in order to achieve the purpose of the criminal trial"[10].

We agree with the first of the two opinions expressed, the fundamental argument that makes us accept this solution lies in the fact that, in such a procedure, one cannot reach a solution that will lead to the conclusion of that case. Evidence in this respect is that even if the death of the defendant occurs between the time of the indictment and the completion of the procedure of the preliminary chamber, the judge sitting in the preliminary chamber cannot rule on the merits of the case but he would be bound to order that the deceased is to be arraigned.

Following the changes made to the preliminary chamber procedure by the two above-mentioned normative acts, the doctrine notes that others are currently the characteristics of the preliminary chamber stage. It is appreciated that the decision of the Constitutional Court overturned the characters initially imagined by the legislator for the preliminary

[3] B. Micu, AG Paun, R. Slăvoiu, op. cit. 2014, pages 224-225.

[4] See the decisions of the Constitutional Court on the texts governing the institution of the preliminary chamber: e.g. Decision no. 461/2014 (published in the Official Gazette of Romania, Part I , No. 887 of December 5th, 2014), Decision no. 663 of November 11th, 2014, published in the Official Gazette of Romania, Part I, no. 52 of January 22nd , 2015; Decision no. 552 of July 16th, 2015 , published in the Official Gazette of Romania, Part I, no. 707 of September 21st, 2015; Decision no. 631 of October 8th, 2015 , published in the Official Gazette of Romania, Part I, no. 831 of November 6th, 2015;

[5] To this end, see I. Neagu, M. Damaschin, Treaty of Criminal Procedure, Special Part, Universul Juridic Publishing House, Bucharest, 2015, pages 209-210.

[6] Published in the Official Gazette of Romania, Part I, no. 911 of December 15th, 2015.

[7] Published in the Official Gazette of Romania, Part I, no. 334 of 29 April 2016.

[8] A.D. Băncilă, The Preliminary Chamber after the Decision no. 641/2014 of the Constitutional Court and the Law no.75/2016. New features of the procedure and practical consequences, in Dreptul Magazine no. 9/2016, page 27-28.

[9] A. Zarafiu, Criminal Procedure. General Part and Special Part, CH Beck Publishing House, Bucharest, 2014, page 341.

[10] M. Udroiu, Criminal Procedure, Special Part, CH Beck Publishing House, Bucharest, 2014, page 110-111.

chamber procedure, which made it transformed from a procedure carried out without the participation of the prosecutor, parties and the injured person, with a limited controversial feature between the prosecutor and the defendant and preponderantly written into a procedure conducted with the participation of the procedural actors, completely contradictory and oral in which becomes possible to administer evidence[11].

In another opinion, criticism is made regarding the legislative changes introduced by the Law no. 75/2016, considering that although this normative act should have come under the Constitutional Court's Decisions, the especially Decision no. 641/2014, "quite surprisingly, the legislator did not understand the essence of the Court's reasoning and was not receptive to the judicial practice and to the opinions of the experts drafted after the Decision no.641". Thus, "by misinterpreting the principles of contradiction and the right to an oral hearing before the court, the Law no. 75/2016 returns practically in time, where we were before the Court's decision from November 11th, 2014, on the realm of the non-controversial procedure and of the decisions taken without summoning"[12].

It is particularly criticized that the Law no. 75/2016 amended article 346 paragraph (1) from the Code for Criminal Procedure, which regulates the situation of the passivity of the parties in submitting requests or *exceptions, stipulating that:* "If no requests and exceptions have been formulated within the terms provided for in article 344 paragraphs (2) and (3), nor any objections were raised *ex officio*, upon the expiry of these time-limits, the judge sitting in the preliminary chamber shall declare the lawfulness of the court referral, of the administration of the evidences and of the execution of the criminal prosecution and ***orders the commencement of the trial***. The judge sitting in the Preliminary Chamber shall pronounce his findings in the council chamber, ***without summoning the parties and the injured person and without the participation of the prosecutor, by resolution***, which shall be immediately communicated to them." It is considered that this new regulation is practically a regrettable return to the non-controversial character of the preliminary chamber, as it was before the constitutional court remedied it[13]. The arguments invoked for the support of that assertion are in the sense that the presumption that a party to the criminal proceedings which has not complied with the time-limit granted by the court does not wish to invoke personal procedural nullity before it is lacking legal support. However, we believe that legal support is given by the criticized provision itself, which clarifies a doctrinal dispute generated by the regulatory framework governing the preliminary chamber procedure.

The controversy concerns the legal nature of the term of at least 20 days provided by article 344 paragraph (2) Code for Criminal Procedure, in which requests and exceptions may be formulated on matters which may form the subject-matter of the preliminary chamber. In the doctrine, it was appreciated, first, that this term is a forfeiture term, which makes the requests and the exceptions filed after its passing to be ignored by the judge, being a legal term[14]. Differently, it is considered that the term is not a forfeiture term, but a recommendation, being a judicial one[15].

We believe, however, that given the manner in which the Preliminary Chamber procedure is currently governed, the term of at least 20 days (which may be increased by reference to the complexity of the case) has acquired a clear forfeiture character. In the same sense, in the judicial practice[16] it was appreciated that from the systematic interpretation of the provisions forming the legal framework relating to the procedure of preliminary chamber it results that the legislator has established in this field two types of procedural deadlines with distinct effects:

- An imperative procedural term, absolutely and indissolubly linked to the exercise of the procedural right of the parties or the injured person to formulate requests and exceptions regarding the lawfulness of the complaint, the lawfulness of the administration of evidence or the execution of criminal prosecution acts (this category is considered to circumscribe as well the term provided for in article 345 paragraph (3) from the Code for Criminal Procedure, whose non-compliance by the prosecutor has the binding effect of restitution of the case, according to article 346 paragraph 3 letter c) from the Code for Criminal Procedure)
- A procedural term of recommendation, relative, fixed by the judge sitting in the preliminary chamber for the handling of applications and exceptions, the non-observance of which does not affect the legality of the act performed.

The terms provided by article 342 paragraphs (2) and (3) have the role of disciplining the activities in the preliminary chamber and giving this procedure the speed needed to achieve its purpose. In that context, in the case-law, it is justly appreciated, in our opinion, by reference to how the procedure for preliminary

[11] A.D. Băncilă, op. cit., page 28.

[12] A. Stan, The Preliminary Chamber and the new legislative amendments - short critical observations. How we return from where we left, available at: https://www.juridice.ro/444627/camera-preliminara-si-noile-modificari-legislative-scurte-observatii-critice-cum-ne-intoarcem-de-unde-am-plecat.html.

[13] Idem.

[14] Corina Voicu, Daniel Atasiei, in the *New Code of Criminal Procedure,* coordinated by Nicolae Volonciu, Andreea Simona Uzlau, Hamangiu Publishing House, Bucharest, 2014, page 890.

[15] Mihail Udroiu, *Criminal Procedure, Special Part,* CH Beck Publishing House, 2015, pages 129-130 and Irina Kuglay, in *The Code for Criminal Procedure – Comments on articles,* coordinator Mihail Udroiu, CH Beck Publishing House, 2015, page 912.

[16] ICCJ, Criminal Section, Resolution no.922 / 05.10.2016, unpublished.

chamber is currently regulated, that the term regulated by article 342 paragraph (2) Code for Criminal Procedure has a forfeiture character, which means that the failure to formulate requests and exceptions within this term generates the sanction of forfeiture of the right to formulate them after its expiration. Even in the event of formulating them after that time, the judge sitting in the Preliminary Chamber judge should ascertain the delay in invoking the claims or the exceptions.

While we accept that this is the possible legal solution by reference to the current regulatory framework, we believe that it is susceptible to unconstitutionality itself. Any provision that would have the role of disciplining the conduct of the preliminary chamber procedure cannot lead to solutions that would violate a person's right of access to justice (governed by article 21 of the Romanian Constitution), and which would not allow the establishment with clarity of the object and boundaries of the judgment by reference to the case with which the court is vested. The way in which the procedure for preliminary chamber is currently governed can lead to this negative solution, especially by referring to the fact that the possibility for the court to invoke ex officio requests and exceptions is limited to absolute nullity. In the same sense, it is clear from the case-law that: "... in relation to the content of the provisions of article 282 paragraph 2 Code for Criminal Procedure, the judge sitting in the preliminary chamber cannot, of its own motion, invoke violations of the law which are punishable by relative nullity … As a rule, the judge sitting in the preliminary chamber may censor ... the legality of the evidence and the acts of the criminal prosecution only to the extent that they have been challenged by the parties and, by way of exception, ex officio, under the limitative and restrictive conditions foreseen in article 281 paragraph 1-4 Code for Criminal procedure, regarding the absolute nullities"[17].

A further negative aspect of the way the preliminary chamber procedure is regulated is the limitation of the type of evidence that can be administrated in the preliminary chamber procedure - an aspect that violates the principle of finding out the truth. We take into consideration the provisions of article 345 paragraph (1) Code for Criminal procedure, in accordance with which "... the judge sitting in the preliminary chamber shall settle the requests and the exceptions formulated or the exceptions raised ex officio, in the council chamber, on the basis of the works and the material in the criminal investigation file and any other new documentary evidence being presented, listening to the conclusions of the parties and of the injured party, if present, as well as of the prosecutor." It is noted that the only new evidence that can be administrated in the preliminary chamber is the documentary evidence, although such a limitation does not result from the findings of the Constitutional Court. By the way the text is formulated in the new regulation, situations can may appear where this limitation may lead to the fact where the judge sitting in the preliminary chamber cannot administer evidence (for example, he cannot hear witnesses), issue that leads to the impossibility to determine whether an evidence has been unlawfully or unfairly administrated during the prosecution. Such an impossibility to establish the illegality of the evidence makes it impossible to exclude it from the evidence at the end of the procedure for the preliminary chamber, and after that moment the sanction of exclusion is no longer accepted by the legislator. Thus, determined by the impossibility of finding out the truth about the illegitimate or unfair character of an evidence administered during the criminal prosecution, renders the evidence impossible to be removed from the evidentiary material. We believe that the regulatory solution needs to be reconsidered as it is not in line with the constitutional principles.

3. About the subject-matter of the preliminary camera

Under the article 342 Code for Criminal Procedure, "the subject-matter of the preliminary chamber procedure is the examination, after the indictment, of the jurisdiction and the lawfulness of the court's referral, as well as the verification of the lawfulness of the administration of evidence and the execution of the acts by the criminal prosecution bodies". The doctrine states that the subject-matter of the preliminary chamber procedure is to verify certain aspects: the jurisdiction of the court, the lawfulness (not the merits) of the court's referral, the lawfulness of the administration of evidence by the criminal investigation body, the lawfulness of the criminal prosecution[18].

Similarly, it is considered as purpose of the preliminary chamber procedure to check: the jurisdiction of the court, the competence of the criminal investigation bodies, the lawfulness of the court's referral and the lawfulness of the deed of intimation, the legality and the loyalty of the administration of evidence and the lawfulness of the procedural or procedural acts[19] .

It has been shown in the case-law that the examination of the judge sitting in the preliminary chamber is limited, by the legislator's will, to issues of law which are circumscribed to the requirements related to the form and content of the procedural documents, their concordance with the procedural acts which they incorporate or the legal pertinent provisions in the criminal prosecution phase,

[17] ICCJ, Criminal Section, Resolution no.922 / 05.10.2016, unpublished.
[18] A. Zarafiu, op. cit., page 341.
[19] M. Udroiu, op. cit., page 115.

characteristics that inevitably imply a formal character of this examination[20]. This examination is one that involves assessing the evidence from the sole perspective of legality or, as the case may be, of the loyalty of the administration of evidence, and does not aim at analysing the appropriateness of their administration.

4. Some aspects of judicial practice regarding the subject of the preliminary camera procedure

Given the fact that it is a new institution, the procedure for the preliminary chamber has recorded sufficient issues on which the case-law registers different findings or from which it results that the subject-matter of the preliminary chamber was not correctly understood.

Thus, it has been shown in the case-law that the following are criticisms of the merits of the case and cannot be assessed in the Preliminary Chamber: the requests and the exceptions concerning the incidence of a case preventing the initiation of the criminal proceedings, the lack of foreseeability of the legal, incrimination norm, the succession in time of the legal provisions in the field, the failure to assemble the constitutive elements of the offense or the wrong qualification of the active subject of the offense[21].

Regarding also the issues that cannot constitute the subject of the procedure of the preliminary chamber, it is stated in a decision of a case that "unfortunately, in our opinion, in the current regulation, the judge sitting in a preliminary chamber is not allowed to administer evidence to prove the disloyalty of the administration of some evidence in the criminal prosecution phase and, as such, the issues raised by chosen lawyer of the defendant BE cannot be verified by the judge sitting in the preliminary chamber"[22].

Similarly, it has been shown that "to statue, even only tangentially, over the *convincing* character of the description of the subjective aspect of the offense or over its ability to subsume the constitutive element of the offense ... is equivalent to dealing with issues that are essentially about the merits of the case, whose analysis clearly outweighs the subject and limits of the pending procedure"[23] (namely of the procedure for the preliminary chamber – author's note B.M.).

In a concrete situation, the judge sitting in the preliminary chamber excluded from the evidentiary material administered during the criminal investigation phase the witness statement given by the defendant's lawyer. In order to do so, from the documents and papers existing in the criminal investigation file, the judge found that Mrs. Ş.D. had no prior express and written permission from the defendant S.G., which is why the criminal investigation bodies could not hear her as a witness, being thus violated the provisions of article 116 paragraphs 3 and 4 from the Code of Criminal Procedure[24] .

Similarly, the judge sitting in the preliminary chamber observed that the criminal investigating authorities had heard the persons suspected of committing offenses under the criminal law, before ordering the continuation of their prosecution, as foreseen by the provisions of article 305 paragraph (3) of the Code of Criminal Procedure, before informing the persons concerned persons that they have acquired the status of suspect, before informing them of the facts for which they are investigated, their legal qualification as well as their rights provided for by article 83 of the Code of Criminal Procedure. For this reason, it was appreciated that the criminal investigation bodies disregarded the legal provisions meant to ensure the observance of the right to defence and to a fair trial, and, justly, the first instance found to be incident the case of the relative nullity provided by article 282 paragraph 1 of the Code of Criminal Procedure, which leads to the cancellation of the minutes, since the harm to the defendants cannot be eliminated otherwise, being thus excluded from the evidentiary material of the case[25].

5. Conclusion

The procedure for the preliminary chamber is, in the Romanian legislation, still in search of the place it has, but also of the balance that it must ensure between the need to speed up its course and to reduce the costs of justice on the one hand and the necessity to ensure the respect of the right to a fair trial for all those who have an interest in the criminal proceedings. Marked by findings of unconstitutionality and legislative adjustments, the procedure of the preliminary chamber is still susceptible to findings of new contradictions between the principles of the Constitution and the way it guarantees the fairness of the procedure.

[20] ICCJ, Criminal Section, Resolution no.922 / 05.10.2016, unpublished.

[21] ICCJ, Criminal Section, Resolution 20/2014, quoted in M. Udroiu, op. cit., pages 116-117.

[22] Court of Appeal Cluj, Resolution from February 26th, 2015, analysed extensively at: https://www.juridice.ro/380093/curtea-de-apel-cluj-camera-preliminara-elemente-de-nulitate-a-urmaririi-penale-si-inlaturarea-constatarii-tehnico-stiintifice.html.

[23] ICCJ, Criminal Section, Resolution no.922 / 05.10.2016, unpublished.

[24] Liesti Court of First Instance, Resolution of 05.05.2015, available at http://legeaz.net/spete-penal/verificarea-legalitatii-sesizarii-instantei-a-2015legalitatii-sesizarii-instantei-a-2015.

[25] Galaţi Court of Appeal, Resolution form December 22nd, 2015, available at http://www.jurisprudenta.com/jurisprudenta/speta-bzj81hp/.

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CRIME OF MONEY LAUNDERING REFLECTED IN THE RECENT MANDATORY JURISPRUDENCE OF THE HIGH COURT OF CASSATION AND JUSTICE

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Abstract

This study represents an in-depth analysis of the rulings of the High Court of Cassation and Justice, by the Panel for clarifying certain legal issues. In actuality, it is about the way in which the Supreme Court ruled when issuing such a decision, respectively the Decision no. 16/2016, the conclusions reached being explained and sometimes criticized. In addition, the study identifies other aspects that receive different classification solutions in the judicial practice, which generates a non-unitary practice in criminal matters.

Keywords: *money laundering, multiple crimes, multiple regulations, the author of the predicate crime*

1. Introduction

We can observe, in a study presented on a similar occasion[1], the history of the definition of the money laundering crime in the Romanian criminal legislation, reaching the conclusion that it appeared in the Romanian legal provisions after our country ratified the Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds from crime of 1990[2], European Union Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, as well as the Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and proceeds of crime (2001/500/JAI)[3].

Under the influence of these regulations, the Law no. 21/1999 on the prevention and punishment of money laundering[4] was adopted in the Romanian legislation, which was subsequently repealed and replaced by the Law no. 656/2002[5]. Article 29 (after the republication) of the new law defines the crime of money laundering and this incrimination text, even after 15 years of activity, is far from being protected against controversies and difficulties in its application.

2. In the study mentioned above, we can note that, among the practical application difficulties of the incrimination regulation from Article 29 of the Law no. 656/2002, are the following: the difficulty to set out the crime of money laundering from the crimes of concealment and abetment in crime already existing in the Criminal Code; another practical difficulty is answering to the question if the active subject of the crime of money laundering can also be the author of the main crime.

3. On the recent rulings of the High Court of Cassation and Justice on the subject of the crime of money laundering

Since the publication of our previous study and until the elaboration of this article, the High Court of Cassation and Justice, by the Panel for clarifying certain legal issues, ruled on the issues we have previously presented, but also on other aspects that the judicial practice or the case law identified under different appreciations. It is about the Decision no.16/2016 of the Panel for clarifying certain legal issues within the High Court of Cassation and Justice[6], and the questions the Supreme Court clarified are if:

„1. Do the actions listed in Article 29 paragraph (1) letters (a), (b) and (c) of the Law no.656/2002 on prevention and punishment of money laundering, and on setting out certain measures for prevention and combating terrorism financing, republished, as further amended and supplemented (exchange or transfer, respectively the concealment or dissimulation and, respectively, the acquisition, possession or use) represent different regulatory ways to commit the crime of money laundering or do they represent alternative versions of the material element of the subjective aspect of the crime of money laundering?

2. Can the active subject of the crime of money laundering be the same as the active subject of the crime from which the goods come from, or must it be different from it?

3. Is the crime of money laundering an autonomous crime or is it a crime subsequent to the one from which the goods come?"

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[1] See C. Nedelcu, The Criminal Offence of Money Laundering – a Series of Theoretical and Practical Considerations, in CKS-ebook/2016, p. 91-95, ISSN **2359-9227**,http://cks.univnt.ro/cks_all.html.

[2] Ratified by the Law no. 263/2002 published in the Official Gazette of Romania, Part I, no. 353 of 28 May 2002.

[3] http://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32001F0500&qid=1458738324354&from=en.

[4] Published in the Official Gazette of Romania, Part I, no. 18 of 21 January 1999. Currently repealed by the Law no. 6556/2002.

[5] Al. Boroi, M. Gorunescu, I.A. Barbu, Dreptul penal al afacerilor, Editura C.H. Beck, București, 2011, p. 367 *(Al. Boroi, M. Gorunescu, I.A. Barbu, B.I. Vârjan Criminal law of business, C.H. Beck Publishing House, Bucharest, 2016, page 367).*

[6] Published in the Official Gazette of Romania, Part I, no. 654 of 25 August 2016.

All these issues were brought before the High Court of Cassation and Justice to be clarified exactly because the interpretation of legal texts included in Article 29 of the Law no.656/2002 has important nuances in the case law, and also in the judicial practice.

The importance of the clarification which the High Court was asked to give cannot be called into question.

The solution of the first issue may in a concrete case, determine the acknowledgment of a single crime of money laundering, or of multiple crimes if an individual commits more offenses constituting the material element of the same crime. A negative to the second question could exclude the hypotheses of multiple crimes acknowledged in the judicial practice for the cases in which the same individual commits the main crime, as well as the crime of money laundering. In the same way, if the crime of money laundering would not be recognized as an autonomous crime, it could never subsist to the extent to which the main crime (from which the goods to be laundered come), due to a reason or otherwise, would lose its criminal nature.

The High Court of Cassation and Justice analyzed in turn the three issues, settling them by way of mandatory jurisprudence.

Thus, with regard to the type of the regulatory methods listed in Article 29 paragraph (1) letters (a), (b) and c) of the Law no. 656/2002 on prevention and punishment of money laundering, and on setting out certain measures for prevention and combating terrorism financing, republished, as further amended (exchange or transfer, respectively the concealment or dissimulation and, respectively, the acquisition, possession or use), the High Court found that they have an alternative character and that they do not justify the acknowledgment of multiple crimes in the case of the same individual, as it often happens in the judicial practice. The Supreme Court correctly highlighted that "money laundering is a crime in which the material element consists of an action that can be performed in seven alternative ways (exchange, transfer, concealment, dissimulation, acquisition, possession or use)". … "Therefore, the performance of several actions representing the material element of the crime of money laundering, for carrying out the same intent, does not affect the criminal unit.

It is often found that it is chosen to acknowledge two crimes at the same time against an individual who committed two of the regulated alternatives from those listed by Article 29 of the Law no. 656/2002, under one of the three letters. Such practice was invalidated by the HP Decision no. 16/2016 of the High Court of Cassation and Justice, which even gives an example: "the individual possessing a good he/she is aware of the fact that it comes from committing a crime commits the crime of money laundering. If, afterwards, this individual transfers this good, this shall represent the same crime, as only a new type of the material type, without legal relevance, is carried out. If the money laundering crime was committed by carrying out more types of the material element pertaining to different variants, this aspect shall be taken into consideration in the legal classification, by acknowledging all these variants".

With regard to the *second issue* brought to the attention of the High Court of Cassation and Justice, we expressed our opinion in the study mentioned above, i.e. the crime of money laundering cannot be committed by the author of the main crime in any hypothesis, the main argument for this purpose being the text. In our opinion, the expression "being aware of the fact that it comes from committing a crime" included in the incrimination regulation of Article 29 of the Law no. 656/2002 means the exclusion of the one who commits the main crime from the circle of the potential active subjects of the crime of money laundering, as the expression appear as useless regarding this individual.

We do not agree with the ruling of the High Court of Cassation and Justice, as the court appreciates that there is no such an incompatibility. The arguments given by the High Court in order to support this ruling are certain arguments related to the history of the incrimination. It was taken into consideration the fact that the incrimination regulation on money laundering appeared in our legislation after Romania ratified the Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds from crime and on financing of terrorism, adopted at Warsaw on 16 May 2005, by the Law no. 420/2006. the Supreme Court shows that, even if the Article 9 paragraph (2) letter (a) of this international legal instrument creates the opportunity that the Member States provide that the "offenses set forth in this paragraph do not apply to the individuals who committed the predicate offense" in their internal legislation. The Supreme Court noted that, at the time of the accession the Warsaw Convention, the Romanian State did not express any reserve, and the Law no.656/2002 "does not provide otherwise in order to hinder the acknowledgment of the crime the goods come from and the crime of money laundering against the active subject, therefore, such multiple crimes are possible from theoretical point of view".

We believe that this method for settling the analyzed legal issue is not in accordance with the need to unify the judicial practice regarding this issue. The High Court preferred to analyze the incrimination history of money laundering, without making available to the professionals facing such cases clear criteria differentiating between the crime of money laundering and of abetment, respectively concealment. We believe that the different solution than the one established by the case law and accepted in practice in the case of the two crimes from the Criminal Code could be only explained this way.

It is true that the High Court showed in its decision that "the crime of money laundering must not be automatically acknowledged against the author of

the crime which the goods come from due to the simple reason that one of the actions of the material element of money laundering was carried out, as this would deprive the crime of money laundering of its individuality". Moreover, the High Court emphasizes that "the legal bodies are responsible for deciding in concrete cases if the crime of money laundering is sufficiently individualized in relation to the crime which the goods come from and if multiple crimes or only one crime must be acknowledged".

The two phrases are in perfect accordance with the rigors of the law, but they shall not lead to the unification of the judicial practice, they shall not give an explanation for the concrete annulment of the abetment and concealment, and they shall not lead to a review of the current circumstances in which the acknowledgment of the multiple crimes, the predicate crime and the money laundering, is almost mandatory for all cases in which, after committing the predicate crime (irrespective if this is about a corruption crime, drug trafficking or tax evasion), the same individual takes various steps in order to be able to use those obtained advantages. There are many cases in which, after committing the main crime, the simple purchase of a good with the money coming from the predicate crime is deemed money laundering. Thus an organized crime is transformed in an unimportant one, even it cannot be said the same for the level to which the special punishment limits rise in the case of this crime.

We believe that this is only a legislative omission that occurred when the international legal instrument generating the obligation for the national legislation to incriminate money laundering had been ratified, i.e. the natural reserve related to the impossibility that the active subject of the predicate crime is also the author of the money laundering had not been formulated. This omission was also accompanied by the impossibility to identify clear criteria with whose help the difference between the crime of abetment, respectively concealment, and the money laundering could be unitary made. In our opinion, the High Court did not settle this legal issue.

With regard to the third issue submitted for clarification, the High Court acknowledged the autonomous nature of the crime of money laundering. The significance of this ruling is that "its existence is not contingent on giving a conviction sentence (postponement of the enforcement of the punishment or withdrawal of the enforcement of the punishment) for the crime which the goods come from". The arguments supporting this solution are also conventional, because Article 9 paragraph (5) of the Warsaw Convention, ratified by Romania by the Law no. 420/2006, provides that: "Each Party shall ensure that a previous or simultaneous conviction for the predicate crime is not a prerequisite for a conviction for money laundering". Besides, an adequate regulation can be also found in Article 29 paragraph (4) of the Law no. 656/2002[7]. Nevertheless, the High Court recognizes the limiting nature of this assumption, showing that "nevertheless, it is obvious that, if there is no conviction for the crime the goods come from, the competent court for the settlement of the case regarding money laundering must not only suspect that the goods come from a criminal activity, but must be certain of this fact".

4. On issues regarding the crime of money laundering which are not yet settled in the case law and jurisprudence

All these rulings are welcome for the unitary interpretation and enforcement of the provisions of the incriminating regulation regarding money laundering. But there are also other issues that are solved differently in practice. One of these issues is that, in the judicial practice, it can be encountered the case in which a tax evasion crime falling under the provisions of Article 9 letter (c) of the Law no. 241/2005 for preventing and combating tax evasion is committed, the method being the following: fiscal invoices are issued by a company for fictitious operations, they are recorded in the books of another company, the pertaining amounts are transferred on the basis of the invoice, these amounts are withdrawn in cash by the representatives of the first company, the amounts are handed over to the directors of the second company, the one helping with this operation retaining a fee. In the judicial practice, this case described above in short is often classified as representing multiple crimes, the tax evasion and the money laundering. Ignoring the debatable nature of the legal classification, which we have mentioned, the courts do not give unitary rulings regarding the case that, by such legal classifications, the money laundering is committed before the predicate crime is committed, nor why the object of the money laundering is larger than the object of the predicate crime.

Our statement takes into consideration the fact that, even if the damages are covered in accordance with Article 10 of the Law no. 241/2005, the courts order the confiscation of the entire rollover between the two companies as representing the object of money laundering. Due to this solution, it can be reached the case in which the amounts resulting from committing the main crime are much smaller than those indicated as representing the object of money laundering. Essentially, the money laundering represents the "whitening" of the product of a crime, and it is abnormal that the product being "whitened" is essentially larger than the result of committing tax evasion. We believe that this very extensive judicial practice from the point of view of the scope is fundamentally wrong, and the High Court should rule on it by means of the previous mechanism for uniting the judicial practice – prior decisions clarifying legal issues, without waiting the creation of a non-unitary

[7] The mentioned text provides that: "The origin of the goods or the pursued purpose can be deducted from the objective factual circumstances".

practice in order to activate the previous mechanism - the referral in the interests of the law.

5. Conclusions

The crime of money laundering is a crime that still generates a number of issues regarding its understanding and enforcement, despite the 15 years of existence of the legal regulation defining it. Even if the High Court of Cassation and Justice tried to settle certain issues by means of mandatory jurisprudence of the decisions for clarifying legal certain legal issues, the given solutions cannot always eliminate the controversies, and other issues have yet to be submitted to this jurisdiction.

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THEORETICAL AND JUDICIAL PRACTICE REFLECTIONS REGARDING THE OFFENCE OF PUTTING INTO CIRCULATION OR DRIVING AN UNREGISTERED/UNLISTED VEHICLE (ART. 334. CRIMINAL LAW)

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Abstract

With the entry into force of the New Criminal Code, the offenses of road safety on public roads have been repealed from the Government Emergency Ordinance no. 95/2002 and inserted into the contents of the normative document.
At the time of the transition, the legislator has chosen to amend certain aspects relating to the existing criminal incriminations of antisocial deeds in direct connection with the road domain.
The regulation of the offense for putting into circulation or driving an unlisted vehicle contained in the provisions of article 334 of the New Criminal Code has a correspondent in Article 85 of the GEO no. 195/2002 on the circulation on public roads.
The deeds incriminated by the provisions referred to in Article 334 par. (1), (2), (3) and (4) have the content almost identical with the previous settlement thereof, with differences under the aspect of the sanctioning regime. Also, regarding the content, the only difference which is meant to better clarify the incrimination conditions refers to the requirement that the vehicle or the tram not to be registered or recorded according to the law.
During the study, we shall try to present a series of theoretical aspects and judicial practice regarding the committing of such crimes.

Keywords: *offenses, safety, roads, circulation, public, unlisted, vehicle*

1. Introduction

Essentially, a given society assumes a series of rules, principles and fundamental values of the citizens, values that are sustained and defended by the rule of law and, implicitly, by the legislation composing their defense mechanism. The whole community revolves around a well-defined system of law that is permanently expanding and adapting itself to the social demands.

"Following the appearance of the state, the function of defending the essential social values that underlie and develop the society is achieved by the help of the criminal law"[1]. As against this opinion we will stress the fact that criminal law represents, at the same time, the most complex mechanism of defending the fundamental rights of citizens, that its main pillar.

Normally, criminal offences stipulated in the specific regulations are the mirror of the social values, and the role of the criminal law is that of defending them from anyone violating them. Though, to a certain extent, it might seem a metaphor, criminal law is applicable to all the aspects of life.

The regulations in the New Criminal Code[2] also comprise those criminal offences against the traffic safety on public roads.

This survey regards the offence stipulated and punished by art. 334 of the Criminal code. The appearance of the new criminal code also brought to the Romanian system of law a reform of the criminal law. This reform was greeted, in most of the cases, by the great doctrinaire authors, but just like any novelty, it was also criticized, which in some cases overshadowed the benefits brought by the new legislation.

As a novelty, a series of offences in the special legislation were included in the new Criminal code, so as, offences such as those falling under the Government Emergency Ordinance no. 195/2002 regarding the circulation on public roads, were repealed and included in the Criminal code.

Art. 121 of Law no. 187/2012 for the implementation of Law no. 286/2009 regarding the Criminal code abrogated art. 85 of the Emergency Ordinance of the Government no. 195/2002.

This survey takes into account the analysis of the provisions of the incriminating text in art. 334 of the New Criminal code, corresponding to art. 85 in the E.O.G. no.195/2002.

2. Analysis of the offence

2.1. The legal contents

According to the provisions of art. 334 par.(1) of the New Criminal code, putting into circulation or driving on public roads an unregistered or unlisted vehicle or tram is punished, according to the law, with prison from one to 3 years or fine.

According to the provisions of art. 334, par (2) *putting into circulation or driving on public roads a vehicle or tram with a fake license plate or registration*

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[1] Constantin Mitrache, Cristian Mitrache, Roman Criminal law. *General part*, Ed. Universul Juridic, Bucuresti, 2014, p.21.

[2] Law no. 286/2009regardin the (new) Criminalcode, published in the Official Journal No. 510 of July 24, 2009.

number is punished with prison from one to 5 years or fine.

Furthermore, the provisions of par. (3) of the same article stipulate that *towing an unregistered or unlisted trailer or of a trailer having a fake registration number or license plate is punished with prison from 3 months to 2 years or fine*.

Finally, according to the provisions in par. (4*), driving a vehicle on public roads or towing a trailer whose license plate numbers have been called in, or driving a vehicle not allowed in the Romanian traffic, although registered in another country, is punished with prison from 6 months to 2 years or fine*.

At first sight, we may notice that within the same article we find four distinct offences.

2.2. Pre-existing conditions

The legal object of these offences resides in the social relations that ensure the safe traffic on public roads.

Offences stipulated in art 334 of the Criminal code are void of a material object, as they are endangering offences, while putting into circulation or driving a vehicle on public roads or towing a trailer under the circumstances stipulated in the incriminating text are means by which the respective offence is committed and not its material object.

Since the law does not require any kind of quality for the person committing the offence, we may say that the active subject is not qualified and can be anyone filling in the requirements for criminal liability.

The criminal stake is present under all its forms.

It is important to stress the fact that the deed of putting into circulation of an unregistered or unlisted vehicle or tram and of driving it on public roads will constitute a single offence. At the same time, the person involved in different ways is committing these two alternatively incriminated activities, commits only one offence.

The offence may be committed by co-authors, in case of co-owners, but there will be no co-authors in case one person puts an unregistered vehicle or tram into circulation and the other drives it. In this case we speak of two autonomous offences, that is the offence of putting into circulation an unregistered vehicle or tram and the offence of driving such a vehicle[3].

With respect to the perpetration of the offence by driving, we can say that under no circumstance can we speak of accomplices, of co-authors, as only one person can drive a vehicle, while a simultaneous action of driving by two or more persons is practically impossible.

As regards the legal persons, we can say that, under certain conditions, they can perpetrate the offence stipulated by art. 334 of the Criminal code.

The passive subject is the State, "on which reverberate the consequences of all the violations of the state of law, as well as the consequences of traffic violations on public roads[4]."

2.3. The constitutive elements

As previously stressed, the contents of art. 334 of the Criminal code defines a number of four offences. We will further try to describe them individually in order to offer a more comprehensive and efficient analysis.

The material element of the offence stipulated by art. 334, par. (1) is constituted by a person's putting into circulation an unregistered or unlisted vehicle or tram on public roads, as stipulated by the legislation in force.

Related to it, we must specify that by "putting into circulation" we mean the prerogative of the person that can decide with respect to the vehicle (owner, custodian/keeper, thief, beneficiary of a leasing contract, etc.) to allow putting the said vehicle in traffic on public roads.

Driving on public roads an unregistered or unlisted vehicle or tram is the action by which the said vehicle is set in motion on public roads by using its own power of movement. The active subject of this offence may be a simple keeper, for example, a thief that entrusts the stolen vehicle to another person in Driving on public roads an unregistered or unlisted vehicle or tram is the action by which the said vehicle is set in motion on public roads by using its own power of movement. The active subject of this offence may be a simple keeper, for example, a thief that entrusts the stolen vehicle to another person in order to be driven on public roads[5]. This entrusting will have a criminal value only if preceded by driving such a vehicle (according to the legal text) on public roads. Thus, the permission to put into circulation the vehicle, not followed by the act of driving it (perpetration) will not be considered an offence. The action of putting into circulation a vehicle implies a series of actions committed by two persons. A first person will decide to allow the said action, under the circumstances shown above, and a second person that will implement this decision by driving the respective vehicle on the public road. In this case we consider that both persons will be liable as accomplices/ co-authors of the offence.

There are opinions in the specialized bibliography that claim that putting into circulation a vehicle means the moment when the vehicle is started and it has the power transmission coupled to the wheels[6]**.** Certain

[3] Vasile Dobrinoiu, Ilie Pascu, Mihai Adrian Hatca, Ioan Chis, Mirela Gorunescu, Norel Neagu, Maxim Dobrinoiu, Mircea Constantin Sinescu, *The New Criminal law* Code –annotated. The special part,. *Second edition, revised and enlarged*, Ed. Universul Juridic, București, 2014, p.704.

[4] Alexandru Boroi, *Criminal lawl. Special part*, Ed. Universul Juridic, Bucuresti, 2014, p. 571.

[5] Vasile Dobrinoiu, Ilie Pascu, Mihai Adrian Hatca, Ioan Chis, Mirela Gorunescu, Norel Neagu, Maxim Dobrinoiu, Mircea Constantin Sinescu, op. cit. p. 704.

[6] A. Ungureanu, A Ciopraga, *Criminal Provisions in the Romanian criminal laws, vol. III*, Ed. Lumina Lex, București, p. 264.

authors dispute, of course, this theory, claiming that, in such a situation, the moment of putting the vehicle into circulation would overlap the moment of driving, fact that would leave the regulative procedure void/without substance.

The criminal investigation of the offence should determine the exact nature of the activity of the offender: putting the vehicle into circulation, driving the vehicle or both cumulated actions perpetrated by the same person. Clarifying the situation is of particular importance with a view to the right legal qualification of the offence and, implicitly, to clearing up all the other unknown factors, such as: participants, form of guilt, conjuncture, etc[7].

The vehicle is a vehicle equipped with an engine capable of moving it on the road. Trolley-busses and road tractors are also considered vehicles[8].

The trailer/ tow is an engine-less vehicle meant to be towed by a vehicle or tractor[9]. It can be of two types: light trailer, whose total maximum authorized weight is under 750 kilos and semitrailer, whose maximum authorized weight is taken over partly by a vehicle or tractor[10].

In order to circulate on public roads, vehicles, except those trailed or pushed by hand or bicycles, should be registered or listed, on a case to case basis, and should bear license plates with a registration or list numbers having forms, dimensions and contents stipulated in the standards in force. Vehicles that are not registered or listed may circulate on public roads only under circumstances stipulated by regulations[11].

Vehicles, except mopeds and trolley-busses, as well as trailers are to be permanently or temporarily registered or listed by the authority under whose territorial – home address, residence or headquarters – competence they fall, under the conditions stipulated by the legislation in force.

Vehicles, trailers and agriculture or forest tractors belonging to the Ministry of Defense, to the Ministry of Home Affairs, as well as those belonging to the Romanian Information Services will be registered by these authorities. Vehicles and trailers may, on a case to case basis, be registered under the conditions mentioned above. Before registration, the vehicles, except mopeds and trolley-busses may circulate with temporary license plates, based on a special certificate, issued by the competent authority.

Upon request, legal persons that manufacture, assembly, or perform the coachwork or the testing of vehicles, trailers or agriculture or forest tractors may receive authorizations and temporary plates for these tests.

The accounts of the registered vehicles will be kept by the authority under whose jurisdiction is the owner's home address, residence or headquarters[12].

Trams, trolley-busses, mopeds, agricultural or forest tractors, other than those of the Ministry of Defense, of the Ministry of Home Affairs and of the Romanian Information Services, including the trailers meant to be towed by the latter, as well as the animal-drawn vehicles, will be registered by the town or city halls or by the municipalities of the departments of Bucharest, which keep these accounts through their specialized compartments[13].

Once the vehicle registered, the competent authority will issue to the owner or custodian/keeper a registration certificate, according to the category or sub-category to which the respective vehicle belongs, as well as the license plate with the registration number. Upon the vehicle owner's written request, the registration certificate may list a person, other than the owner, specifying in what capacity that person may use the vehicle, based on a legal right. In case the owner of the vehicle is a leasing company, mentioning the identification coordinates of the custodian/keeper in the registration certificate is mandatory. At the same time, it is forbidden to put into circulation a vehicle, registered or listed, that has not the license plate issued by the competent authority or whose plate does not comply with the standards in force, or a vehicle whose registration certificate has been suspended, while the certificate replacing it was issued without a circulation permit or its validity period expired[14].

By registration or listing we mean, of course, the administrative activity of certifying that a vehicle may circulate on public roads. The proof certifying the registration/listing is the registration/listing certificate and the given number on the license plates.

It can be of two types:

Permanent registration/listing, which represents the registration/listing activity which grants a registration/listing certificate and number plates for an undefined period of time.

Temporary registration, which represents the registration/listing activity that grants a registration certificate and number plates for a determined period of time.

We can still notice that the criminal deeds stipulated by par. (2) and (3) of art. 334 harm the same social values as the criminal deed incriminated under par. (1). And we mean the social values regarding the accounts of vehicles circulating on public roads, that is the social relations that ensure a safe traffic on public roads.

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[7] Alexandru Boroi, *Criminal law. Special part*, Ed. Universul Juridic, Bucuresti, 2014, p. 572.
[8] Art. 6, pct. 6 din O.U.G nr. 195/2002.
[9] Art. 6. pct 27 din O.U.G nr. 195/2002.
[10] Art. 6. pct 27 din O.U.G nr. 195/2002.
[11] Art. 12 din O.U.G nr. 195/2002.
[12] Art. 13 din O.U.G nr. 195/2002.
[13] Art. 14 din O.U.G. nr 195/2002.
[14] Art. 15 din O.U.G. nr. 195/2002.

The material element of the offences stipulated in par (2) and (3) will be embodied by putting into circulation or driving a vehicle or a tram with a fake license plate, and towing an unregistered trailer or a trailer with a fake license plate.

"Perpetrating these offences is the act of ignoring the right of both police agents, or on a case to case basis, and of the other state authorities that keep the accounts of vehicles and trailers, to demand to the owners of vehicles and trailers not to change their license plate numbers, as well as to impose them the correlative obligation of circulating on public roads only with the valid license plate number"[15].

The notion of "fake license plate number" may, of course, have several definitions, but we consider that this phrase defines not only a fake, imaginary number placed on the vehicle, but also the number corresponding to a previous registration, whose validity expired at the time of the perpetration of the offence, the vehicle being erased from any kind of accounts of the competent authorities. In another sense, this phrase defines the inconsistency existing among the elements constituting the plate numbers and the truth resulting from the official documents relative to the vehicle on which the respective plates with the registration/ listing number are fixed[16]. Thus, it is important that the prosecuting authority establish if the vehicle had a fake registration number and if the perpetrator committed one of the illicit activities stipulated by the law. Furthermore, the prosecution shall also establish the fact related to the exact place of the perpetration, since the offence is likely to be committed only on a public road[17].

In the section dedicated to legal practice, in connection with the offence stipulated by art. 334, we are going to present certain issues with great influence on understanding this institution, yet we are also going to make some remarks in this respect.

By the criminal sentence no. 77/1996 of Bucharest Court of Appeal they point out that a license plate number legally obtained in the past, at the time of registering other vehicle, be it the defendant's property, will represent a fake license plate number with reference to the vehicle whereupon it was illegally placed, since it does not reflect the actual situation of this vehicle for which there is no valid registration in the police records, or the competent bodies for this purpose.

By decision no. 192 / 1999 of Suceava Law Court, the Court held that registration numbers become fake numbers at the time of their removal from circulation, since any number written on the plates placed on the vehicles and not listed with the competent authorities should be deemed a fake license plate number. Under such circumstances, we point out that the time of deregistration of any vehicle will superpose over the moment when license plate numbers become fake numbers, if they continue to be placed on the vehicles.

In Romania certain courts ruled that driving on public roads an unlisted vehicle, with expired temporary license plate numbers, means perpetrating the offence of driving an unlisted vehicle in ideal concurrence with driving a vehicle with fake license plate number. The criminal sentence no. 154/1989 delivered by Bucharest Law Court ruled to the same purpose.

The relevant published literature[18] also points out that under such circumstance we are solely subject to the offence of driving an unlisted vehicle, driving a vehicle with fake license plate numbers implying other prior condition, respectively: placing imaginary license plate numbers, or other number that the attributed one.

The decision of Alba Iulia Court of Appeal was also delivered to this effect, by the criminal sentence no. 468/2010, where they ruled that in order to retain the offense of driving a vehicle with fake license plate number it is necessary to exist a deceptive action in order to forge the license plate number.

Certainly, in support of this point of view, the authors considered that expiry of the license plate number may not attract the incidence of driving a vehicle with fake license plate number since, with reference to the material element of the offense of forgery, there is no counterfeiting, or alteration, or any other normative means of committing such offense. Without the deliberate intervention in order to manufacture, imitate, change the form or mentions on the license plate number for the purpose of creating a seemingly legal framework, there is solely the offense of driving an unlisted vehicle, art. 334 par. (1) New Criminal Code.

The High Court of Cassation and Justice ruled, by the decision no 18 of the 10th of December, 2012 on the uniform interpretation and implementation of the dispositions under art. 85 par. (1) and (2) of the Government Emergency Ordinance no. 195/2002 on public roads circulation, that putting into circulation, or driving on public roads of any vehicle on which they placed license plate number with expired temporary license plate number, and the validity of the temporary circulation license also expired, meets solely the elements of the offense provided at Art. 85 par. (1) of the Government Emergency ordinance no. 195/2002 on public road traffic, republished, with subsequent modifications and supplementations.

Thus, we can say that when any person is driving a vehicle registered in another state, with expired license plate numbers, we encounter the same offense.

Also, they considered including the offense of driving an unlisted vehicle in the offense of driving a

[15] Alexandru Boroi, *Criminal law. Special part*, Ed. Universul Juridic, Bucuresti, 2014, p. 572.
[16] Vasile Dobrinoiu, Ilie Pascu, Mihai Adrian Hatca, Ioan Chis, Mirela Gorunescu, Norel Neagu, Maxim Dobrinoiu, Mircea Constantin Sinescu, op. cit. p. 706.
[17] Idem.
[18] G. Marcov, *Offences pereptrated in traffic*,iîn RRD nr. 2/1968, p.38.

vehicle with fake license plate number, since we could say that committing the latter offense, the driver's passivity should exist concerning the legal registration of the vehicle, since nobody will use fake numbers save for creating a framework that may be apparently legal regarding the vehicle listing or registration of the unlisted vehicle or registered.

The Court of Appeal of Ploiesti, by the criminal sentence no. 833/2009, determined there will be concurrent offenses between the offense of driving an unlisted vehicle and driving a vehicle with fake license plate numbers, when an individual is driving an unlisted vehicle on public roads with license plates issued for driving test in other European states, and expired validity.

As regards the concurrent offenses, we say that this offense (art.334, par.(2) Criminal Code) might enter an ideal concurrence with other offenses, such as, driving a vehicle under the influence of alcohol or other substances, driving without a driving license etc.

Further on, taking into consideration the decision of the High Court of Cassation and Justice above mentioned, it is important to specify that the lawmaker understood to make a clear distinction among the types of numbers a vehicle can have, and that not all such plate numbers are designed for listing or registration in order to bring along the incidence of art. 334par. (2) of the Criminal Code.

Thus, according to art. 23 and art. 25 par. (1) of the regulation implementing the Government Emergency ordinance no. 195/2002 on public roads circulation, approved by the Government Decision no. 1.391/2006, with subsequent modifications, there are the following types of numbers:

- listing number – consisting of the county symbol or Bucharest Municipality, order number, expressed by Arabic numerals, and a combination of three letters with capital Latin characters;
- temporary listing numbers – in case of which, besides the symbol of the county or Bucharest Municipality and the order number, they will add the month and year of listing validity termination;
- registration number for tests – consisting of the county symbol of Bucharest municipality, order name and the mention "TESTS";
- registration number – granted solely for the vehicles registered at the local councils, and consisting of the name of the respective locality and abbreviated name of the county, in capital Latin characters, and also an order number, in Arabic numerals;
- number of temporary circulation license – consisting of the county symbol or Bucharest Municipality and order number.

According to the said dispositions, it results that in the matter of the vehicles circulation on public roads there are three types of listing numbers, one registration number and one temporary license number for circulation.

According to the dispositions of art. 334 par. (2) of the Criminal Code, the lawmaking body referred to the situations where the vehicle has a fake listing or registration number, yet not to the situation where this number is the number attributed by the temporary circulation license (a hypothesis subject to solving the Law matter by the appeal on points of law concerned the former regulation of art. 85 par. (2) of the G.E.O. no. 195/2002, republished).

We conclude that the dispositions of art. 334 of the Criminal Code refer solely to those situations where any kind of intervention was operated on the listing number of any actually listed vehicle, as above described, either by manufacturing the license plate number or imitating an authentic license plate number, or by changing the aspect or mentions of such license plate number, thus creating an improper appearance of truth, as well as the situation where the vehicle may be listed or not, yet it bears the license plate number of another vehicle[19].

"Yet, any expired license plate number cannot be assimilated by analogy with a fake license plate number, where there was no intentional forging thereof, according to the above mentioned issues.

Where the vehicle's right of circulation is limited solely to a specified period of time, and afterwards the activities required to registration of the respective vehicle were either not carried out, or not completed, will not tantamount to forgery of the temporary license plate numbers, the number mentioned in that license will not become a fake number, but the respective vehicle will become an unlisted vehicle"[20].

On the other hand, by the incrimination provided by art. 344 par. (20) of the Criminal Code, "the lawmaker took into consideration that the offender may abscond from prosecution, in connection with an offense caused by the impossibility to identify the vehicle. Yet, when the temporary license plate number is being used, the vehicle can be identified, since the respective license plate number has not been attributed to any other vehicle.

Thus, identification of the vehicle will be carried out under the same conditions as in the case of final registration.

A similar situation will be found in respect of the regulation of identity documents of Romanian citizens.

In connection with these identity documents as well, expiry of the validity term thereof and use of this document will not lead to such finding that this act is fake, but will incur solely the personal liability.

If the opposite point of view were adopted, this would mean that only the expiry of the validity of identity documents and providing the expired identity

[19] Vasile Dobrinoiu, Ilie Pascu, Mihai Adrian Hatca, Ioan Chis, Mirela Gorunescu, Norel Neagu, Maxim Dobrinoiu, Mircea Constantin Sinescu, op. cit. p. 709.

[20] Decision no.18 /10.12. 2012 on the interpretation and uniform application of dispositions under art.. 85 alin. (1) and (2) of Government Emergency Ordinance no.. 195/2002 on public roads circulation.

documents by the holders thereof, to the competent authorities, would be forgery relating to the identity"[21].

No doubt, even when the legal matter referred to the High Court of Cassation and Justice concerned the dispositions of art. 85 par. (2) of the Government Emergency Ordinance no, 195/2002, hereinabove, we tried to adjust all such issues to the text of the law in force, respectively the dispositions of art. 334 par. (2), since the appeal on points of law (Romanian RIL) still applies in this respect.

Nevertheless, there are opinions in the published literature[22] which do not approve of the efficiency of the decision delivered by the High Court of Cassation and Justice, since they started from the questionable premises that a fake license plate number will always be a fake number, while in practice there is the possibility that temporary and expired license plate numbers be placed on registered vehicles. Thus, since this is not about counterfeited numbers involving the vehicle on which they are placed, we confront with the situation of fake license plate numbers.

Furthermore, as regards the offense stipulated and sanctioned by art. 334 par. (3) of the Criminal Code, the material element is represented by towing an unlisted or not registered trailer, or bearing a fake listed or registered license plate number.

As regards the fourth offense, as provided by art. 334, par. (4), we say that the material element thereof will be driving on public roads of a vehicle, or towing a trailer having the license plate numbers removed, or a vehicle registered in other state, not having circulation rights in Romania.

Certainly, for better understanding of such institution, we find it necessary to bring into attention a number of issues regarding the listing, registration, removal and other operations closely connected to vehicle records.

Listing, registration or granting of temporary license plate numbers, or for tests to a vehicle will be cancelled by the authority having performed such operation, when they find out the legal regulations relating to the said operations have been violated[23].

Cancellation of vehicle records will be carried out by the authority which performed the listing or registration of the vehicle solely in case of definitive removal thereof from circulation, when:

- the owner desires the definitive removal from circulation of the vehicle, and brings evidence of suitable vehicle storage space, held in compliance with the lawful dispositions;
- the owner brings evidence about the dismantling, cassation or handing over the vehicle to specialized units for the purpose of dismantling;
- upon definitive removing the vehicle from the country;
- in case of vehicle theft.

Removal from records of registered vehicles, upon passing thereof to other owner, will be carried out by the authority having performed the registration, at the owner's request, in compliance with the law.

The vehicles which were declared without any owner, or abandoned according to the law, by order of the public local administration, will be removed from records automatically in 30 days from receipt of the respective order[24].

As regards the place of perpetrating the offense, we say that the offenses specified under art. 334 of the Criminal Code, will be deemed offenses solely when committed on public roads. Without this spatial condition, the criminal activities analyzed above will not be offenses, according to the dispositions of the incriminating text.

The immediate consequence of such offence is represented by the creation of dangerous conditions to the traffic safety on public roads.

The causal relationship results from the materiality of the offense, which needs no proof.

As regards the subjective side, the offenses provided under art. 334 Criminal Code are committed with intent (direct or indirect). Committing an offense by negligence or without guilt will not involve criminal liability.

There is a direct intention when the offender foresees the result of his act, pursuing occurrence thereof by committing this act. There is an indirect intention when the offender foresees the result of his act, and although not pursuing the result, he accepts the occurrence thereof.

The incrimination rule does not include specifications as to the motive of the criminal act or scope of the offender.

The offenses take place at the time when the material element thereof has been achieved.

As regards the sanctions, committing the offense provided under art. 334 par. (1) will be sanctioned by imprisonment between 1 and 3 years or fine. The offense provided in par. (2) will be sanctioned by imprisonment between 1 and 5 years or fine. The hypothesis of par (3) proposes a sanction system between 3 months and 2 years imprisonment or fine. Finally, the offense provided under par. (4) will be sanctioned by imprisonment from 6 months to 2 years or fine.

3. Aspects of judicial practice

In connection with the judicial practice, in Romania, there are two opinions as regards settlement of the situation according to which a person is driving, on public roads, a vehicle registered in other state

[21] Ditto.
[22] Vasile Dobrinoiu, Ilie Pascu, Mihai Adrian Hatca, Ioan Chis, Mirela Gorunescu, Norel Neagu, Maxim Dobrinoiu, Mircea Constantin Sinescu, op. cit. p. 709.
[23] Art. 16 of G.E.O. no.. 195/2002, republished.
[24] Art. 17 of G.E.O. no. 195/2002, republished.

without having a valid Civil Auto Liability (RCA) insurance.

Thus, one of these opinions held the incidence under art. 16 par. (1) letter b) the final thesis of the Code of Criminal Procedure (the offense is not provided by the criminal law) where a person is driving a vehicle registered in other state, without a valid insurance, or with an expired insurance.

According to other opinion, they held that the offense is incriminated by the criminal law, pursuant to the provisions of art. 82 par. (2) of G.E.O. no. 195/2002, the vehicles registered in other states can circulate on Romanian territory solely for the time when there is an insurance policy for them. Otherwise, the vehicles fall under the scope of art. 334 par. (4).

By the criminal sentence no. 1491/A/05.11.2015 delivered by the Court of Appeal of Bucharest, the defendant was acquitted, based on the provisions of art. 16 par. (1) letter b) final thesis, for perpetrating the offense of driving a vehicle registered in another state without the right of circulation in Romania, consisting in the fact that the defendant drove on Romanian territory a vehicle registered in Bulgaria for which he did not have a valid mandatory insurance.

By the criminal sentence no. 32/A dated the 8th of January, 2015, delivered by the Court of Appeal of Bucharest, the defendant was acquitted based on the provisions of art. 16 par. (1) B the final thesis, for perpetrating the offense of driving a vehicle registered in other state without the right of circulation in Romania, consisting in the fact that on the date of 12th of April, 2014, around 00.10 AM hours, the defendant B. F.M. of Vitanesti commune, Teleorman County, was driving the car brand Chrysler Neon, black, with license plate number x, on street y. of Alexandria town, Teleorman County, and was stopped in traffic by the traffic police of Alexandria, and he presented the car documents, driving license, registration certificate and green card series X, with validity term expired on 22.02.2014.

By the criminal sentence no. 127 dated the 19th of January, 2016, the Law Court of sector 5, Bucharest acquitted the defendant B.N. for perpetrating the offense of driving a vehicle registered in other state, without the right of circulation in Romania, this offense being stipulated and sanctioned by art. 334 par. (4) Criminal Code, consisting in the fact that the defendant was driving a vehicle registered in other state, without a valid insurance, on the Romanian territory.

This sentence was appealed by the Prosecutor's Office attached to District Court, sector 5, Bucharest. As concerns the perpetration of the offense making the object of this survey, The Court of Appeal of Bucharest sentenced the defendant B.N., the Court noting that the dispositions under art. 334 par. (4) Criminal Code sanctions as an offense the act of driving on public roads a vehicle registered in other state, without the right of circulation in Romania. The Court holds that, pursuant to the dispositions under art. 82 par. (2) of G.E.O. no. 185/2002, the vehicles registered in other states can circulate on Romanian territory solely for the period when there is an insurance policy covering the civil liability resulting from the damages caused by car accidents.

As a consequence, namely, from the expiry date of the mandatory car insurance, respectively from the date of 01.02.2014, the car brand Mercedes Vito, license plate number X, driven by the defendant on the date of 05.11.2014, no longer had the right of circulation in Romania, thus falling under the scope of the sanctions pursuant to the dispositions under art. 334 par. (4) Criminal Code.

In law, the act of the defendant J, who, on the date of 17.09.2008 removed the license plates bearing registration no. X from the car belonging to the damaged party, parked on a street, and placed these plates on another car which he subsequently drove on the streets, the act of the defendant meets the constitutive elements of the offense of aggravated theft pursuant to art. 208 par. (1), art. 209 par. (1) letter e) of the Criminal Code and the offense driving on public roads a car with fake registration numbers placed on it, pursuant to art. 85 par. (2) of the G.E.O. no. 195/2002[25].

Driving on public roads of a vehicle with a trailer attached thereto, without registration, meets the constitutive elements of the offense pursuant to art. 85 par. (1) of G.E.O. no. 195/2002[26].

Art. 85 par. (1), correspondent in art. 334 par. (1), incriminates the expiry of the registration number, and not the expiry of the civil liability insurance (RCA). The consequences relating to the non-existence of the RCA are not of a criminal nature, but contraventional offences.

The serious error in fact should not be confused with an incorrect assessment of the evidence, this case of cassation being incident whenever the erroneous determination of the facts is obvious, concerning their existence or non-existence, their nature and the circumstances of committing thereof, by not taking into consideration the evidence confirming their existence, the sole condition being their influence on the solution taken[27].

The defendant sitting behind the wheel of a towed vehicle, when the engine of this car is not running, does not meet the constitutive elements of the offense pursuant to art. 85 par. (1) of G.E.O. no. 195/2002, since this car moved along the public roads being towed by another vehicle[28].

[25] C.A. Suceava, Criminal section and cases involving minors, criminal sentence no 101 / 22 .02. 2010.
[26] C.A. Galaţi, Criminal section, criminal sentence no. 134 /19.02. 2010.
[27] C.A. Braşov, Criminal section and cases involving minors, criminal sentence no 54 / 22 .01. 2010.
[28] C.A. Târgu Mureş, Criminal section, criminal sentence no. 206 / 5.04. 2009.

4. Conclusions

Although, at first glance, the offense provided and sanctioned under art. 334 Criminal Code would not raise problems for the correct determination of the legal classification of a factual situation, in this survey I admitted and presented that the doctrine, and the juridical practice as well, experienced fields with different interpretations.

It is important, in such cases, to analyze very carefully whether the factual situation meets the constitutive elements of an offense.

On points of law in practice, we agree with the solution that the act of a person driving on Romanian territory a vehicle that was registered in other state, yet not having the mandatory car insurance, does not meet the constitutive elements of the offense analyzed.

The principle of legality of incrimination and punishment, enshrined in art. 7, par. 1 of the European Convention on Human Rights and Fundamental Freedoms requires, inter alia, that the legislation define clearly the offenses and punishment, in compliance with the principle of predictability.

The term "law" includes the legislative and jurisprudential law, at the same time, and involves certain qualitative conditions, including those of accessibility and predictability. In this respect, the European Court of Human Rights consistently held that the meaning of the notion of foreseeability depends, to a large extent, on the content of the concerned text, the area covered, and the number and quality of its recipients[29] , and the predictability of the law does not oppose that the concerned person would have to rely on good advice in order to assess, to a reasonable level, the consequences that could result from an action or inaction thereof.

At the same time we appreciate that art. 334 par. 4 of the Criminal Code is written in a manner that creates confusion for its recipients regarding the scope extent of the objective side of the offense or the certainty that solely certain actions would be included in the content thereof, respectively specifically involving driving of a vehicle registered in other state without the right of circulation in Romania.

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[29] Dragotoniu and Militaru-Pidhorni against Romania, Groppera Radio AG and others against Switzerland.

THE CRIMINAL CHARGE

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Abstract

The process of criminal prosecution against a particular individual is ordered by the prosecutor or law enforcement investigator by ordinance. After the decision to carry on with the criminal investigation, the suspected person, the perpetrator acquires a legal standing which allows a full spectrum of rights and obligations stipulated by law. This project is focused on the link between our national criminal law regulation regarding the criminal investigation and the demands of the European Convention for human rights.

Keywords: *criminal prosecution; European Convention on Human Rights; criminal law, reasonable suspicion, criminal charge.*

1. Introduction

The start of the criminal investigation proceedings has undergone significant changes under the provisions of the new Criminal Procedural Code over the old regulations of 1968.

Thus, according to art. 305 of the Criminal Procedural Code, "when the preliminary criminal complaint fulfils the conditions stipulated by law, the investigator begins criminal proceedings regarding the committed or prepared illicit act, even if the author is indicated or known".

Compared with the provisions of the Criminal Procedural Code of 1968, which in art. 228 stated that " the investigator notified by resolution, begins criminal proceedings when from the content of the complaint or from the preliminary investigatory acts does not result any legal impediment stipulated in art. 10" we may ascertain the occurrence of two major changes in the national criminal policy.

2. Content

Firstly, according to the Former Criminal Procedural Code, after notification the prosecution could commence proceedings regarding both the offense (*in rem*), and on one particular person (in personam). Nowadays, authorities are required to begin with the in rem phase, even if in the complaint the offender is indicated or enough information exists to allow his identification in order to concentrate the investigation on a particular individual prosecution (initiation of the in personam phase).

The new Procedural Code thus establishes the obligation of the prosecution to be initiated only regarding an offense, so initially it can capitalize only on the *in rem* part of the process.

Secondly, the prosecutors are obligated to initiate in rem proceedings every time they were seized legally and have established the document meets the form and substance and in the case self-notification. Consequently, the new Code of Criminal Procedural vision has eliminated the Preliminary acts of criminal prosecution, previously covered by art. 224 of the old C.p.p.

The immediate start, quasi-automatic prosecution after formulating a notification enables the creation of a procedural framework necessary for the investigators can effectively manage the evidence relevant to verifying the merits of the complaint and, further on, to identify and prove the act was committed by the perpetrator. Thus, the message stemming from the start of the criminal investigation concerning a crime means that the investigators have been lawfully notified, are legally invested and are currently analysing evidence to verify the complaint[1].

In order to indict after receiving the complaint, the criminal investigator (prosecutor or law enforcement official) should first verify their competence, in accordance with art. 294 C.p.p. In case they consider that they are generally, materially and territorially competent, they then proceed to check the notification act (criminal complaint, denunciation, acts signed by other authorities) in terms of form and content. During this "regulatory" stage the alleged criminal complaint is verified if it is described in a clear and sufficient manner, and if not it shall be resent to the complainant, in order to be completed.

By analyzing art. 305 par. 1 C.p.p., as amended by Ordinance No. 18/2016, one can notice the elimination of the condition that none of the cases that

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[1] Nicolae Volonciu, Andreea Simona Uzlau, Noul Cod de procedura penala, Bucuresti, Editura Hamangiu, 2014, p. 765.

prevent the criminal action stipulated by art. 16 par. 1 C.p.p. should be applicable[2].

The elimination of this negative condition is useful because at the beginning of *in rem* investigations, an analysis of legal impediments to the criminal indictment related to a person's criminal liability is not necessary. This condition was apt to lead to difficulties at the start of investigations, especially in cases in which criminal action was conditional upon prior complaint of the victim who was in a physical or moral impossibility to formulate preliminary the complaint (as an example road accidents which caused a bodily injury leading to a period in which the victim was unconscious and in intensive care, given that the offense provided by art. 196 penal Code, the criminal proceedings required the previous complaint the injured person to be set in motion)[3].

However, judicial practice has provided cases in which even if the criminal complaint met the content and form conditions, the prosecutor found evidence of one of the cases stipulated by art. 16 par. (1) C.p.p., certain situations which require the dismissal of a case, without the criminal proceedings *in rem* can be identified.

Also, if the investigator finds nonessential errors that can be corrected by complainant, he may decide to return it for completion. In case the deficiencies are major, essential and cannot be rectified, the case is to be closed, in accordance with art. 315 par. 1 letter. a C.p.p.

After verification of the formal conditions of the notification act and upon establishing their competence, the *in rem* phase can commence. In this regard it should be noted that in the process of finding the applicable law, the investigator is not bound by initial complaint.

From a procedural standpoint, the criminal investigation shall be ordered by the law enforcement investigator or by the prosecutor by ordinance. The procedural act of commencement of prosecution *in rem* must include the particulars set out in art. 286 par. (2) letter a-c and g: name of the prosecutor's office and date of issue; full name and position of the person making it; the object of the prosecution, the applicable legal frame, data on the suspect or accused person; signature of the person who wrote it.

By analyzing art. 286 par. 2 letter a, C.p.p., in relation to art. 305 par. 1 C.p.p., a mismatch can be found. Thus, considering that the order of commencement of prosecution *in rem* must be made by the law enforcement investigator (be it by the police as part of the structures of the judicial police or special criminal investigation unit), the name of the police unit in which the law enforcement official is enrolled should also be mentioned.

Therefore, in the vision of the New Penal Code, the law enforcement investigator is not obliged to submit the ordinance for confirmation by the prosecutor who supervises the activity, but merely to inform the prosecutor, as stated in art. 300 par. (2) C.p.p .: " the law enforcement investigation units are required to inform the prosecutor concerning ongoing or future activities."

Even if the in rem stage is quasi-automatic, it should be subjected to thorough analysis and legal rigor, as required by art. 5 C.p.p., which states that the authorities have the obligation to find the truth concerning the facts and circumstances of the case, and also regarding the suspect or accused person, but by reference to art. 97 and art. 100 C.p.p. we can conclude that the process of finding evidence should be conducted after creating the necessary procedural framework. There are of course exceptions to this rule, such as art. 111 par. (10) which states that the injured person's statement provided during a hearing conducted immediately after registration of the complaint, constitutes evidence even if it is administered before the start of in rem criminal proceedings.

After starting the in rem criminal investigation, authorities may proceed to administering evidence in order to achieve the objectives under art. 285 C.p.p.

Thus, according to art. 285 par. 1 of the C.p.p., "the prosecution is to gather the necessary evidence regarding the existence of the crime, to identify those who have committed a crime and to establish criminal liability, in order to assess whether or not it should be sent to trial ".

When concerned in conducting research that there is evidence proving the reasonable suspicion that a particular person has committed the offense for which prosecution has begun and there is one of the cases mentioned in art. 16 par. 1 C.p.p., the criminal investigation shall order, under art. 305 par. 3 C.p.p., making further prosecution against the suspect (*in personam*).

The process of criminal prosecution against a particular individual is ordered by the prosecutor or law enforcement investigator by ordinance.

The ordinance of the law enforcement investigator against the suspect is subject to confirmation by the prosecutor within three days from the date of issue. The procedural term stated in art. 305 par. 3 is not mandatory.

However, the confirmation act by the prosecutor is of particular importance. Thus, if the law enforcement investigators administer evidence which

[2] According to art. 16 para. (1) C.p.p., criminal action cannot be set in motion, and if it was set in motion cannot be exercised if: a) the act does not exist; b) the act is not provided by criminal law or was not committed with guilt established by law; c) there is no evidence that a person has committed the offense; d) there is an explanatory; e) lack of preliminary complaint, authorization or notification by the competent body or another condition stipulated by law, required in support criminal action; f) amnesty or prescription, the death of the suspect or accused person or suspect legal termination in a case of a business; g) withdrawn prior complaint, so that criminal liability is removed, reconciliation, agreement or mediation under the law; h) legal impediment to punishment; i) there is res judicata; j) transfer procedure with another state.

[3] Mihail Udroiu, Procedura penala.Partea speciala, Editura C.H. Beck, Bucuresti, 2016, p. 37.

requires the existence of a suspect in the case (reconstruction[4] or hearing of the suspect), in case later on the prosecutor overseeing the prosecution cancels the ordinance, this will entail the exclusion of the evidence outside the procedural framework as unlawfully. In addition, after further criminal investigation, law enforcement investigators have apprehended the suspect and the case prosecutor cancels the ordinance, the revocation of detention is also a direct consequence. According to art. C.P.P. 209, in conjunction with art. 203 par. 1 and art. 202 par. 4, letter a, C.p.p., the arrest can be done only against the suspect or defendant, which requires the confirmation by the prosecutor. If the prosecutor should cancel the ordinance, under art. 304 par. 1 C.p.p. the positive condition instituted by art. 209 par. 1 C.p.p. is no longer fulfilled, which stipulates that law enforcement investigators may make an arrest if the conditions of Art. 202 C.p.p. are met. art. 202 C.p.p. stipulates that preventive measures can be arranged if there is evidence or reasonable suspicion that a person has committed a crime, as a minimal standard of proof that would lead to a reasonable charge against the suspect or defendant.

After the decision to carry on with the criminal investigation, the suspected person, the perpetrator acquires a legal standing[5] which allows a full spectrum of rights and obligations stipulated by law.

Thus, in accordance with art. 77 C.p.p. and art. 83 C.P.P., the suspect has the following rights:

a) the right not to give any statement during trial, bearing in mind that should he refuse to testify, he will not suffer any negative consequences, and he should give statements, it can be used as evidence against him;
b) the right to be informed of the offense of which he is suspected of and its legal qualification;
c) the right to see the file, in a accordance with the law;
d) the right to have a lawyer of his choice, and if should not not designate one, in cases of compulsory legal assistance the right to be appointed one;
e) the right to propose evidence in accordance with the law, to raise exceptions and draw conclusions;
f) the right to make any other claims related to the settlement of civil and criminal side of the case;
g) the benefit of an interpreter free of charge when he does not understand, isn't able to express himself well or cannot communicate in Romanian;
h) the right to appeal to a mediator in cases permitted by law;
i) the right to be informed of his rights;
j) other rights provided by law.

The legal doctrine has stressed out the importance of this particular stage in which the prosecution efforts are confirmed which has the significance of formulating a criminal charge against a person when the prosecutor or the law enforcement investigator, after evaluating the existing evidence in question comes to a reasonable suspicion that a particular person committed the act stipulated by criminal law[6].

The term criminal charge is an autonomous one, judicially established by the E.C.H.R.[7]. This means any official notification, issued by a competent authority, which is attributed to a person committing a crime, is able to bring forth significant repercussions on the rights and freedoms of the individual.

We appreciate that the disclosure of the criminal charge should not be confused with the disclosure to the accused that he is a suspect, the criminal act that he is suspected of and the legal classification under art. 307 C.p.p.

The E.C.H.R. ruled that the notion of the "formal notification" is in direct correspondence to the moment when the accused person becomes liable for prosecution (for example when a house search is carried, which under art. 158 of the C.P.P. can be performed even in the in rem stage of the criminal proceedings[8]).

It is essential to accurately establish the time of the criminal charge, because from that moment on the rights and guarantees provided by art. 6, E.C.H.R. become applicable.

The Criminal Procedural Code established in Article 307 the obligation of the prosecution to bring to the attention of the suspect before his first hearing, the procedural capacity he has acquired, the act he is suspected of, it's legal classification and the procedural rights he is entitled to.

However, in judicial practice interpretations differ substantially regarding the moment of the prosecution is confirmed, with the disclosure of the accusation and the actual time when the criminal charge against a person is brought forth in the autonomous meaning established by the E.C.H.R..

To analyse the importance and effects of these issues we shall endeavour to address some cases with a proven applicability of the concept.

Thus, the moment at which the prosecution is confirmed against a person he consequently becomes the suspect indicated in art. 305 par. 3 C.p.p., which

[4] According to art. 193 par. 1 of the C.p.p., the investigator or the court, if it is necessary for the verification and accurate data or to determine circumstances which are important to solving the case, can reconstruct, in whole or in part, the manner and conditions in which the offense was committed.

[5] Art. 33 C.p.p. states that the main subjects in the criminal proceedings are the suspect and the injured person.

[6] Mihail Udroiu, op. cit., p. 46.

[7] ECHR ruled in the Engel v. The Netherlands case, para. 81, three alternative criteria in order to ascertain the concept of the criminal charge: qualification as a crime by the domestic law, the nature of the offense and the severity of the sanction that can be applied to the defendant.

[8] ECHR, Rulling Hozze c. Pays-Bas, 25.05.1998.

states that when the law enforcement investigator considers that there is enough evidence leading to a reasonable suspicion that a person has committed a crime, further investigation may be carried out.

Although there isn't a strict and rigorous method of separating the in rem stage and the in personam phase, the prosecutor and law enforcement investigators must, when there is evidence leading to a reasonable suspicion of an offense by a determined subject to confirm the criminal proceedings. This obligation stems from the wording of the law itself, which does not provide an option for the law enforcement investigator, but firmly establishes it as a rule by using the imperative verb "has" and not "may"[9].

However, in order to come to this particular stage, enough evidence should be administered, thus establishing a factual basis for prosecution of a person, since the criminal complaint itself has no probative value.

That way in which the evidence was administered during the stages of the criminal prosecution in rem stage has a significant bearing on the rights granted in this stage and the fairness of the criminal investigation.

In support of this statement, there are instances where the very nature of offenses for which criminal proceedings have been triggered may maintain a balanced procedural process and ensure a fair trial, the right to defense of the person suspected, but nonetheless involves certain difficulties.

For example, the case of injury committed by a doctor. At first in rem proceedings shall commence, by administering preliminary evidence. Most times, the evidence necessary for building a reasonable suspicion of an unlawful medical fault is limited to the hearing of the injured, witness testimony and an expert report which establishes malpractice. But in this case the prosecutorial in rem efforts are directed against a particular person, the only one that could have committed the crime under investigation. Even so, the person under investigation (perpetrator), not until the confirmation of the investigation can he participate effectively in the administration of evidence. The right to propose evidence and the right to hire a lawyer become functional only after the *in personam* stage. Moreover, the right to see the file of the criminal investigation, granted pursuant to art. 83 par. 1 letter b C.p.p. may be exercised by the suspect and not the perpetrator. If he should formulate requests for the administration of evidence or to consult the file, they can be easily dismissed after a purely formal interpretation of the legal provisions that stipulate the necessity of acquiring the quality of the suspect in order to enjoy the rights and guarantees.

Also, in such cases it is necessary that the authorities to weigh in very carefully the evidence, so that the in rem stage isn't prolonged more time than necessary. Infringement of this obligation once the evidence leading to a reasonable suspicion of committing a crime by a particular individual may cause injury of the right to a fair trial, which may attract in case of real and substantial harm, the cancelation of procedural acts and procedural samples obtainted after this time.However, it should be stressed that to establish a possible injury to the right of the accused persons to defense, the proceedings must be examined in their entirety[10].

After confirmation of the in rem prosecution, the suspect may propose more evidence. The European Court of Human Rights determined that the admissibility of evidence is primarily based on nation law and appreciation about the usefulness of evidence remains the attribute of the investigators with the added necessity to motivate their decision.

Another vulnerability stems from the existence of an unusual lag time between the start of the investigation and the disclosure of the accusation. Although art. 307 C.p.p. does not set a time frame, but merely states that the obligation must be fulfilled until the first hearing of the suspect, considering the fact that in some cases the evidence should be taken expeditiously, the authorities must inform the suspect in the shortest possible time. Only this way can he understand the charge, prepare his defense and in doing so the process does not stagnate or threaten the administration of evidence[11].

Doctrine has encountered another potential problem, namely the examination of a witness with the right to refuse to testify[12]. Namely, the husband and former spouse, relatives up or down in a direct line, brothers and sisters of the suspect or persons as nominated by art. 117 par. 1 C.p.p. Strictly procedurally speaking, these people do not have the right to refuse to testify in cases when a criminal investigation is underway in order to document the alleged criminal activities of a specified perpetrator, but during the in rem stage.

3. Conclusions

In conclusion, it should be noted that both the prosecutor but also the law enforcement investigators have the difficult task of administering the evidence in order to establish the judicial truth and to carefully weigh in on the value of the evidence to meet the obligation of confirming the investigation without undue delay .

We appreciate that between the notion of confirmation of the investigation and the criminal charge is a part-whole relation, the second incorporating the first one both in terms of extended

[9] See in this regard the decision of the Constitutional Court of Romania, no. 236 19.04.2016, published in O.M. no. 426 of 07/06/2016.
[10] Case of Van Mechelen c. Olandei, ECHR rulling 23.04.1997.
[11] See also Penal Decision no. 242 of 12/03/2012 of the High Court of Cassation and Justice.
[12] Nicolae Volonciu, op. cit. p. 767.

warranties provided and, in some cases, from the perspective of the occurance during the criminal trial.

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THE PRIVATE VISIT – RIGHT OR COMPENSATION

Iulia POPESCU[*]

Abstract

The connection of the person deprived of his/her liberty with the family is an important aspect to be kept in the prison environment both for him/her and for the family. This connection is accomplished in particular by the right to private visit as provided within the legal regulations. Identifying the origins of the right to private visit and establishing the nature of this private right represent a goal, given that its peculiarity is that although it is regarded as a right, its implementation seems to be closer to the concept of reward.

The radiography of the concept „private visit" is trying to identify both the willingness of the legislator that regulated this right, but also the realities from the prisons in terms of concrete realization of this right, considering both the legal provisions and the concrete situations in prisons.

Keywords: *rights, private visit, family, penitentiary, compensation*

Introduction

The deprivation of the persons' freedom, as a result of the imposition of a sentence or of the disposition of the preventive custody, inevitably leads to their separation from society, and especially from the family environment. The physical closeness between the prisoner and the family members is affected with priority when they are separated, especially the possibility of preserving a private life between the partners when one of them is imprisoned.

The lack of contact between the prisoners and their partners can lead to abnormal behaviour, taking into account that, in addition to the sentence imposed, the prisoners suffer from other penalties not mentioned in the court decisions of conviction.

The work aims to highlight the pros and cons regulating this right, or to clarify to what extent, in its current form, the right to private life of the prisoners can be regarded as a right or as a compensation (possibly a conditional right).

Thus, the intended purpose in achieving this objective is of particular importance, because if it proves that the right to privacy of the convicted person is not in fact a law, the conclusions drawn can be taken into consideration by the legislator in order to harmonize the existing legislation with the concept of the rights.

Thus, this study supplements the existing literature by making an objective analysis of the provisions governing the right to privacy of the prisoners, presenting also the specific issues arising in the process of implementing them, trying to identify the weaknesses.

The work is based on the systematic analysis of the Romanian legislation represented by laws and regulations, which regulated the right to private visit (Law no. 275/2006, Law no. 254/2013 and their implementing regulations), the Constitutional Court Decision no. 222/2015, Case Gaciu against Romania, the relevant matters, and the transposition of the legal rules in the form of standard procedures at the level of prisons.

The right or the compensation are two concepts with different meanings, resulted from their definitions.

"Right = Power, legal prerogative recognized to a person to have a certain conduct, to enjoy certain privileges etc."[1].

„Compensation = what is or is given in order to reward someone for the committed action; reward; gratification"[2].

From the definition of law it can be extracted its essential characteristic, namely that the right person is a recognized power, without being subject to any conditionality.

On the other hand, the concept of compensation reflects a benefit due to the implementation of other activities. Hence, a compensation exists prior to a performed activity that gives rise to a reward. As such, the reward is conditional.

The private visit, new concept in the prison system, was first granted as an experimentally compensation in 1995 and starting with 2006 it was introduced as a legal right[3].

Content

The enactment of this concept was developed through the Implementing Regulations of Law no.

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[1] The Romanian explanatory dictionary.

[2] The Romanian explanatory dictionary.

[3] Ioan Chiș and Alexandru Bogdan Chiș, *The execution of the criminal penalties*, (Bucharest, Universul Juridic, 2015) page 395.

275/2006 on the execution of the punishments and measures ordered by the court in criminal proceedings (hereinafter REG 1). Within art. 43-45 of REG1 it is defined who can benefit from the private visit, the conditions and procedure for granting this right. Currently, the right to the private visit is regulated by Law no. 254/2013 on the execution of the sentences and custodial measures ordered by the court in the criminal proceedings, which repealed Law no. 275/2006 on the execution of the punishments and measures ordered by the judicial bodies during the criminal trial.

The need to regulate this concept through REG 1 results from the importance of its existence for people deprived of their freedom and for their partners.

The private visit, as stipulated in REG 1 (article 43 paragraph 1), allowed the meeting between the convicted person and the husband/ wife, partner/ partner, quarterly, for 2 hours. An exception was also foreseen if the marriage was officiated in prison in the first year of marriage, the private visit being paid monthly (article 43 paragraph 1).

In oredr to grant this right, it was necessary that the convicted person to meet certain conditions established by law.

It is at least peculiar as for achieving a right, it was necessary to comply with certain conditions. Analyzing also other rights of the convicted persons for example, the right of access provided for in art. 38, the right of petition provided for in art. 50 or right to correspondence mentioned in art. 51, it is noted that for exercising these there were not required certain conditions. The law regulated the existence of such rights, for which the administration of the prison had to take certain measures, by no means imposing conditions on the persons convicted.

Introducing the private visit, even conditionally, it was just normal considering the fact that within the Constitution, among the rights recognized to the citizens it was set out in art. 26 para. (1) the right to private family and private life, such as *"The public authorities shall respect and protect the family and private life"*.

It is true that the convicted person must bear the consequences of his antisocial actions, but it is required that the government to create optimal conditions for serving the sentence without restricting the convicted other rights which have not been limited by the sentence.

By Law no. 254/2013 on the execution of the sentences and of the custodial measures ordered by the court during the criminal trial, which repealed Law no. 275/2006 on the execution of the punishments and measures ordered by the court during the criminal trial, the right of the private visit was introduced as free-standing law.

It is worth mentioning that the old regulation regarding the private visit was stipulated in REG 1, now this right is provided within the Law regarding the enforcement of the sentences in art. 69 - Chapter V entitled "Rights of the convicted persons".

According to this article, in order to benefit from the right of the private visit of the persons convicted must meet certain conditions, cumulatively:

a) They have been convicted and are distributed in a regime of enforcement of custodial sentences;
b) It is under trial as a defendant;
c) There is a marital relationship, as evidenced by the certified copy of the marriage certificate or, where appropriate, a partnership relationship similar to the relations established between the spouses;
d) They have not benefited in the last 3 months preceding the request for the private visit, from permission out of prison;
e) They were not disciplinary sanctioned over a period of 6 months prior to the request of the private visit, or the sanction was lifted;
f) Actively participates in educational programs, psychological and social assistance or working;

(2) The married convicted person can only benefit from the private visit of the spouse.

(3) For granting the private visit, partners must have had a similar relationship with the relations established between spouses prior to the date of receipt in prison.

(4) The proof of the partnership relation is done by affidavit, authenticated by a notary.

(5) The director of the prison can approve private visits between the convicted under this article.

(6) The number, frequency of the visits and procedure of carrying out private visits shall be determined by the implementing regulation of this law".

The text of the legislation mentioned above made no significant changes compared to the previous regulation, concerning the conditions for granting a right to visit intimate and the categories of persons to whom it recognizes this right.

What it is worth mentioning is that if in the previous regulation, the convicted and their partners were not married, they had to prove the existence of a relationship similar to that of a marriage in the last 6 months prior to the request for the intimate visit, the main evidence representing the visits under art. 40 of REG 1, as in the new regulation this period is not foreseen anymore and neither the proof of this relationship through the visits.

A new aspect of the new legislative text is the possibility that the governor approves private visits between the convicted under the same conditions as those laid down by Art. 69 of the law.

The rules of implementation of the Law no. 254/2013 (hereinafter REG 2) transposes the obligation regulated in art. 69 para. (6) of the Law, so that the number, frequency and procedure of conducting the intimate visits.

Analyzing the right to visit as foreseen in REG 2, we could say that it provides a significant change in the

art. 69 para. 1 letter b). Thus, art. 145 par. (1) letter a) in REG 2 *states* that the persons "*who are convicted and are sent in a regime of enforcement of custodial sentences, and they are remanded during the trial*" have the right to intimate visit.

The necessity of this change was imposed by decision no. 222/2015 of the Constitutional Court which, upholding the exception of unconstitutionality, reflected that the provisions of art. 69 para. (1) b) of the Law are not constitutional.

Thus, the Constitutional Court was hearing a plea of unconstitutionality in terms of the fact that the right to intimate visit does not apply to people in custody.

In the exception invoked it was mentioned that the existing provision in art. 69 para. (1) letter b) of Law no. 254/2013 - *There are not under trial as defendant* – the persons in custody are exempted from the right to intimate visit.

The Court by its Decision, motivated also by the decisions of the European Court of Human Rights (Case *Varnas against Lithuania*, Case *Moiseyev against Russia*), upheld the exception of unconstitutionality and found that the difference in legal treatment regarding the right to intimate visits as it is provided in the art. 69 para. (1) letter b) and art. 110 para. (1) letter b) of Law no. 254/ 2013, when regulating the enforcement regime of the custodial preventive measures and the final criminal punishments, it has no objective and reasonable justification and are not based on considerations of security activities in the detention centers. Therefore, this difference discriminates the persons remanded in relation to those sentenced to deprivation of liberty, *being likely to contravene the provisions of article 16 of the Fundamental Law, related to those of article 26 of the Constitution*[4].

The Constitutional Court decision came shortly before Romania would be condemned by the European Court of Human Rights, Tuesday 23rd of June 2015, in Case Costel Gaciu against Romania, for discrimination and violation of the right to respect family life, establishing that the authorities applied on the plaintiff differential treatment when they refused his request to receive conjugal visits from his wife during remand.

The new regulation represents normalization of the present situation in prisons because, for example, it was not fair that a person sentenced to imprisonment for two years to be given the right to intimate visit and a person who spent the same period in custody not to have the same rights. One should not lose sight of the fact that the person who is not definitively convicted still benefits from the presumption of innocence. So it was quite unnatural as a person who was found guilty to have a right recognized, which implies a strong emotional involvement and other who hadn't the "chance" to be condemned not to have this right recognized. Moreover, the court ruled definitively on the crime committed by the convicted, but in terms of a person in custody, the court found that the evidence results in the reasonable suspicion that one committed a crime.

It can be concluded that the Constitutional Court decision restores, if allowed, a balance in the rights of the persons deprived of their liberty.

The conditions imposed (article 69 letters a-f of the Law) in order to benefit from this right determines the special status of the right to intimate visit compared to other rights. The text of the law requires both positive and negative circumstances.

The connection of the imprisoned with the outside world can represent that opportunity to motivate in an attempt to overcome the difficult situation they are in.

The new regulation still left unsettled the possibility of the unmarried or single detainees to benefit from intimate visit. This positive condition in para. 1 letter c) art. 69 of the Law sets out the categories of the persons to whom this right applies.

Even the doctrine[5] stated the fact that barring the right to intimate of the young and unmarried individuals not involved in a long-term relationship, is still a type of discrimination. It is quite true that you can have an intimate life even if you're not in a relationship, moreover if you are a young person. Therefore, the lack of intimate activity can affect people depending on their lifestyle and not on their marital or civil status.

It would probably be very interesting to find out what were the reasons envisaged by the lawmaker at the time of regulating this right in its current form.

Hypothetically, if the lawmakwer chose to establish this right to preserve the matrimonial ties or a stable relationship and avoid its collapse, it would still not justify the exclusion of other categories of persons from benefiting from it.

Thus, it is really important to preserve the links between the persons deprived of their liberty and their partners, for physical and mental health of both parties. An additional reason is the fact that the partner of the person deprived of liberty should not be brought into the situation to serve the sentence imposed on the convicted.

However, as far as preserving the links was the main reason for recognizing this right, young and unmarried people should have been included as beneficiaries of this right, just to facilitate the links that may have the gift to temper the aggressive behaviour of the persons imprisoned.

The studies conducted on animals and humans emphasizes an interdependence, although uneven, between high testosterone and aggression. At biological level this fosters competition in order to adapt to the environment, but in case of humans it is

[4] Decision of the Constitutional Court no. 222 on 2nd of April 2015.

[5] Ioan Chiș and Alexandru Bogdan Chiș, *The execution of criminal penalties*, (Bucharest, Universul Juridic, 2015) pag. 395.

associated with antisocial behaviour (domestic violence, DUI)[6].

In prison, such a behaviour can foster abuse and violence. Besides the aspect related to the discrimination between people, according to the Declaration from Geneva, the right to marital life could have a beneficial effect in order to reduce psychological tension and homosexuality in prison[7].

Since 1959 these reasons are supported by literature data, when an American psychologist stated that not only sexual satisfaction should be taken into account, but also the possibility of reuniting with the family, of keeping marital relations or cohabitation and finally the prisoner can foresee a future after the imprisonment[8].

The emotional discharge achieved through intimate activities can normalize the behaviour of people, especially of the young who have much higher hormonal disorders due to age.

If the reason for introducing this right represented an attempt to maintain a balance between the health of the person deprived of his liberty and his partner or to avoid changes in the sexual orientation as a result of the physical contact deprivation with your partner/ spouse, restricting the access of other persons to this right is not justified. Young people who before imprisonment had an active private life may be more frustrated by the loss of this possibility by imprisonment. It is true, as stated above, that by imprisonment, the person must be taken out from the environment where he/ she committed the offense, for his/ her own good, and especially for the society but this does not mean deprived of other rights that were not mentioned in the sentence. The rights whose exercise may be restricted to imprisoned are strictly stipulated by law and individualized by the court in order to personalize each sentence separately. If all imprisoned, regardless of the offense committed, who *ab initio* would have been restricted from all rights benefiting from as free people, it would create a too heavy situation and certainly with no positive consequences. So, irrespective of the act committed, in addition to the sentence imposed, the person would loose all rights and this would have had a devastating impact on him/ her and he/ she would get frustrated and, besides the less serious situations, the persons concerned would be tempted to commit more serious offenses that would produce some of the same consequences.

Often, the imprisoned who are young or who are involved in stable romantic relationships are tempted to rebel more easily since, in most cases this is the only way to suppress, and that their behaviour affects not only them.

It is true that it is difficult to establish a friendship, maybe stable between the persons in detention and the people at large, but it is not impossible, however this can not be a reason for restricting the right to benefit from when knowing someone with whom you can establish a relationship even later after leaving the prison.

The communication with the outside world is much easier today, given the fact that through the Internet connections between people on a very large physical distance can be preserved.

However, communication without physical contact, even occasionally, is a form without substance, and as Titu Maiorescu said "*The second nature, and most important, that we must focus on, is this: the form without substance is not only useless, but it is truly corruptible*"[9].

Based on the reasoning set out, it can be appreciated that the exclusion of the persons mentioned above from the right to intimate visit is not justified and moreover leads to discrimination.

Going back to the analysis of the legal texts, one should mention that the first negative condition, also preserved in the law in force, is that in the last three months preceding the request to intimate visit, the detainee must not have permission to get out of prison.

Restricting the right to intimate visit compared to the right to visit can be noticed more clearly in this condition. Thus, only the right to intimate visit is subject to permission, not necessarily the right to visit. The reason for different treatment between the two rights is not easily identifiable. If one of the reasons for limiting the intimate visit is that in the last 3 months there was a meeting between the imprisoned and the partner, when granting the permission to leave the prison for a certain period, it is difficult to understand why it is not applied the same treatment as to the right to visit. Why the permission as measure ordered by the prison administration does not affect the frequency of the right to visit, and only granting the intimate visit?

The differential treatment between those two rights generates natural questions. It is important for the detained person to have the right to visit or the right to intimate visit? Why should it be distinctive?

The right answer is difficult to be given because for some people the lack of closeness to family, partner, may be more painful than the lack of intimacy with your partner. At the same time there are people who give a greater significance to privacy and the deprivation of this right is deeply felt.

In an attempt to understand the cause of establishing the circumstances for exercising the right to intimate visit, one can assume that the lawmaker found that the intimate visit has a value equal to or greater than the right to visit the detainee and it can be conditioned without unpleasant consequences.

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[6] Archer John ”Testosterone and human aggression: an evaluation of the challenge hypothesis” Neuroscience and Biobehavioral Reviews 30 (2006) 319–345.

[7] Cavan.R.S., Zeemans E.S. „Marital Relationship of Prisoners” J.Crim.L.Criminology&Police Sci. 50 (1958-1959): 50-57.

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[9] Titu Maiorescu, Against Today's Direction in the Romanian Culture, Works, 1978, p. 153.

On the other hand, the answer could be on the opposite, the right to intimate visit being more important and
conditioning it as a deprivation of the detainee to those that would have been benefited from if he was free, showing him again the consequences of his actions.

It is true that by imprisonemnet, the person loses the exercise of several rights that benefited from when free, however regular exercise of some of these rights may lead to the idea of suppressing the punishment nature of the penalty imposed by the court.

Thus, we can conclude that this condition does not justify the existence of the right to the intimate visits.

The second negative condition established in letter e) of para. (1) article 69 of the Law is the lack of disciplinary sanctions for a period of six months preceding the request for the intimate visit.

The right to intimate visit arises especially under this circumstances. According to this condition, the right to intimate visit is granted if the imprisoned has not a behaviour that needs to be punished. So, the detainee is "rewarded" for his behaviour, namely he is rewarded because he was not sanctioned.

The same conclusion is extracted from the last condition laid down in art. 69 para. 1 letter f) of the Law, otherwise positive condition. This condition aims the behaviour of the imprisoned that must *actively participate in educational, psychological and social assistance programs or working.*

These last conditions seem to be the most restrictive of all. While the other conditions are, to a certain extent, independent of the imprisoned person's will, the last two are referring to his will.

All the conditions established for obtaining the right for an intimate visit, and, above all, the last two, are turning it into one closer to a reward.

The right to a visit, being the closest notion to the one referring to an intimate visit, does not require to meet certain conditions in order for it to be applied. There are conditions stipulated for its denial and interruption, mentioned in the art. 141 from Reg. 2. It is only natural for a right to be denied as long as manifesting that right is threatening the order and security. In the art. 141 from Reg. 2, denying the right for a visit applies for: a) guns, amunition, hallucinogenic substances, drugs, medicines or any other objects that are forbidden for the visitors to have on them and which they hadn't declared before the security check; b) the visitors may have a negative influence on the convicted person's behaviour; c) the visitors are under alcohol use; d) there is proven information that the visitors might trouble the security, order or discipline of the conviction area; e) the visitors do not comply with the specific check.

In case of an intimate visit, prior to signing a marriage contract, which lasts 48hrs, it can be interrupted for maximum 24 hrs for reasons related to the administration of the conviction place, without shortening the 48 hrs, according to paragraph no 2 and 3, art. 146 from Reg. 2.

The difference between the right for an intimate visit and other rights, especially the ones related to visits, to which it is mostly related, comes from the fact that if the right for visits does not imply respecting certain conditions, and not only in special situations stipulated by law can be restricted, the right to an intimate visit is conditioned right from the beginning. Altogether, the intimate visit in the case that is referred to in art. 146 paragraph 3, can be interrupted for different reasons that the law did not specify. It is clear the fact that the right for an intimate visit has a particular judicial status. It seems to be a "taming" method for the convicted, by giving them certain benefits if they behave according to the requirements. The convicted themselves perceive it as a reward, especially that such a rewards exists, which is imoral and inadequate for a serious institution as the prison[10].

The ambiguity of the notion referring to the intimate visit is also given by the procedures of implementation for the legislation regarding giving the right for the intimate visit, elaborated by the prisons. According to the procedures, giving the right for intimate visits involves more stages, such as:

- offering information for the implementation of the procedure
- filling in the forms for applying for an intimate visit by the convicted persons and submitting the documents proving the relationship. In the form it has to be specified the person with whom they want to have a personal visit, no other than the husband/ wife, male/ female partner.
- disseminating the information related to the implementation procedure and processing staff, with representatives of the chamber and all imprisoned and informing the tutors.
- analyzing the request and approving it by the departments. The analysis is done by the personnel from the visiting sector, education and psychosocial assistance, labor organization, staff that keeps track of the detainees and of the work organization, the discipline committee secretary, the rewards committee secretary and crime prevention in the prison environment that make notes on the request form, depending on the activities the convicted has conducted.
- checking the request and final resolution given by the director responsible for the security and prison regime, who may or may not approve of the visit.
- approving the intimate visit and filling in the declaration form;
- filling in the documents, making notes in the register, in the form for giving the right and in the electronic system.

The time consuming procedure and the multitude of filters through which the convicted person's request

[10] Ioan Chiș and Alexandru Bogdan Chiș, *The execution of criminal penalties*, (Bucharest, Universul Juridic, 2015) pag. 395.

is analysed in order to get the right for an intimate visit, don't have an explanation. The consequences of the penalty are not diminished by the existence of the intimate visit right. There are plenty of deprivations so that the reason of the penalty takes effect, so much so giving the unconditional right for an intimate visit cannot create the ilusion of lenience in the emprisonment system.

All these activities, and especially the effective procedure of verification for meeting the conditions and the large amount of factors that have to approve the request, prove what has been highlighted in the law text, namely the right for an intimate visit, even though it is regulated in the chapter regarding the rights for the convicted persons, is nothing but a reward.

Conclusions

After the systematization of the above presented data, it can be stated that the right for an intimate visit, even though regulated in the Law 254/ 2013, is far from being a right. All the aspects that refer to this notion show that this is a rewarding way for the convicted persons and at the same time a confining one for their behaviour. Conditioning the approval of this right, restricting the access of other persons apart from the ones already established by the law and presenting this right as an "exchange method" turns what is desired to be a right into a new form of punishment, creating space for certain abuses.

The analysis realized through this study conducts to the idea that the existence of the right for an intimate visit is a consequence of the development of the society that understands and should understand the human psychology and that correcting the behaviour of people is realised rather through understanding, communucation, phisical contact, than through oppresion.

In order to clearly establish whether the current form of the right to intimate visit is beneficial for physical health, mental and moral development of the imprisoned or the consequences would be undoubtedly others if they had regulated as a true right and not a right compensation as today still remains a goal.

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ASPECTS OF GUILTY PLEA AND PROCEDURE OF GUILT ADMITTANCE, NEW JUDICIAL INSITUTIONS FOR A CRIMINAL TRIAL OF HIGHER QUALITY

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Abstract

During the broad reform process that has taken place in recent years for the criminal proceeding activity, following the entry into force of the new Criminal Procedure Act on February 1st 2014, there have been changes of some legal institutions from the old Criminal Code, such as the procedure of admitting the deeds the defendant is held responsible for (art 320 from former Code of Criminal procedure) by its provisions in the content of art 374, alignment 4, as it has been modified by Government Emergency Ordinance and introducing new ones, such as the guilty plea (art 478-488) under the circumstances of modifying GEO nr 18/2016 a special procedure meant to insure the judging of causes with celerity. Both procedures have a common component given by the guilt plea from the defendant, having an additional condition in the case of the guilty plea, besides the aforementioned one, which is the one of accepting the legal classification of the offence for which the criminal proceedings were commenced.

The two legal institutions ensure the compliance with the procedural guarantees of the right to a legal counsel of the defendant, sanctioning this one, taking place with a reduction of the sentence, under conditions stipulated by law.

Furthermore, by admitting the guilt and the legal classification of the offence by the defendant found guilty, in the two procedures also takes place a confirmation of the legality and compliance of the evidence submitted in the course of criminal proceedings.

Keywords: *simplified procedure, guilty plea, admittance of guilt, legal classification of offences, quality of the criminal proceedings.*

1. Introduction

1.1. Procedure of admitting the acts by the defendant.

The Romanian legislature has consolidated the new institution of admitting facts to be totally under the accused responsibility as it has been regulated and modified in the contents of art 374, Alignment 4 from the Criminal Procedure Code with reference to art 375 and 377 from the same Code. So, if in the art 374, alignment 4 exists the legal obligation for the president of the court in first instance to inform the defendant that he may request the trial by simplified procedure, in two other norms, of distinct nature there have been regulated procedure in the case of admittance of guilt, in art 375 and respectively judicial inquiry in the case of guilty plea, art 377. The guilty plea by the defendant only based on evidence gathered during criminal prosecution and based on documentary evidence brought by parties and by the injured party is constructed based upon a deep awareness process of the defendant that reflects upon the way in which criminal prosecution took place, the way in which legal provisions were obeyed during the administration of evidence by prosecutors, both those in favour and those against, the way in which the accused 'defendant expressed both requests and conclusions regarding the evidence presented.

In other words, when the defendant understood to request his/her judgment by simplified procedure he has accepted that the total admittance of deeds in his case is also a consequence of the prosecutor's activity in his case, confirming the abeyance of legal provisions in the case of evidence needed to prove the facts.

This request of the defendant for a total guilty plea of all his/her acts does not clear the judge from checking how evidence was administrated during the criminal prosecution , as far as its foundation is concerned since from a legal point of view they have been already undergone a judicial control from the preliminary chamber judge.

Therefore, if regarding the factual component, it is exclusively in the defendant's capacity to admit them, as far as legal classification it is concerned, the obligation belongs to the judge to assess over it, and when it is determined the need for changing it, whether ex officio, whether by the request of the prosecutor or parties, first to bring it into discussion and to draw the attention simultaneously to the accused that he has the right to request to leave the cause to the end.

1.2. The guilty plea procedure.

This procedure has been introduced into the new Criminal Procedure Act and modified afterwards in terms of specific provisions leading thus to a new retrial, in higher court, with respect to the retrial in higher court.

The specific nature of this institution is based on a negotiation form between the prosecutor's office and

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defendant resolved through an agreement whose object is strictly regulated by the content of art. 479 of the Criminal Procedure Code as it has been modified by Government Emergency Ordinance no.18/2016, namely the acknowledgement of the act and the acceptance of the legal classification for which the criminal proceedings were commenced and the manner and addresses the manner and length of the sentence as well as the way of enforcement of the sentence, the type of educational measure or as the case may be the solution to dismiss the penalty or the solution to postpone the penalty.

As opposed to the simplified declared procedure, which is based on the defendant's admittance of guilt, in the special declared procedure of the guilty plea, in addition to the admittance of guilt the defendant has to also agree with the legal classification of the offence that commenced the criminal proceeding, both being cumulative conditions.

2. Content

The procedure of pleading guilty by the defendant, as it was regulated at present in the Criminal Procedure Code, offers more dynamism to the criminal trial, as it benefits from increased quality, by swiftness and sensible judging of causes but also underlining the quality of criminal prosecution, respectively obeyance of legal provisions, but also the proper foundation of evidence means.

At the same time it is worth mentioning that the lawmaker allowed also the issue of admitting the facts and also requesting the judging of the cause by simplified procedure and by authenticated document, by this aspect retruning and referring to the old regulation from the previous Criminal Code.

However, we believe that the change has occurred with the purpose of an improved efficiency of judging the cause, in its simplified procedure, when the accused finds himself unable objectively speaking to present himself in front of a judge.

As seen in practice in judicial court, Even if the cause is solved by simplified procedure, The sentence delivered is well documented and motivated by the judge, retaining as to fact or law, based on evidence from prosecutor's, analyzing the judicial classification maintained, as well as fixing the individuality of the applied sanction with reduction of its limits under the provisions of art 396, align 10 from the Criminal Code, giving more efficient sense to the contents of art 374 align 4.

In the sense of the above mentioned, it exemplifies two cases settled by the High Court of Cassation and Justice at the first instance, where the simplified procedure was applied[1].

Thus, in first instance, the Supreme Court held that after the implementation of the provisions of Art. 374 par. 1 of the Criminal Procedure Code and the provisions of Art. 374 par. 4 of the same code, the defendant R.N. declared his intention to avail himself of this procedure by acknowledging the acts as described in the act of apprehension, requesting that the trial be based on evidence administered during the criminal investigation phase. In this respect, according to art. 375 Code of Criminal Procedure Code the defendant was made a statement, the court granting his request to be tried in the simplified procedure.

In the recitals of the sentence, the High Court essentially held that "in 2009, at the proposal and with the opinion of the deputy R.N. (Deputy in the Parliament of Romania for the legislature 2008-2012), R.C.(His daughter) was employed in his parliamentary office in the constituency no. 7 B, also in 2010, deputy R.N. has concluded a civil service contract in the same parliamentary office with his daughter, P)former R) S.

The High Court finds that the issue in fact presented in the indictment, also admitted by the defendant R.N. (Evidence not contested by the defendant), the whole evidence proving - beyond reasonable doubt - the existence of the acts committed by the defendant and his guilt for committing the offense of conflict of interest"

It was also reasoned that "the constitutive elements of the offense of conflict of interests are met. Thus, the actively qualified subject, respectively the civil servant who has the competence to carry out acts and / or to participate in decision-making. .. In order to achieve the material element of the offense there is no need for damage and only for the realization of a material benefit for himself / herself, husband / wife, which in this case has been achieved.

The daughter of the defendant R.N., called R.C. has earned a salary of 6391 lei during 19.10.2009-1.06.2010 on the basis of the individual labor contract no. 4924/09 and 5267 lei during 15.06.2010-01.04.2011 on the basis of civil contract 1436/2010.

Thus, the public money accesible to the defendant was directed to the members of his family, and due to this personal interest of patrimonial nature, it results that the legal condition is the non-fulfillment of the duties attributable to him as a member of the Parliament of Romania, in accordance with the principles underlying the exercise of public dignity.

The rule of incrimination does not includes that the material benefit to be unjust, but only that it has actually been obtained through a biased procedure. Thus, obtaining a material benefit is the condition for achieving the objective side of the offense provided by art. 253 [1] The previous criminal code, which does not convey to the act the character of an offense of damage, since the main strain of social relations protected by the

[1] Sentence nr .869 from 30th September 2014 of High Court of Cassation and Justice, remaining definitive by no appeal;Sentence nr. 950 from 27th october 2014 of High Court of Cassation and Justice remaining definitive by decision nr.14 from 9 th february 2015 of High Court of Cassation and Justice, Judicial Formation of 5 Judges.

law is the correct exercise of public authority by civil servants.

The facts of the defendant R.N. have created a state of danger regarding the social values protected by the law, regarding the functioning of the institutions, since the indirect patrimonial interest of the MP can influence the objectively fulfilling of the attributions, thus fulfilling the stipulation in the indictment rule.

In regards to the subjective side of the offense of conflict of interest results in the fraudulent intent of the defendant R.N. to act in the direct interest of his family, which has facilitated him to obtain material benefits from the budget of the Chamber of Deputies.

Thus, the case meets both the subjective aspect and the objective ones, the constitutive elements of the offense of conflict of interest provided by art. 253^1 previous Criminal Code, a text on the basis of which the defendant will be sentenced to imprisonment for 4 months, with the provisions of Art. 396 par. 10 Criminal Procedure Code and Art. 41 paragraph. 2 Criminal Code .

In regards to the method of execution of the punishment, it is considered that, in relation to the personal data of the defendant, the purpose of the punishment can be achieved without the execution of the sentence in detention, which is why it will order the conditional suspension of the execution of the sentence".

In the second cause, also conflict of interests, the High Court has retained that defendant K.K assited by chosen attorney, that he declared in front of the court that he request trial based just in evidence administrated during the criminal prosecution, admitting his facts as stipulated in the documents submitted to the court, but without accepting their judicial classifications, assessing that this aspect does not interfere with his ability to ask for simplified procedure trial.

Thus, for the case file the defendant filed a statement (also signed by his attorney) in which he made these remarks, underlining that he committed the act being convinced that it does not constitute an offence, the conviction being reinforced by the customary law existing in his activity area and confirmed by the circumstance that the legal interdiction occured later when the acts have ceased.

Along the same lines it has been pointed out in that extrajudicial statement that the defendant understood to file it to the case file in order to outline his procedural position- that his conviction of innocence has been reinforced also by the regulations of other states with democratic regime.

At the same time his hearing directly before the court, the defendant requested a time limit for filing documents, circumstantial evidence.

In view of the defendant's willingness to demand that the trial be conducted only on the basis of the evidence administered in the course of the prosecution and the documents filed in the file, in the context of the process of fully recognizing the facts detained in its task, as found and described in the indictment, as well as the fact that the High Court of Cassation and Justice - the Criminal Section did not identify any reason for which at the term of ... to reject the request for simplified procedure, the judicial investigation here in this case was conducted according to art. 375 of Criminal Procedure Code - art. 377 par. 1 Criminal Procedure Code, with the consequence of applying art. 396 para. 10 Code of Criminal Procedure concerning the Settlement of Criminal Action against defendant K..K.

With a view to the delivered sentence, it was retained the issue in fact and law, the judicial classification was motivated, dismissing the invoked defence. Therefore, „contrary to the claims made by the defence regarding the so called lack of precision, predictability and foreseeable quality of criminal law, in the sens that at the date of the acts there was no legal interdicition on hiring family members in the Parliamnetary offices – The high Court of Cassation and justice finds the conflict of interest offence as stipulated in art 253 Former Criminal Code (legal text for incident mentioned) was introduced by Law 278/2006, and the interpreting of the incrimination text brings the conclusion that the acts of the accused falls under the scope of criminal illicit when the activity of a public clerk is related to personal interest by not acting in a transparent way, and not to abstain from decison making, with the purpose of gaining material benefits for any of the persons mentioned in the incrimination norm.

Neither the defense constructed on the lack of quality for the active subject of the criminal offence, that of public clerk, cannot be accepted in consideration to the fact that in the special status of MPs, the Constitutional Court has stated that "although the constitutional and legal status of MPs, as poeples representatives, is different from public clerks status, and different from other citizens in general ….but this status cannot be retained as being enough to accept a different legal treatment in report to other categories of individuals for which the law 176/2010 on integrity and public function is applied (to be consulted decision 279/2006 of CC, decision 81/27 February 2013. In the cause above mentioned the accused received a 2 year sentence in prison, by applying art 86 Criminal Code and art 5 Criminal Code, with application of complementary sentence and accessory penalty, being reduced to 1 year and 6 months, by applying art 81 from former Criminal Code and removing the complementary penalty applied initially, by course of appeal from accused that was accepted.

Unlike the admittance of guilt by the defendant in front of a judge, in first instance the guilt plea is a special procedure that has been recently introduced in the Romanian criminal procedure with incidence during criminal prosecution, based on a negotiation process between prosecutor and the defendant in limits explicitly provided by its object, in limits established by a preliminary notice and written by a prosecutor with a superior role in hierarchy. Admittance of guilt is

under judicial control from the court instance, its sentence may be submitted under legal and regular remedies. Therefore, the procedure starts in the course of the criminal prosecution, the initiator of the agreement, being both the prosecutor and the defendant, the subject of cumulative conditions, namely the acknowledgment of the commission of the act and the acceptance of the legal classification for which the criminal proceedings were initiated, unlike the procedure in which recognition does not concern legal classification and the type and amount of the punishment, as well as its form of execution, namely the type of the educational measure, or, as the case may be, the solution to the application of punishment or postponement of punishment.

In the judicial practice, the application of this special procedure is increasingly applicable in view of the change in the sense that the guilty plea agreement can only be concluded with regard to the offenses for which the law provides for the fines or imprisonment For 15 years. As with the simplified procedure, the consequence of the application of this procedure is that the defendant benefits from a reduction in punishment.

The scope of the offenses in which an agreement on the recognition of guilt can be concluded is widely extended, in the case of the High Court, either in the cases of jurisdiction at first instance or in the appeal, ranging from conflicts of interest under the conditions Old regulations, art. 253 1 of the Criminal Code, as a result of the more favorable criminal law, for abuse of office against public interests, provided by art. 248 Previous criminal code, favoring the offender, provided by art. 264 par. 1 Penal Code, False Intellectual Code provided by Art. 289 Penal Code, the offense of using in any way, directly or indirectly, information which is not intended to be advertised or to allow unauthorized persons access to such information for the purpose of obtaining for itself or for another undue advantage provided by art. 12 letter B of Law no. 78/2000, the driving on the public roads of a motor vehicle by a person who has an alcoholic admix of over 0.80 gr / l of pure alcohol in the blood provided by art. 87 para. 1 of GEO no. 195/2002 with the application of art. 5 Criminal Code.

Thus, as an example, in the agreements with which it was invested admitted, condemning the defendants to the punishments in the amounts and modalities of execution[2], either admitted in the appeal, as a result of the finding that the provisions of art. 478-481 Criminal Procedure Code that the penalties applied and the manner of execution is appropriate[3].

Conclusions

In the research carried out over the newly presented institutions, respectively the admission of facts by the accused and the special procedure of guilt plea, it has been noticed that these two have a real and efficient applicability during the criminal trial, offering a guarantee for the obeyance of right to defence, but as well of respecting principles such as contradiction, oral speech and finding the truth.

The existence of such procedures in the Romanian Code of Criminal Procedure ensures an alternative to the procedure of common law, that reflects the reality when the quality of criminal prosecution gives the possibility of guilty plea or/and judicial classification, reduction of sentence under conditions stipulated by law, ensuring the possibility of raising awareness of the consequence of a criminal act done.

The quality of the criminal trial in the simplified procedures presented can be found also within the contents of the decisions given, in which are examined not only legal provisions, but also the factual situation, the judicial classification and the analysis of observing the fulfillment, criteria that are needed for the individual sentence in each and ways of serving the sentence.

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- Sentence nr. 1049 from 4th December 2014 of High Court of Cassation and Justice, Criminal Section, remaining definitive by no appeal;
- Sentence nr. 67 from 2nd February 2016 of High Court of Cassation and Justice, remaining definitive by no appeal;
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[2] Sentence nr. 1049 from 4th December 2014 of High Court of Cassation and Justice, Criminal Section, remaining definitive by no appeal.

[3] Sentence nr. 67 from 2nd February 2016 of High Court of Cassation and Justice, remaining definitive by no appeal; decision nr. 200/A from 3th june 2015 of High Court of Cassation and Justice, Criminal Section; decision nr. 53/A from 16 th february 2015 of High Court of Cassation and Justice, Criminal Section; decision nr. 201/A from 4 th june2015 of High Court of Cassation and Justice, Criminal Section.

THE JUDICIAL TREATMENTN APPLICABLE TO INFRIGEMENT OF THE PROVISIONS ON SETTING AS CIVIL PART IN THE CRIMINAL TRIAL

Irinel Dumitru SAMOILĂ*

Abstract

Admisibilitatea echivalează cu permisivitatea din partea legii. Un anumit act poate fi interzis de legea ce guvernează procedura în care care este efectuat, însă același demers judiciar poate fi permis într-o altă materie, de o altă lege. Constituirea de parte civilă îndeplinită legal potrivit legii vechi, își păstrează valabilitatea și sub imperiul legii noi, cea din urmă aplicându-se doar cu privire la modalitatea de soluționare a acțiunii civile.

The admissibility is the equivalent of the permissiveness of the law. A particular act may be prohibited by the law governing the procedure inside which it is performed, but the same approach can be allowed in other judicial matters, by another law. The legal constitution of civil party fulfilled under the previous law, remains valid under the new law, the latter one being applicable only on how to solve the civil action.

Keywords: *inadmissibility, civil action, civil party, transitional regulations*

Test case: Following a traffic accident, caused solely by the defendant on September 22, 2011, the injured party suffered injuries, which required 150-160 days of medical care. In legal terms, this is a civil part in the criminal trial, according to the legal provisions in force at that moment, namely the provisions of article 15, line 1 and 2 of the Code of Criminal Procedure from 1968[1], without indicating the amount of the claims, grounds of evidence on which they are based.

By the indictment of October 26, 2015, the defendant was prosecuted for bodily injury by negligence.

At the first hearing, the injured person has been suggested that he should also specify the civil action, obligation that was not carried out.

By the Criminal Verdict 273 of March 14, 2016 pronounced by the Court of Law of District 3, it was rejected as inadmissible the civil action exercised by the civil party inconsistent with the defendant and the civilly responsible party, considering that *"...failure to comply with any of the conditions cumulatively set in line 1 and 2 of the article 20 of CCP entails, according to the provisions of article 20 line 4 CCP, the mandatory penalty of inadmissibility of civil action in a criminal trial, the civil party having the option to bring it in a civil court."*, therefore "...*the civil action in a criminal trial constitutes a procedural benefit granted to the victim, in order to harness all elements gathered by the prosecutor in the prosecution, as well as the entire procedural framework of the criminal proceedings, in order to meet all the civil, patrimonial or moral interests affected by committing the offense and, therefore, should have been exercised in the conditions imposed by the legislator...".*

Vested with the civil party appeal against this verdict, the superior court considered that "*... assuming that constitutions as civil part does not meet the conditions provided by law, the situation is equal to the one in which the injured party has not been civil part in the criminal trial, therefore it does not justify rejecting the civil action as inadmissible (solution which involves constituting as civil part in the criminal procedural law conditions, to be in the presence of a civil action adjoining the criminal one*)."

Moreover, the judicial control has further mentioned that "*... in question, indeed, the constitution of civil part of the injured party has taken place on November 21, 2011, therefore according to the old law and, hence, remains valid, over the provisions of article 4 line 1 of the Law no. 255/2013*."

Accordingly, the appeal of the civil party it has been partially admitted and sent the case back for another trial to the first instance court, only with regard to its civil side[2].

In addition to the relatively innovative solution to send back the case for another trial by strictly taking into consideration these aspects[3], but which is not the subject of the present study, I consider that the case raises a series of discussions regarding the judicial treatment and the procedural penalties applicable to the civil action performed in the criminal trial.

In the criminal procedure, the concept of admissibility is equivalent to the permissiveness from

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[1] The injured person can be a civil party against the defendant and the civil liable party. (2) Constituting as civil party can be done during the prosecution, as well as in court until reading the notification act.

[2] Bucharest Court of Appeal, IInd Criminal Division, D.P. 918/June 1st, 2016, file no. 32105/301/2015.

[3] As it involves a direct approach of the more conventional standard stipulated by the provisions of article 2 line 1 of the Additional Protocole 7 to the E.D.O Convention. For further explanations, please check I.D. Samoilă- *Motivations of the judicial solutions- guarantee of the rights of the defense*, in European Legal Studies and Research (book dedicated to the international conference of PhD students of Law), Edit. Universul Juridic, 2016, pages 431-435.

the law in order to achieve a particular judiciary approach (to perform an act or exercise a right).

Inadmissibility is therefore a procedural penalty, which burdens a right that is prohibited by the law. This impermissiveness of the law occurs, though, in two ways:

- Tacitly, when the law does not provide the existence of the right[4].
- Expressly, when the law prohibits the exercise of the right[5] or its depletion[6].

In other words, if the law does not grant a procedural vocation to a certain participant at the criminal, to achieve a substantial right or judicial interest, the judicial instrument used by the participant in question is *ab initio* invalid, by legislative will. However, declaring this invalidity is the exclusive privilege of the judicial authorities, which basically runs an *a posteriori* control over the document drawn up in such conditions.

It follows therefor the *latent* character of inadmissibility, which becomes operative on the act, only after observing it.

Therefore, whether it is a tactically or expressly prohibited right, the procedural law is the one that determines its inability.

Drawing a parallel, more or less offset, the admissibility of criminal procedural law is similar to typicality[7] of the criminal law, therefore it's the lack of correspondence between the conducted approach and the procedural rule that governs it.

It is noteworthy the fact that, the inadmissibility may be a *general* one, which affects a judicial approach regardless of the subject it covers, as well as *particular*, meaning that it prohibits a manifestation in a certain subject.

In other words, a certain act may be prohibited by the law regulating the procedure that is performed, but the same judicial approach is allowed in another subject, by another law which regulates it. For example, according to the dispositions of article 20 line 7 of CCP, the civil action cannot be performed in the criminal case, the person who was informed on a conventional way the entitlement to compensation, but it is perfectly admissible its performance thereof under the conditions stipulated in the provisions of article 1349 et seq CCV.

According to the doctrinal views,"...*the inadmissibility concerns only the acts of the parties of the trials and not the judicial bodies, because the latter do not make their jurisdiction comply with the limits set by the law, and if they are exceeded, the penalty of nullity may occur*."[8]. I consider this paradigm as being inaccurate, at least not in the context of the current regulations, because the inadmissibility may affect also the judicial bodies' undertakings[9].

The civil action is the means provided by law to reach, on a judicial way, to undamaging the person who suffered an injury as a result of an illegal act[10].

The earlier regulation of the institution, was minimal concerning the manifestation of will on the implementation hereof, the provisions of article 15 line 1 and 2 of CCV regulating only the term until when the constitution can be regarded as civil, and not with other formal requirements thereof[11].

Broadly speaking, the institution keeps its previous rules already established by the previous regulation, the current enactment coming with a surplus of regulations meant to align to a new legislative concept, strewn with additional elements of adversity and conventionality.

Such a regulatory surplus is also the one stipulated by the provisions of article 20 line 2 of CCP, which constitutes a series of additional formal conditions (indicating the *nature and the extent of the claims, reasons and evidence on which it is based*), under the mechanism of constituting as civil part, conditions once unfulfilled, draw the penalty treatment provided by the dispositions of line 4 of the same article.

I consider that because of these consequences that arise from failure to comply with this rule, presents great importance to establish the legal nature of the incident penalty, so as to also be determined the legal status applicable to its occurrence.

Thus, I consider relevant to determine if the phrase "*can no longer constitute civil part in a criminal trial"*, is equivalent or not to an express establishment of inadmissibility.

As shown in the example above, it was specified by the fund court that not mentioning the civil action by the civil, in terms of the amount of the requested

[4] For example, even though it is a common law and more frequently encountered, there is no legal provision which allowes scheduling a certain hour to call the case. Even though there are normative sources in this regard (please refer to the provisions of article 121 line 4 of Annex to HCSM 1375/2015, regarding the approval of the Court's Internal Regulations, published in the Official Gazette 970/ Dec. 28, 2015), but given their infralegislative nature, procedural penalties cannot be applied, in case of violation of the provisions set there.

[5] For example, according to the provisions of article 409 line 1 letter c) with refference to article 87 line 2 of CCP, the civilly responsible party cannot make a call on the criminal side of the case, only insofar as the solution from this side has influenced the civil side's solution.

[6] For example, according to the provisions of article 213 line 6^1 of CCP, the rights and freedom judge's pledge with which a decision is made against the prosecutor's order through which the judicial control is taken, is final. Accordingly, the appeal against such verdict becomes inadmissible, the right to a superior jurisdiction being depleted.

[7] Corespondance between the concrete and abstract model features provided by the incrimination rule - F. Streteanu, D. Nițu- Criminal Law. General Part, University course, vol. I, Ed. Universul Juridic, 2014, pg. 254.

[8] I. Neagu- Criminal Procedural Law. General Part, Treaty, Ed. Global Lex, București, 2004, pg. 469.

[9] For example, the prosecutor's appeal against the rights and freedoms judge's conclusion in which, pursuant to the provisions of article 213, line 6 of CCP, he revokes the judiciary control ordered by the prosecutor, must be rejected as inadmissible, as per the provisions of article 425^1 line7 point 1 letter a) of CCP.

[10] G. Antoniu, C. Bulai- Dictionary of Criminal Law and Criminal Procedure, Ed. Hamangiu, 2011, pg. 29.

[11] The fact that, unlike the previous regulation, it has been stipulated the possibility of constituting as civil part " *in writing or oral",* doen not constitute an express dedication of the alterniteveness manifestation form of will.

damages, which represents this and the evidence it intends to use, thereby attracts the inadmissibility of the action carried out this way. At the same time though, the inadmissibility implies the absence of the right or its depletion.

Or, under the given assumption, the injured person is in full vocation to get indemnities for the injuries which have been caused, therefore one cannot speak of an absence of the right. Furthermore, this right has not been depleted in another form of prescription by the law, from those stipulated by the provisions of 22-27 CCP, namely trading, mediation, civil court settlement and so on.

Consequently, the approach of the civil party is allowed by the law, because there is correspondence between this and its prescriptive rules, included in the provisions of article 19 CCP.

This correspondence loses though its validity of the act which is burdened by further formal conditions, such as those provided by the provisions of article 20 line 2 of CCP, whereas the provisions of article 19 of CCP governs exclusively the possibility of exercising the civil actions, *in the criminal trial.*

Therefore, the final thesis becomes reasonable of the provisions of article 20 line 4 of CCP, in the sense that failure to comply with the formal conditions of constituting the civil part, invalidates itself the whole procedure exercised *in the criminal proceedings,* but not in a civil one.

Accordingly, in this hypothesis, we can talk about a *particular inadmissibility* of the civil action, but not a general one, the fund court's reasoning being correct regarding to this aspect.

It is therefore wrong the argument of the appeal court according to which the civil action admissibility implies the initial existence of this actions (thus failure to comply with the conditions stipulated in the provisions of article 20 line 2 CCP is equivalent to the absence of this action), because it induces the idea of interference of the most severe criminal procedural penalties, namely what qualifies the doctrine as being *absent*.

Besides the fact that this penalty does not benefit from a legislative regulation, the absence involves an actual reality and not a legal one[12], producing no legal effect and no need to be taken into consideration. In the present case, not complying with the conditions stipulated in article 20 line 2 of CCP, produce a series of legal consequences, namely the impossibility of joining the civil action to the criminal one, or opening the way to perform the action in the civil court. Therefore, one cannot speak about the incident of this penalty.

Another penalty, which can be discussed as being incident, would be incapacity, but the assumption established by provisions of article 268 line 1 of CCP and namely not complying with the legal term prescribed to exercise the right, is not also satisfied. This is because the civil party expressed its option within the legal term stipulated by article 20 line 1 of CCP.

Moreover, I believe that failure to comply with the dispositions of article 20 line 2 od CCP, cannot draw the nullity penalty, with all its legal status, because the nullity's essence is the possibility to remake the act which was declared invalid, this time lawfully, according to the dispositions of article 280 line 3 of CCP. Compared to the present case, this would mean therefore the possibility to remake on a civil way, according with the legal provisions, and taking them into account in the criminal proceedings, but this possibility *de plano* excluded by the legislator, which provides the unique possibility to appeal to civil court.

On the other hand, it is correct the second level of reasoning at the court of appeal, meaning that the conditions of becoming a civil party are met according to the previous regulations, its effects still being valid according to the new law, under the dispositions of article 4, line 1 of the Law no. 255/ 2013.

Proceeding with a virtual dismantling of the civil action next to the criminal one, I believe that this progressively follows three major components: constituting as civil party, the actual implementation of the civil action and its resolution.

According to article 3 of the Law no. 255/2013, the new procedural regulation applies to all criminal cases that have a pending status at the judicial bodies, except the cases as stipulated by this law. Such an exception is the one referred to in the article 4 line 1, according to which, the procedure acts legally fulfilled before the Code of Criminal Procedure entered in force, shall remain valid, with the exceptions provided by this law.

Because in a civil action, the transitional rules[13] comprised in the Law no. 255/2013 does not stipulate such exceptions, I believe that the constitution as civil part is legally fulfilled according to the old law, keeps its validity under the new law, the latter applying only when on the way to solve the action. This is because the new law is applied only on the civil action steps that were not yet covered until the moment of its entry into force, the reflection of the principle *tempus regit actum.*

Compared to this case study, since establishment as a civil party has already taken place under the rule of the old law, the new law will govern only two of the remaining steps, namely the its implementation and the resolution of the civil action.

Therefore with this regard, the court of appeal's resolution for which the admissibility of the civil action was found, appears as being the correct one.

Conclusions

Compared to the arguments above, I consider that the principle of *tempus regit actum* received express

[12] A. Crișu- Criminal procedural law, ediția a 3-a, Ed. Hamangiu, 2011, pg. 370.
[13] Article 1-24 and 103-109 of Law no. 255/2013.

provisions in Law no. 255/2013, these behave as special provisions derogating from the general principle under specialia generalibus derogant. As such, these rules have priority in applying in relation to those contained in the Code of Criminal Procedure concerning acts initiated or conducted under the rule of the old law, but continue to take effect and under the influence of the new. Thus, the legal establishment as a civil party in the criminal proceedings conducted prior to 2.1.2014 remains valid after this date, but will be specified and complemented by the mentions expressly provided by art. 20 para. 2 CPP, within the term provided by art. 20 para. 1 CPP, under penalty of its inadmissibility exercise criminal proceedings.

However, if these gaps are not filled, civil action may be exercised only in civil court without civil party applicants to be enforceable against res judicata judgment or criminal inadmissibility civil action stated in the frame procedure as according disappear. art. 28 para. 1 CPP, res judicata judgment criminal civil court reflects only the existence of the crime and the person who committed it.

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COMMENTS ON THE OFFENSE SET FORTH UNDER ART. 13IN THE LAW NO. 78/2000

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Abstract

The law conditions the application of its provisions only to the arbitrary conduct of the head of a political party, union, employers' association or some non-profit corporate bodies. Considering the contradictory judgments pronounced so far in case law, we believe that some comments on the capacity of the passive subject against the active subject of an offense are required. In fact, we consider that the dispositions of this article should be conditioned only following some influence exercised on the members of one's own political party, union, employers' association or non-profit corporate bodies.

Keywords: *head of political party, members of political party, exercising influence, using authority, offenses assimilated to corruption offenses, law no. 78/2000.*

1. Introduction

Fighting against corruption involves a *sine qua non* premise, namely understanding the concept of „corruption". For these purposes, an outline of the meanings of the notion of „corruption" was required. The first substantial amendments to the legal status of corruption deeds were made in the Law no. 78/2000, as subsequently amended by the Law no. 161/2003.

Through this law, the legislator aimed at fighting against any types of corruption, among which the offenses assimilated to corruption offenses.

The provisions under art. 13 in the Law no. 78/2000 (as subsequently amended and supplemented) incriminated the deed committed by a person holding a management position in a political party, union, employers' association or a non-profit corporate body, exercising their influence or authority for obtaining, for themselves or for others, money, assets or other undue benefits.

2. Content

The legal object[1] referred to in the dispositions under art. 13 in the Law no. 78/2000 consists of „*the social relationships related to the honesty and fairness of the persons leading political parties, unions or other institutions playing an important role in the political and social life and in the creation and operation of the rule of law and market economy. Such persons' conduct should be materially subordinated to the idea of serving the public interest and only secondly their own interest*".

In light of the form the material element may take, the law mentions two alternative versions arising exactly from the management position held by the active subject. The influence or authority exercised by the active subject of the offense refers to the employ or use of their capacity for changing a decision or judgment, based on the position held. Such use may refer either to the influence or to the authority the active subject has, or to both of them, these completing each other.

Influence, in the meaning relevant to this case, is the ability/capacity of a person holding a management position in a political party to determine or to convince someone to change their attitude, belief, judgment or decision, in virtue of the position held.

Authority means the prestige, consideration, importance, as generally accepted, of the person holding the position specific to the active subject of the offense.

Both influence and authority arise from the very position held and not from the individual/personal characteristics of the person holding a management position in a political party, being inherent to them.

The socially dangerous consequence consists of the risk posed to the social relationships, that the special legal – main and secondary – object of the offense and, *ipso facto*, the object that safeguards the penal law, namely the creation of some danger to the reputation of the entity managed by the active subject (a political party, employers' association, etc.). Once created, such danger determines the appearance of the cause-effect relationship that should exist between the immediate consequence and the material element, strengthening thus the objective element of the offense. The actual achievement of benefits is not a condition for the existence of the offense.

In support of our claim, we recall the case law[2] of the High Court of Cassation and Justice, according to which „*the offense imputed to the defendant is the danger it poses, which means that its existence does not involve that the benefit aimed at be actually obtained*".

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[1] C. Voicu (coord.), Dreptul penal al afacerilor (Penal Business Law), 4th edition, C.H. Beck Publishing House, Bucharest, 2008, page 456.
[2] The Hight Court of Cassation and Justice, Penal Sentence no. 76 of 30.01.2012.

Such facts may be noted, among others, within the relationships existing within a political party (in the first case) or within a non-profit corporate body (in the second case). Therefore, we consider that both the person exercising their influence or authority, and the victim of such pressure should be members of the same political party. Otherwise, the influence or authority exercised would not arise from the position held by the doer in the political party, but could arise from any other circumstances, a case the legislator did not envisage.

Such manner of construing the legal disposition is apparent also in the case law of the National Anticorruption Directorate: „*one shall order the rescission of the case as regards the offense set forth under art. 13 in the Law no. 78/2000, corroborated with art. 35 par. 1 in the Penal Code (2 material documents), as retained in charge of the defendant G. M. S., given that the evidence taken showed that the persons meeting the defendant's requests held in the political party positions that were higher than the position held by the first, therefore the defendant could not have imposed a decision on them; thus, S. N. E. acted deliberately and fully aware, for the purpose of fulfilling its own interest, whereas F. D. attested, by signing the neighborhood minutes, an actual situation*".

The facts mentioned above show that the offense is related to a limited range of social relationships, namely those governing the activity of a political party/employers' association/union or a non-profit corporate body. Therefore, the legislator aimed, through the incriminating rule under art. 13 in the Law no. 78/2000, to sanction the deed committed by a person that, upon fulfilling their management position held in the entities aforementioned, uses their authority or influence for obtaining, for themselves or for others, undue benefits. Or such influence or authority should be exercised, in the hypothesis related to a political party, only over the members of the political party in which the active subject holds the management position. Otherwise, exercising the influence or authority has no relevance whatsoever, given that these may be exercised only over some persons that are subordinated to the active subject of the offense. It is absurd to suppose that the head of a political party may exercise any influence or authority over some persons that are not members of such political body. This is the reason why the legislator incriminated such deed, in order to limit the discretionary actions of party leaders in their relationships with the members of their own political party. As such, we consider that the offense set forth under art. 13 in the Law no. 78/2000 has a limited scope of applicability, regarding only the relationships deployed within a political party by its leader and not outside such context.

Further, such opinion was stated also by specialist authors[3]: „*when we speak about influence, we consider those relationships between the doer and the injured person and the manner in which the doer's position might harm in the future the activity of the injured person. When we speak about authority, we should consider the somewhat subordinated status of the injured person against the doer, inclusively the doer's moral authority over that person. (...)*

If the doer's deed is not based only on the influence or authority arising from the position held, but also on other kinds of relationships, such offense may not be considered (for example, a party leader approaches a good friend for acquiring some funds for supporting the party election campaign).

We take as an essential requirement for considering such offense that the doer's deed causes the panic of the person approached, making the latter surrender to the doer's insistence".

In support of such claims, we should recall also another judgment[4] against the defendant M.D.I. who, as the head of a county party organization, was tried for committing the offense set forth under art. 13 in the Law 78/2000. „*The evidence showed that, under a sole resolution, criminal in character, the head of P. N. L. G. branch, M.D.I., ordered the local party branch to buy books and magazines in value of RON 43 million from his own company, SC A. SA, ordered the managers of public institutions to buy school materials that were distributed in the name of P. N. L., and exercised his influence as a political leader in order to determine some central decision makers to appoint managers of public institutions, as agreed upon under the protocol signed on 6th March 2005.*

The prosecution documents showed that, in the period aforementioned, the defendant M.D.I., as the head of P. N. L. G. branch, exercised his influence and authority for obtaining undue benefits consisting of amounts of money requested from several persons, who were members of P. N. L., or who held management positions in several public institutions or trading companies, with full state capital; such amounts of money were requested outside the legal framework, for supporting the election campaign for the European Parliament, scheduled to start on 13th April 2007.

As regards the persons holding management positions in several public institutions or trading companies, the Court considered that the influence exercised was based on the relationship between the political party and the person influenced. Therefore[5], „*for the purposes mentioned above, the appointment of the chief commissary of the Financial Guard of G. is also relevant. I.T. was appointed managing chief commissary of the Financial Guard, G. Section, on 1st November 2005, and on 1st January 2006, he was appointed permanent holder of this position. He mentioned in the statement made on 22nd March 2007 as follows: „Upon the emergence of these problems, Mr. C.A.D. came to me with a party membership application and asked me insistently to complete it, given that I was not a member of P. N. L. and I paid nevertheless the membership fee as*

[3] C. Voicu (coord.), Dreptul penal al afacerilor, (Penal Business Law), 4th edition, C.H. Beck Publishing House, Bucharest, 2008, page 456.
[4] The High Court of Cassation and Justice, Judge Panel 5, Judgment no. 363 of 10.11.2011.
[5] The High Court of Cassation and Justice, Judge Panel 5, Judgment no. 363 of 10.11.2011.

a party supporter, and he told me that it would be better to become a member. I completed the application, but I did not fill in the date, so that a previous date could be put down. As a P. N. L. G. supporter, I was recommended, given that I held a position that, according to the political allocation of positions, should have belonged to P. N. L., to pay RON 100 monthly, as a party membership fee or as a donation to the party. I should mention that such fee was also paid by Mr. P.G.A., the manager of the General Directorate of Public Finances, by Mr. P.D., a deputy manager of the General Directorate of Public Finances, and by Mr. P.G.B., a deputy manager of the General Directorate of Public Finances. These amounts of money were requested from us by the president D.I.M. on the occasion of certain events, such as Easter and Christmas; each of us contributed as we were able, with products specific to such holidays (such as cake, sweets, juice, etc) for orphanages and rest homes for the elderly. On the occasion of such holidays, press conferences were conducted that we did not attend but where such products were provided. The audio recording broadcast on the TV channels and in the local press regarding the P. N. L. meeting on 5th March 2007, at which D.I.M. asked some amounts of money from various institution managers, was genuine".

On the contrary, a court judgment[6] pronounced by the High Court of Cassation and Justice, the Penal Section, considered that „*the law listed with limitation the active subjects (a person holding a management position in a political party, union or in a non-profit corporate body), described clearly the incriminated conduct (exercising influence or authority for obtaining, for themselves or for others, money or other undue benefits). The fact the law does not mention that influence or authority should be exercised only in one's own organization (political party, union or non-profit corporate body) leads to the conclusion that the legislator considered this conduct as illicit, notwithstanding the place or persons it is employed against. If the law does not differentiate these hypotheses, it results that the person construing the law is not entitled to make such a distinction and, therefore, that one should not limit the scope of application of the law, as requested by the defense*.

Further, the Court finds that there can be no confusion, based on the incriminating rule, between supporting the initiatives of the members of an election circumscription by the person representing them and the deed of exercising influence or authority, given that the law incriminates only the conduct that aims at obtaining, for themselves or for the others, money or other undue benefits. (...)

Exercising one's influence or authority is illicit conduct, notwithstanding the persons over which this is exercised (over one person or several persons, over an individual or over a corporate body), considering the purpose (obtaining undue benefits) and whether the conduct was caused also by other circumstances, such as the relationships between the person exercising the influence and the person benefiting from it (relatives, friends or persons with whom there are no such relationships)".

In our opinion, the deed of a person that is the head of a political party, consisting of receiving financial support from a person that is not a member of such political party and has no direct or indirect political connection with the first is not set forth in the penal law. Even more so when the relevant support was not requested by the person holding that position, but was offered willingly by other persons outside the party and then remitted to the poor in several locations, on certain holidays; therefore, we consider that this is not the sponsorship of a political party by a person without political affiliation; a charitable act may not be considered a penal deed.

We consider that this interpretation may be supported also by another judgment[7] in the case law. On 16.01.2009, the defendant A. N. was indicted for committing the offense set forth under art. 13 in the Law no. 78/2000 corroborated with art. 41, par. (2) Penal Code, *„namely that he repeatedly and with the same criminal determination exercised his influence and authority arising from his position as president of P.S.D., and obtained, with the help of the defendants J.I.P. (a state general inspector in the State Inspectorate for Constructions), P.B., P.M.I. and V.M.C. (representatives of some trading companies), as well as of other persons, undue benefits, consisting of bearing the cost of some election propaganda materials within the presidential election campaign during November – December 2004, amounting to ROL 34,223,906,475 (ROL 33,841,734,455 from SC E.G. SRL and ROL 382,172,020 from SC V.T.C. SA Bacău)".*

In light of the influence or authority exercised over the defendant J.I.P., the High Court of Cassation and Justice retained the following[8]:

„Evidently, the closest relationship was that of the defendant J., involved recently in the construction of the house of the defendant N. in the 1st district (starting from 1999), as a director of SC C.N.P. SA. Bacău.

In this context, on 22nd January 2001 the defendant was appointed deputy state general inspector in the State Inspectorate for Constructions, an institution subordinated to the Ministry of Public Works within the Government led by the defendant N., as a Prime-Minister.

Subsequently, as of 1st April 2001, the defendant was appointed a state general inspector within I..C., a position she held until after the elections in the fall of 2004, despite the legal changes made during that period, which affected the status of that institution, being confirmed in that position directly by the defendant N., under the decision no. 149 of 15th July 2004.

[6] The High Court of Cassation and Justice, Penal Sentence no.1039 of 22.11.2013, pronounced as final by the Judge Panel 5, page 32.
[7] The High Court of Cassation and Justice, Penal Section, Penal Sentence no. 76 of 30.01.2012.
[8] The High Court of Cassation and Justice, Penal Section, Penal Sentence no. 76 of 30.01.2012.

The relationships between the defendant J. and the defendant N. and his family became tighter after she was appointed a state general inspector, as evidenced by her trips to China together with N.D., the wife of the defendant N, during 2002 and 2003, for buying some goods for the houses owned by the family N. in 1st district. The manner in which such goods were bought, as well as the involvement of the defendant J. in this business are the subject matter of another corruption case on the docket of I.C.C.J, in which both N.A. and J.I.P. are defendants.

All these facts are sufficient for considering the defendant J. influenced by the defendant N".

Thus, the Supreme Court considered that the offense set forth under art. 13 in the Law no. 78/2000 may be committed also through exercising some influence, based on a relationship between friends. However, even in the case previously mentioned, the relationship between friends, namely between the defendants N. and J., was strengthened through the position acquired by J. Therefore, even if the defendant J. was not a member of the political party, she held a position which, according to political allocation, belonged to the party, or was under the authority of the defendant N., as a head of the governing party.

Moreover, we consider that a correct application of the incriminating rule under discussion involves approaching it by construing the legal dispositions.

Thus, the very content of the rule results implicitly in a clear description of the scope of the persons – secondary passive subject versus active subject, and the penal rule should be construed in its spirit and not automatically, as the doctrine also shows[9]: "*the enforcement body (the judge or administrative body) should comply with, by its activity, the law, in its letter and also its spirit*."

We consider that it is absurd to suppose that a person managing a political party/union/employers' association/non-profit corporate body is able to exercise their influence or authority over some persons outside such organizations.

As such, in order to be able to establish the application of the incriminating rule to an actual situation, we should establish clearly the meaning considered by the legislator when developing the rule, in order to find out whether the defendant's activity is penal or not.

The only way to identify the legislator's intention is to construe the legal rule in a manner suitable for the accurate enforcement of the penal law.

Thus[10], „*the need for interpretation is based on the fact that, during the process of law enforcement, the enforcing body (the judge, administrative body, etc.) should clarify precisely the rule content, should establish its applicability to a certain actual situation (a case ruled by it)*".

If an official interpretation, which could remove any possibility of arbitrariness upon establishing the match between the penal rule and the actual situation subject to indictment, is missing, we are in the hypothesis required for the legal interpretation, involving the responsible efforts of the court of law to check whether the aim of the penal law regarding the alleged criminal activity in charge of the defendant was fulfilled or not.

For these purposes, one is obliged to analyze this rules by using the most common interpretation methods, so that to establish the penal nature of the deed beyond any doubt.

Thus[11], in light of the grammatical method, the Court has the obligation to understand the meaning of the legal rule, by considering its terms, phrases and their syntax within the rule. „*The grammatical method aims at establishing the disposition contained in the legal rule, by means of the grammatical (syntactic and morphologic) analysis of the content of the legal rule*".

By using the grammatical method, we notice that the legislator listed comprehensively the persons that may act in capacity of active subject of the offense, but did not consider necessary to describe the persons that may become a passive subject of such offense. However, the syntax of the terms used by the legislator shows clearly that these are within the scope of the entities at the top of which the active subject of the offense is placed, a position which grants them, further, the authority or influence they exercise.

Specialist doctrine[12] stated the same: „*The passive subject is the political party, the union, the employers' association or the corporate body within which the active subject holds a position*".

Moreover, the use of the logic method results in the same kind of interpretation of the incriminating rule. In the hypothesis the legislator intended to extend the scope of passive subjects, the phrase „*or other persons*" would have been inserted in the incriminating rule. Thus, to make the argument more effective *per a contrario* seems to be mandatory, the inexistence of such phrase supporting the interpretation that the persons that may act in capacity of passive subjects are limited to the political party, union or the non-profit corporate body within which the active subject exercises their authority or influence.

Last but not least[13], we should use also the systematic method for interpretation, which „*regards the manner of establishing the meaning of the legal rule, by considering it in the context of the law it is a part of or by comparing it with other laws*".

Or, the Law no. 78/2000 was developed in order to regulate the efficient removal of corruption deeds *lato*

[9] Teoria generală a dreptului (General Law Theory), Nicolae Popa, All Beck Publishing House, 2002, page 247.
[10] Teoria generală a dreptului (General Law Theory), Nicolae Popa, All Beck Publishing House, 2002, page 236.
[11] Teoria generală a dreptului (General Law Theory), Nicolae Popa, All Beck Publishing House, 2002, page 243.
[12] Legea nr. 78/2000 pentru prevenirea, descoperirea și sancționarea faptelor de corupție (The Law no. 78/2000 on the prevention, detection and sanctioning of corruption deeds), Vasile Dobrinoiu, Mihai-Adrian Hotca, and others, Wolters Kluwer Publishing House, 2009, page 204.
[13] Teoria generală a dreptului (General Law Theory), Nicolae Popa, All Beck Publishing House, 2002, page 244.

sensu, committed, usually, by persons in a capacity or in a position in which they are able to decide as regards the interested/influenced/subordinated person, a fact that allows them to condition/ to constrain/ to influence the said person. Thus, we consider, according to the fundamental principles of the material penal law, unanimously used in the specialist doctrine, that the interpretation and enforcement of the penal rule should be strict, while the extension of the meaning of the rule, for purposes of a comprehensive interpretation, is a risky operation, liable to change the legislator's intentions and to result in an overlap between the legislative function and the court function.

As some authors in this field[14] said: „*However, an extended interpretation should be made carefully, given that, rather often than not, the possibility of extending the meaning of a notion used by the legislator in the case of a new situation is debatable, and such uncertainty is difficult to reconcile with the legality principle. (...) A last issue to discuss regards the situation in which all the interpretation approaches presented failed to offer the result expected, namely the ambiguity of the law content is maintained, being thus liable of divergent interpretations. The Canadian doctrine and case law claim that, in such a situation, one should use the interpretation that is more advantageous to the defendant, given that doubt would benefit the latter*".

The principle *in dubio pro reo* became legal upon the coming into force of the New Code of Penal Procedure, art. 396 par. 2 reading as follows: „*the Court should pronounce the conviction, if it finds, beyond any reasonable doubt, that the deed exists, is an offense and it was committed by the defendant*".

The rule *in dubio pro reo* complements the presumption of innocence, an institutional principle reflecting the manner in which the principle of finding the truth, as regulated by the dispositions under art. 5 in the CPP, is found in the evidence taken. According to such rule, the Court, if not being able to be convinced based on certainty, should rule the defendant's innocence and clear the charges against them.

Therefore, the Court should not and may not construe a law widely, against the defendant's interest, if the doubt the latter would benefit from regards precisely the existence and capacity of the passive subject.

Thus, as the doctrine also established, the method of wide interpretation should be used only if none of the other interpretation methods described previously is able to lead to a correct legal reasoning.

In light of the subjective aspect, this shall include, besides the culpable form of direct intention, also the purpose of obtaining undue benefits, in form of cash, goods or other benefits.

As regards the description of the manner of committing the deed, the High Court of Cassation and Justice considered[15] that „*it is irrelevant, in light of incrimination, as set forth under art. 13 in the Law no. 78/2000, whether the defendant was aware or not of the actual manner in which the undue benefits were to be obtained, being unimportant whether the defendant knew or not the details of the criminal activity carried out by the other defendants*". Therefore, in order for the dispositions under art. 13 in the Law no. 78/2000 to be applicable, the existence of the purpose to obtain undue benefits is sufficient.

3. Conclusion

Given the facts described so far, we consider that, as regards the offense set forth under art. 13, the legislator intended to sanction the conduct of a person that takes advantage of their position in order to go beyond the limits of the law, by exploiting their moral superiority against other persons, perceived by the latter also in light of the position held by the active subject. Therefore, the possibility of the active subject to exercise their influence or authority exists only if considered within some relationship framework, in which the passive subject is integrated, and, thus, may be exposed to the doer's illicit conduct. If the passive subject is not a member of the entity managed in whatever way by the active subject, we cannot speak about the existence of any criminal act subject to the incriminating rule.

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CRIMINAL LIABILITY OF A LEGAL ENTITY ACCORDING TO ROMANIAN LAW NO.46/2008

Sorin-Alexandru VERNEA*

Abstract

The purpose of this paper is to highlight the main practical issues concerning the enforcement of Law no.46/2008, in regard to the protection granted under the regulations of title VI, in the particular case when the perpetrator is a legal entity.
In order to establish a frame for the content of this article, alongside the introduction, its structure shall be divided in three parts.
The first part will point out the terminology used in Romanian Law no.46/2008, which shall prove to be necessary for the analysis proposed.
The second part will refer to specific provisions found in Law no.46/2008, mainly articles 106-110, with a brief reference to the Decision of the Romanian Constitutional Court no.670/2008, alongside the Decision given in an appeal in the interest of the Law, by the High Court of Cassation and Justice, no. XII/12.02.2008, and will also consist of a critical approach, from a practical point of view, of the provisions earlier mentioned, holding into account the manner of incrimination by reference to another provision, or to another normative act.
The third and final part will consist of brief conclusions as resulting from the present article.

Keywords: *Forest protection, criminal liability, moral person, legal entity, practical difficulties*

Introduction:

The idea for this paper occurred while trying to establish the compatibility of Romanian special criminal legislation with the criminal liability of legal entities, especially when the legislation referred to is prior to the enforcement of the actual Romanian Criminal Code, namely Law no.286/2009.

The importance of this issue is given by the need to effectively protect the national forest fund, mostly because the greatest environmental damages are not made by individuals acting separately, but by organizations, regardless of their legal form.

My approach was to analyze particular crimes provisioned by title VI of Law no.46/2008 taking into account especially the problems that emerge alongside the interpretation of legal norms as requested by the need of clarity and predictability of criminal law, when the perpetrator is not an individual, but a legal entity.

Mainly because judicial practice lacks in this matter, I focused on analyzing the provisions earlier mentioned in a critical manner, expecting to cover some of the issues that may be raised in practice, without claiming that my approach is exhaustive.

Unfortunately, dedicated literature in this matter is hard to encounter, reason for which my paper deals with issues which are not definitively settled neither in practice nor in theory.

Specific terminology:

It is useful, for the purpose of this paper, to highlight the terminology used in Law no.46/2008[1].

Art. 1 of the Forest Code, in its first paragraph, defines the "*national forest fund*" as all forests, fields intended for afforestation, land that serves the needs of crops, production, or forest administration, ponds and other fields with forestry destination, including those that are not productive, part of forest arrangements on the 1st of January 1990, including surface modifications, done according to the law, regardless of the form of property exercised upon the land[2].

The second paragraph provides that, according to the first paragraph, the *national forest fund* includes:

a) forests,
b) fields under regeneration, and plantations established under forestry purposes,
c) fields intended for afforestation,
d) land that serves the needs of crops: nurseries, solariums, plantations and crops of mother-plants,
e) land that serves the needs of forest production: walnut plantation, trees destined for Christmas, ornamental trees and shrubs and fruit trees,
f) land that serves the needs of forest administration: fields intended to represent feed for the game, and for the production of

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[1] This article is based on conditions of criminal liability of the legal entity imposed by art.135, 136 and 137 of Law no. 286/2009 regarding the Criminal Code of Romania, enforced since the 1st of February 2014. Any reference to the Forest Code, will be considered made to the form republished in the Official Gazette, no.611/12.08.2015, after the last amendments made by law no.232/2016.

[2] D.Marinescu, M.C.Petre – *Treaty of environmental law* (original title: *Tratat de Dreptul Mediului*), Univesitara Publishing House, Bucharest, 2014, pag.271.

feed, or fields temporary used by the forestry staff,

g) fields occupied by constructions and the yard associated with them: administrative headquarters, cottages, pheasant raising facilities, trout raising facilities, animal breeding grounds for hunting purposes, roads and railways used for forest transportation, industrial spaces, forestry technical equipment, fields temporary occupied or affected by obligations or litigation, alongside forest fields in the border corridor and the border protection strip and those intended for objectives within the State Border Integrated Security System,

h) ponds, and non-productive fields, part of forest arrangements.

Paragraph 3 of article 1 states that all surfaces included in the national forest fund are defined as *fields with forestry destination*.

Art.2, paragraph 1 defines the "*forest*" included in the national forest fund as the surface of at least 0,25 ha, covered with trees, that must reach a minimum of 5 meters at maturity, in normal growth conditions.

The second paragraph of the same article states that a "*forest*", as defined by the law, contains a) the surfaces used as forest, part of forest arrangements on the 1st of January 1990, including surface modifications, done according to the law, b) forest protection curtains, c) fields on which juniper thickets are located, d) fields covered with forested pastures with a higher consistency than 0,4, calculated only for the surfaces effectively occupied by forest vegetation, e) plantations forest species located in the protection area for hidrotechnic developments or land improvements on fields that are part of the State public property, if they satisfy the conditions imposed by paragraph 1 of the same article, earlier mentioned.

Paper content:

Title VI of Law no.46/2008 reunites the crimes provisioned by this law, and, to indicate the main practical issues that can rise from the interpretation of these provisions a punctual analysis will be made on art.106-110 of the earlier mentioned law.

Art.106, in paragraph 1 incriminates the reduction of the national forest fund surface, contrary to the provisions of art.36 and 37 of Law no.46/2008 which represents a crime and is punished by prison between 6 months and 1 year, or a fine.

The act incriminated, more precisely the material element, is the *reduction* of the national forest fund surface. This can be done either by an action of deforestation, destruction or by an omission, like the avoidance of taking the legal measures for the protection of the integrity of the forest, or of other components of the national forest fund, as defined by art.1 of Law no.46/2008. For this act to be a crime, it is essential that the reduction of the national forest fund surface to be done with disrespect to the provisions of art.36 and 37 of Law no.46/2008.

Article 36, paragraph 1 stipulates that by exception from the provisions[3] of art.35, the reduction of the national forest fund surface is allowed by the removal of fields necessary to accomplish objectives of national interest, declared of public utility, according to the law, and of fields on which production facilities and/or services for strategical defense in the purpose of national security are placed.

The second and third paragraphs of this article mainly stipulate that by the request of the beneficiary of the land removed from the national forest fund, in order to fulfill the objectives indicated in paragraph 1, the value of the land can be compensated by another land of at least equal value and surface. In this case, the value of the land definitively removed from the national forest fund will not be reimbursed, but other monetary obligations will be paid in advance.

The fourth and fifth paragraphs essentially indicate that no compensation or other monetary obligations are owed if the reduction of the national forest fund will be done at the request of the Ministry of Defense for strategical defense reasons. Equally, if the land measures less than 400 square meters, at the request of the Ministry of Internal Affairs, it will be excluded from the national forest fund without compensation or other monetary obligations, only if it will be used for the accomplishment of an objective within the State Border Integrated Security System.

Art.37, paragraph 1 states that surfaces from the national forest fund can be definitively removed, only if their value is compensated, without the reduction of the entire surface of the national forest fund and with anticipated reimbursement of monetary obligations, only for the fields necessary for the edification or extension of the following categories of objectives:

a) exploitation of mineral resources indicated in art.2, paragraph 1 of Law no.85/2003[4],

b) tourist objectives, including touristic facilities, places of religious worship, medical and sporting objectives, or social objectives done only by the providers of social services, for the administrative territory in the area of economic interest of the Danube Delta Biosphere Reserve mooring pontoons for tourist boats in order to provide food and fuel, floating pontoons and fishing shelters for fishermen organized in associations,

c) holiday houses, only in the private owned surfaces of national forest fund,

d) objectives installed in the national forest fund prior to 1990, alongside the surfaces related to actives sold by the National Forest Administration Romsilva,

[3] Art.35 of Law no.46/2008 stipulates: The reduction of the national forest fund surface is prohibited.

[4] Law no.85/2003 regarding mines, Published in the Official Gazette no.197/27.03.2013.

e) sources and networks of water and sewerage, sources and networks of energy from conventional or regenerable resources, networks and systems of communication, roads of districtual or local interest, recreational parks, theme and educational parks, alongside hidrotechnical and fishing facilities,
f) exploration of the following mineral resources: coal, useful rocks, mineral aggregates, ores, the exploration, exploitation and transport of petrol and natural gas, alongside the installation, repairs, maintenance and dismantling of transportation networks used for petrol, gas and electric energy distribution.

Paragraph 2 of the same article stipulates that the location for the objectives found in paragraph 1, letter c, shall be done according to the following conditions: a) both construction and land are property of the same entity, b) the maximum surface that can be removed from the forest fund, including the building, access road and yard is of maximum 250 square meters if the entire forest property is larger than 5 ha., and maximum 5%, but not more than 200 square meters if the entire forest property is smaller than 5 ha.

Paragraphs 3 to 10 of art.37 establish particular rules regarding the manner of compensation for the fields removed in accordance with paragraph 1.

As previously pointed out, the incrimination is activated only if the reduction of the national forest fund surface is contrary to art.36 and 37, therefore, art.106, paragraph 1, consists of an incrimination *per relationem*, with reference to another article from the same law.

In what concerns art.36, only the first paragraph establishes the conditions in which the fund can be diminished, and the other four paragraphs indicate particular provisions regarding the compensation or reimbursement for the land removed.

I find this particular case imprecise, mainly because it refers to all provisions of art.36, not only to the first paragraph, and the effects of an interpretation regarding all these provisions might exceed the intentions of the legislator. As a consequence, in a theoretical case, if a legal entity exploits, without legal conditions, part of a forest by illegally placing an industrial building on the site (contrary to paragraph 1), the legal qualification of this act will be the same as in the case of a legal entity that intends on building a public utility facility and offers in compensation a field of the same dimensions, but of an inferior value (contrary to paragraph 3). Here, actions themselves and the effects of the crime are completely different, and it is excessive to qualify both acts under the same provision.

Also, I cannot consider the provisions of paragraphs 2,3,4,5 as legal stipulations of a action or omission allowed, because they are only used to indicate the conditions in which a compensation or reimbursement for the value of the land removed is necessary.

In what concerns art.37, I believe that for the same reasons as shown above, only paragraphs 1 and 2 are able to represent the complimentary part of the incrimination, because these are the only provisions that establish the actions allowed in order to reduce the national forest fond. Paragraph 2 consists of a special provision for the case in which the forest fund is reduced in order to allow a holiday home setup, reason for which I believe it can be treated as a supplement of paragraph 1, letter c.

Equally, I must add that the legislator regulated in art.37, paragraph 2, the situations in which the entire forest property is *strictly larger or strictly smaller* than 5 ha, without providing any rules if the forest property is exactly of 5 ha.

Therefore, I believe that art.106, paragraph 1 should have only indicated art.36, paragraph 1 and art.37 paragraphs 1 and 2, not the entire article, in order for the incrimination to be adequate.

Art.106, paragraph 2 states that the same penalty, as provisioned in paragraph 1, shall be applied if the destination of an objective from the national forest fund, that was removed or occupied, is changed within 5 years since the approval date.

In this case the material element is clear, and it consists of an action to change the destination of an objective that was earlier found in the national forest fund, and afterwards removed or occupied, with approval.

It is essential that the change of destination occurs in an interval of 5 years, since the approval to remove the objective from the national forest fund was given. The purpose of the provision is to prevent the unlawful use of an objective after its removal from the national forest fund, by continuously changing its destination into something that would have never been approved. After five years since the approval date, the destination of the object may be changed, and it is likely to be changed for economic or social reasons, fact that is not incriminated according to the provision earlier mentioned.

Paragraph 3 of the same article, 106, provides that the *author* of the acts indicated in paragraphs 1 and 2 must *clear the land* of any constructions or installations illegally edificated.

The first element of debate is the legal nature of this provision: is it a complementary sanction established by the law against the author of the actions incriminated in the first two paragraphs or is it a legal obligation of private nature imposed by the law as part of reestablishing the facts as they were before the action described in paragraphs 1 and 2?

The solution I find most suitable is that of a legal obligation, derived from an action prohibited by the law, mainly because the complementary sanctions are expressly stipulated in the Criminal Code or other normative acts and secondly because it is not

consequent to a criminal conviction[5], but to an unlawful act, regardless of its qualification as a crime or not. Personally I consider this obligation to be a partial[6] form of *restitutio in integrum* after an unjust conduct.

Criminal law literature[7] appreciates that this provision has the nature of a reparatory measure.

The second element of debate is whether the term "author" refers only to the perpetrator of the acts, or to any entity in whose interest the act was committed or if a conviction for the crime is necessary to qualify, beyond reasonable doubt, an entity as the author.

The answer relies in the definition of the author in the Criminal Code (art.46, paragraph 1), which applies accordingly by effect of art.114 of the Forest Code. By these texts, an author is a person that directly commits a fact incriminated by Criminal law. As a consequence, apparently, there is no need for a definitive conviction of a person for it to be liable under the provisions of art.106, paragraph 3 of the Forest Code.

In this case, can the provision be applied to a legal entity, given the specific manner in which it is regulated, namely the *author* of the acts indicated in the first two paragraphs must *clear the land*?

My point of view is that a legal entity can be considered author a crime, only if it is convicted by a definitive criminal ruling mainly because under Romanian law it can be liable for a crime as an author, if the conditions provisioned in art.135, paragraph 1 of the Criminal Code. In this case, the legal entity is considered to be the author of the crime, if during its activity, in its interest, or in its name, *a crime* is committed. Criminal law literature[8] stipulates that the Romanian legislator established a form of direct liability for the legal entity, therefore it can act as author of a crime.

To attract the liability of the legal person it is essential for a crime to be committed, not only an act prohibited by Criminal law. If there is no crime, for no matter what reason, although the act is regulated by the law as a crime, it shall not attract the liability of a legal entity.

Equally, if the conditions provisioned in art.135, paragraph 1 of the Criminal Code are not fulfilled, the legal entity cannot be considered as author of the crime, because, by its nature, it cannot directly commit the crime.

Therefore, to answer the question earlier stated, the legal entity is liable under the provisions of art.106, paragraph 3 of the Forest Code only if it is convicted as an author for the crimes regulated by the first 2 paragraphs of the same article. If a definitive conviction was not ruled, the legal entity cannot be author in the acceptance of art.46, paragraph 1 of the Criminal Code, reason for which it cannot be held liable under the provisions of art.106, paragraph 3 of the Forest Code.

The third and final element of debate for paragraph 3 of article 106 is the reference to both previous paragraphs.

Although the legislator stipulated that the author of acts regulated by "paragraph 1 *and* 2" must clear the land, I believe that the purpose of this provision wasn't to establish a legal obligation only for those perpetrators that commit both crimes (the main form in paragraph 1 and the assimilated form in paragraph 2), but to remove the effects of either crimes, so I consider that the rational interpretation is to hold liable the author of the crime regulated by paragraph 1, *or* the author of the crime regulated by paragraph 2, in accordance with the legal obligation found in paragraph 3.

Paragraph 4 of article 106, indicates that the reinstallation of forest vegetation is done, on the expense of the author of the crimes regulated by paragraphs 1 and 2, by the Forest district which provides forestry services or administrates the forest, on the site that is the object of the crime.

Here, the legislator used the term "crime", and for this reason, I believe that it implies a definitive legal ruling that establishes the fact that a crime had taken place and its author. For this reason there is no doubt that a legal entity can be held liable under this provision. More than that, this provision has the nature of a legal obligation, subsequent to a conviction, with the purpose of reestablishing the facts before the crime.

Art.107 paragraph 1, art.108 paragraph 1 and art.109 paragraph 1 will be briefly analyzed together, because the main difference between al three of them is the material element, which is clear in all cases, and it is not plausible to generate difficulties in practice.

The most important point of the analysis is the main penalty for each crime, which is set, by the legislator, depending on the value of one cubic meter of wood, value established by Government decision.

Therefore, in order to establish the punishment for a certain act it is necessary to refer to a Government decision that is adopted annually, according to art.116 of Law no.46/2008, based on information provided by the National Statistics Institute, according to point 39 of the Appendix to the Forest Code.

In this matter I do not see a problem regarding the legality of the incrimination, mainly because by organic law the constitutive elements of the crimes have been established, and the penalty is subjected to an update depending on the price of the cubic meter of wood, fact expressly stipulated in the provisions of the articles mentioned.

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[5] The text does not refer to a definitive legal ruling that establishes the author of the crime provisioned in paragraphs 1 and 2, or to a conviction, but only to an "author" of the acts indicated in the previous paragraphs.

[6] The term "partial" has been used because the simple clearing of the land from construction facilities does not take it back to its original state. This action can, at most, prepare the area for afforestation, and in a matter of 5-10 years a complete *restitutio in integrum* can be made.

[7] M.Gorunescu – *Crimes against the environment* (original title: *Infracţiuni contra mediului înconjurător*), CH Beck Publishing House, Bucharest, 2011, pag.201.

[8] G.Antoniu, T.Toader (coord.) – *Explanations of the New Criminal Code* (original title: *Explicaţiile Noului Cod Penal*), vol.II, Universul Juridic Publishing House, Bucharest, 2015, pag.388.

The only way in which the regulation would have been arbitrary is when it would have depended only on the free will of the Government, with no limitations, but, in accordance with article 116 of the Forest Code, *the medium price of a cubic meter of wood is established annually, by Governmental Decision, at the proposal of the central public authority in matter of forestry*. The price is settled in an objective manner, namely, in accordance with the medium sale price of a cubic meter of wood, at national level, determined according to statistic data issued by the National Statistics Institute, as provided by point 39 of the Appendix to the Forest Code.

This way, firstly, the incrimination is not about to be established in a subjective manner, depending on the interests of the Government, but in an objective manner, as resulting from an organic law, updated in a manner provided by the same law, depending, essentially, on national statistics.

Secondly, the text is not contrary to art.23, paragraph 12 and art.73, paragraph 3 letter h of the Romanian Constitution[9], as continuously shown by the Constitutional Court of Romania[10]. Essentially, the Court decided that the establishment of the medium price of a cubic meter of wood is done by enforcement given by the organic law to the administrative authority that establishes the price.

Thirdly, considering the decision given in an Appeal in the interest of the Law, by the High Court of Cassation and Justice, no. XII/12.02.2008[11], it is obvious that the incrimination by reference to a Government decision (the act of an administrative authority) is subjected to the principle of the most favorable criminal law, in case of a time-succession of penal laws. In this situation, although at the time of the act it would have been considered a crime, if the price later established by the Government generates a prejudice under the value of 5 cubic meters of wood, the action will not be qualified as a crime.

Paragraph 2 of the same provisions establishes an aggravated form for each of the incriminations, but, as long as my research focuses, this does not raise practical issues, therefore, it doesn't fit the purpose of this paper.

Art.110, provides in its only paragraph that the disrespect of the obligation stipulated in art.30, paragraph 1 represents a crime and it is punishable by fine. According to article 30, paragraph 1, activities of artificial regeneration and of completion of natural regenerations is done in an interval of at most two vegetation seasons starting from the unique or definitive cutting of the trees.

The first point of the analysis aims at stipulating the limits of the penalty, given the fact that the legislator only stipulated a fine.

The answer for this issue resides in the provisions of art.137 of the Criminal Code, namely in paragraphs 2, 3 and 4 letter a.

The second paragraph stipulates that the quantum of the fine is determined by the system of days-fine, were the value of one day-fine (established between 100 and 5.000 lei) is multiplied by the number of days-fine (between 30 and 600 days). Paragraph 3 indicates that the specific number of days-fine will be determined by general criteria in what concerns the individualization of the punishment, and the value of one day fine will be established depending on the sales figure, for legal entities with a lucrative purpose and by the value of patrimonial assets and other obligation for other legal entities.

The special limits of the number of days fine is established, according to paragraph 4, letter a, between 60 and 180 days, if the law only stipulates the fine as a penalty.

In this case, for the crime provisioned by art.110 of the Forest code, the effective penalty can be established between 6.000 and 900.000 lei, depending on the factors indicated in art.137 paragraph 3 of the Criminal Code.

The second point of analysis regards the material element, as referred to in art.30, paragraph 1. Effectively it consists of an omission to accomplish the activities of artificial regeneration and those of completion of natural regenerations, or to accomplish them in more than two vegetation seasons since the unique or definitive cutting of the trees.

A vegetation season is defined by point 45 of the Appendix to the Forest code as the time frame between the entry into vegetation and the vegetative rest of an arboret.

In this case, the act can be qualified as a crime if the perpetrator failed to act according to the provision previously stipulated for at least two vegetation seasons, that cannot be established in precise intervals, depending on the trees found in the arboret.

More than that, the law did not specify that the vegetation seasons should be complete, reason for which, if the definitive cutting is made a few days before the end of the vegetation season this year, after the end of the vegetation season of next year the act could be qualified as a crime because one vegetation season was pending when the cut took place and the other was completed next year. Therefore, two vegetation seasons can practically represent one year and a few days.

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[9] Art.23, paragraph 12: Penalties shall be established or applied only in accordance with and on the grounds of the law.
Art.73, paragraph 3, letter h: Organic laws shall regulate: criminal offences, penalties, and the execution thereof.

[10] Decision no.670/12.06.2008, published in the Official Gazette, no.559/24.07.2008 (regarding the actual Forest code, namely Law no.46/2008), or decision no.599/19.06.2007, published in the Official Gazette, no.523/02.08.2007 (regarding the previous Forest code, namely Law no.26/1996, where the same legislative solution has been adopted).

[11] Published in the Official Gazette, no.866/22.12.2008.

Equally, given the relativity of the time frame that represents a vegetation season, the incrimination of article 110 of the Forest code does not effectively meet all expectations of predictability.

Conclusions

In this last part of the article, the main conclusions will be highlighted in a brief manner, primarily considering that the purpose of this paper was to identify practical issues regarding the enforcement of title VI of Law no.46/2008.

As a general observation, an incrimination *per relationem*, as found in all provisions subjected to analysis has its own limitation, determining an imprecision in establishing the material elements of the offence[12].

In this regard, I stated that art.106, paragraph 1 should have only indicated art.36, paragraph 1 and art.37 paragraphs 1 and 2, not the entire article, in order for the incrimination to be adequate.

Equally, analyzing the provisions of paragraph 3 of the same article I consider that the legal entity is liable under those provisions only if it is convicted as an author for the crimes regulated by the first 2 paragraphs of the same article. If a definitive conviction was not ruled, the legal entity cannot be author in the acceptance of art.46, paragraph 1 of the Criminal Code, reason for which it cannot be held liable under the provisions of art.106, paragraph 3 of the Forest Code.

In what concerns art.107 paragraph 1, art.108 paragraph 1 and art.109 paragraph 1, I believe that the legality of the incrimination is satisfied, mainly because by organic law the constitutive elements of the crimes have been indicated, and the penalty is subjected to an update depending on the price of the cubic meter of wood, objectively established, fact expressly stipulated in the provisions of the articles mentioned.

Finally, given the fact that incrimination is depending on the time frame that represents a vegetation season, the provisions of article 110 of the Forest code don't effectively meet all expectations of predictability.

By this approach, surely many practical issues were not treated accordingly, but I consider those already indicated to be part of the main problems usually encountered in criminal judicial activity, when enforcing title VI of Law no.46/2008.

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[12] This observation has proven to be a general problem of contemporary environmental law, according to M.Duțu – *Introduction to environmental Criminal Law* (original title: *Introducere în dreptul penal al mediului*), Hamangiu Publishing House, Bucharest, 2013, pag.64.

ACTUAL ISSUES REGARDING THE ENFORCEMENT OF LEGAL STANDARDS OF THE DEED OF INTIMATION LODGED WITH THE COURT OF LAW IN THE ROMANIAN COURT PROCEEDINGS

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Abstract

The dynamic evolution of the new fundamental law in criminal matters triggered serious challenges in the adaptation process to the new legal realities of the Romanian legal system, as a whole.
Within the seeming conclusion of the transition period given by the profound change of the criminal substantial and procedural regulations, the new dimensions of the functional relation between the two classes of authorities who perform main judicial functions have been clarified: prosecutors and courts of law. The action that refers to the way functional competency is transferred from the investigating authorities to decisional authorities and through which the progressive route of the criminal trial passes from the preliminary stage, the investigation stage, to the trial stage and that of the actual dispute settlement is an essential element of this relation.
The study aims to identify and analyse some of the most important court trial matters or issues that might occur in the recent practice with regards to observing the legal standards of form and contents of the deed of intimation lodged with the court of law.
Equally, the theoretical analysis and the jurisprudence tackles to identify certain actual resources in order to render efficient mechanisms submitted to assessment.

Keywords: *deed of intimation, form, effects, limits, legality*

1. Introduction

The exercise of any function with judicial nature is subject to a prior formal authorisation, materialized in a legal document whose form and content are confined to a strict regulatory regime.

Especially in the case of the jurisdiction on the merits, the principle of *ne procedat iudex ex officio* prevents the self-authorisation and forces the subject performing that function to manifest only within the limits of his investiture, even if the judicial context is of criminal nature. As jurisdiction implies both the authority to resolve and decide on the conflict submitted to settlement *(cognitio)* as well as the power to have the decision taken being executed *(imperium)*[1], the modality in which the apparent excess power may be tempered is to draw a predetermined frame for its manifestation.

In the criminal trial, the act that initiates the exercise of the judgment function and contributes mainly to set the procedural framework in which the scope of the judgment shall be accomplished is the indictment drafted by the prosecutor who conducted the prosecution. It has the nature of an act characterized not only through the provision it contains and in which the prosecution function is focused - the arraignment, but also in terms of its content, regulated in an imprecise manner through the provisions of article 327 of the Criminal Procedure Code.

2. General considerations concerning the form and functionality of the indictment

Regardless of the way how the current structure of the type of Romanian criminal trial[2] is perceived and addressed, it is undisputed that within the major subdivisions of the trial an essential place is occupied by the prosecution. Even abandoning the autonomous concept of procedural stage and rallying to the current trend developed in continental systems that were the main inspiration of the present Code, the importance of the investigative stage of the trail is obvious. Thus, in the French system, there are two main phases of the criminal trial. A preparatory phase that includes the monitoring, the investigation and the instruction, and a decisional phase, which includes the court's

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[1] *G.Theodoru*, Treaty of criminal procedure, 3rd edition, Hamangiu Publishing House, Bucharest, 2013, p. 195.

[2] In the specialized literature, once with the entry into force of the new Criminal Procedure Code, the majority opinion was expressed that the actual criminal trial is composed of 4 stages: the prosecution, the preliminary chamber, the judgment and the enforcement of criminal judgments (*B. Micu, A. Păun, R. Slăvoiu*, Criminal Proceedure, 2nd edition, Hamangiu Publishing House, 2015, p. 248; *M. Udroiu*, Criminal Procedure, special part, 2nd edition, CHBeck Publishing House, 2015 , p.120-121; *C. Voicu* in The New Code for Criminal Procedure, commented, group of authors, coordinator *N.Volonciu*, 2nd edition, Hamangiu Publishing House, 2015, p.945, etc.). In favour of this opinion the Constitutional Court ruled in the recitals of the Decision no. 641 / 2014 from November 11, 2014 (Official Gazette no. 887 of December 5, 2014). In a different opinion, appreciating that the proceedings in the preliminary chamber do not have the nature of a procedural stage, it is considered that the current Romanian criminal trial knows only three stages (*I.Neagu, M. Damaschin*, Treaty of Criminal Procedure, Special Part, Universul Juridic Publishing House, 2015, p.196-203.

proceedings[3]. In the Italian system, a distinct system amongst continental mixed systems due to the preponderance of adversarial elements, the jurisdictional phase (the actual trial) is preceded by an investigative phase (non-procedural - *indagini preliminari)* and the decisional power is characteristic only to the jurisdictional phase[4].

Having the role to mark the beginning of the criminal trial, in the opinion of the current Criminal Procedure Code, the prosecution represents the procedural phase suitable for the gathering of the evidence material required to solve the criminal cases. Moreover, considering the recent changes in the procedural manner through which the initiation of the prosecution is ordered[5], this phase is the only context allowed by the law in which evidence able to lead to the establishment of a person's guilt or innocence can be administered. Although it knows exceptions [the statements taken from the person that formulated the criminal complaint is considered evidence even if it was administered before the initiation of the prosecution, under article 111 paragraph (10) CPP, the objects collected by the extra-judicial bodies in case of new offenses ascertained under article 61 and 62 CPP may be used as evidence even if they were won for the case prior to the initiation of the prosecution, etc.] this rule is able to highlight the object of the prosecution. Expressly prefigured through the provisions of article 285 CPP in a form taken from the former regulation[6], the object of the prosecution captures the essence of the activity corresponding to the scope of this phase, which constitutes as well the main or qualified activity of the prosecution *"the prosecution has as object to gather necessary evidence of the existence of crime, to identify the persons who have committed a crime and to establish their criminal liability, in order to ascertain whether it is appropriate to order an indictment".* As pertinently shown in the relevant literature[7] the collection of evidence means in fact a series of activities without which it would not be possible to know whether an act that was committed is a crime – and that means first and forehand to conduct a research *in rem.* These activities involve operation of discovery, gathering and preserving evidence, involving specific tasks in the probation activity: identifying, managing and appreciating the evidence. To this respect, article 99 paragraph (1) CPP stipulates that the burden of administrating the evidence (proof) in criminal proceedings lies mainly with the prosecutor. The exclusivity of the judicial body in terms of evidence administration is tempered by the recognition of the right to propose evidence administration, right that belongs to distinct parties in the proceedings (suspect, injured party and parties) and cannot be refused unless the observance of the restrictive conditions of article 100 paragraph (4) CPP. The existence of crime means on one hand the material existence of an offense and, on the other hand, if the respective offence constitutes a punishable attempt or a *fait accompli*. "Identifying the persons who committed a crime" means that the administrated evidence must provide as well the needed data to know the perpetrators (the person who committed the crime, the instigators, the accomplices), both regarding their person (natural or legal) as regarding the identity, activity corresponding to a *in personam* research.

"Establishing the liability of the perpetrators" means that the necessary evidence should concern not only the facts but also enough data to be able to know whether the perpetrators acted or not guilty, if they can be held criminally liable for acts committed and whether it is appropriate that they are prosecuted. This activity of collecting evidence, specific to the prosecution, is subordinated to a precise purpose - *to ascertain whether it is appropriate to order the indictment,* purpose which in turn comes under the general purpose of criminal trial, as foreseen by the article 8 CPP[8].

Therefore, the criminal prosecution may determine primarily a positive finding, when the indictment and thus the passing into a new stage of the trial are necessary. As a judicial disposition, the indictment is the result of a triple findings, namely that the crime exists, that it was committed by the defendant and that it is criminally held liable. Also, the result of the main activity of prosecution may result in a negative finding, in the sense that the indictment is not necessary, in which case the criminal trial is interrupted, either *temporarily* (if subsequently the prosecution is resumed) or *permanently* (if the solution of the non-indictment is confirmed by the judge). This finding occurs in a distinct stage of the prosecution, in the stage of the finishing the criminal prosecution and the case's solving by the prosecutor, that does not mean the exhaustion of the criminal prosecution phase but only the finishing of the investigation activities. Since the function and the purpose of the criminal prosecution have a significant impact, the result it incorporates is

[3] *J. Pradel*, Criminal proceedings, 16th edition, Cujas Publishing House, Paris 2011, p.298, p.339-723, p.739-839; *J.C. Soyer*, Criminal law and Criminal Procedure, 21st edition, Lextenso Publishing House, L.G.D.J., Paris 2012, p.282, p.359-427.

[4] *M. Mercone*, Criminal procedure, 11th edition, Edizioni giuidiche Simone, 2003, p.66-67, p.298-306, p.505-512; *F. Izzo*, Manuale de Diritto procesuale penale, XXI edizione, Edizioni giuidiche Simone, 2013, p.12, p.175-228, p.427-433.

[5] The Emergency Ordinance no. 18/2016 (Official Gazette no. 389 from May 23, 2016) simplified this mechanism, so that currently the only necessary condition required for the initiation of the criminal proceedings is a positive one – the existence of a deed of intimation complaint from the perspective of the conditions regarding the form and content, per article 305 paragraph (1) Code for Criminal Procedure.

[6] See for details *I.Neagu*, Treaty of criminal procedure, Special Part, Global Lex Publishing House, 2008, p. 32-33.

[7] *V. Dongoroz, and others*, Theoretical explanations of the Romanian Code for Criminal Procedure, Special Part, volume VI, Romanian Academy Publishing House and All Beck Publishing House, 2003, p. 25.

[8] Per article 8 CPP the judicial bodies are obliged to carry out the prosecution and the judgment with the respect of the procedural guarantees and rights of the parties, so as to ascertain, in due time and completely, the facts constituting the offense, not to prosecute an innocent person, and anyone who has committed an offense to be punishable by law in a reasonable time.

submitted to a preliminary verification, which is transposed by the establishment of preliminary filters: the presumptive end of the criminal prosecution, in which, according to article 321 CPC, the criminal investigation body shall prepare a report on the solution it considers appropriate, the actual termination of the prosecution, in which, according to art. 322 and 327 CPP, the prosecutor proceeds to a review of the works of the criminal prosecution and gives the case a solution through one of the means provided by the law, plus possibly the further verification of the indictment by the prosecutor hierarchically superior to the one who drafted it, according to article 328 paragraph (1) CPP.

In considering these preliminary explanations, the procedural positive act - the indictment - represents the document that focuses the entire judicial function of criminal prosecution, representing the solution through which the prosecutor decides to institute the proceedings and the passage, in a progressive manner, to another stage of the criminal trial. To dispel any arbitrary assessment, the law conditions the indictment to the prosecutor's belief, formed following the assessment of the evidence legally administrated and materially supported by them that the crime exists, it was committed by the accused and that it is criminally responsible. The only legal instrument by which the arraignment is made is the indictment drafted by the prosecutor. The indictment is the deed of intimation of the court, through which the prosecutor asks the court to apply the law whereas the defendant is concerned[9]. The indictment and its processual consequence, the court's referral, are acts placed under the exclusive competence of the prosecutor as the main organ to carry out the prosecution. Having the ability to determine the procedure in which the judgment will take place, the indictment is materially funded on the same elements that the court may use to found its verdict of guilt, being obvious a functional symmetry between the act ordering the indictment (act of essence of the criminal prosecution) and the procedural act through which a person is prosecuted (act of the essence of the judgment). In this sense, both acts of disposition are materially grounded on the same essential elements of the report of conflict: fact and person.

Through the act of disposition that it incorporates, the indictment, when expressed under the procedural form established by the law, simultaneously produce two types of legal consequences, with positive character (the court's referral) and with negative character (the end of the formal authorisation of the criminal investigative body regarding the case). Therefore, accomplishing further criminal prosecution activities about the fact and the person for whom the indictment who issued appears as an unlawful way to proceed whereas through the indictment, a transfer of functional competence occurred between organs exercising different judicial functions. After that moment, the prosecutor cannot take any action and, in the continuation of the trial, he no longer has the powers he had as investigating authority[10].

In consideration of its specific nature, the indictment is an act characterized, both by the particularity of the main procedural act it includes as by its shape. As an exception to the rule foreseen in article 286 paragraph (1) CPP, the procedural act (the content) – *the arraignment* is not materialized in an ordinance but in one type of written procedural act (the form) – the indictment. Being a complex act, the indictment may include several acts of disposition since it ensures a multiple functionality but the main and binding disposition that it contains and that customizes its nature, is the arraignment. By reference to this disposition, the indictment is the main court's deed if intimation, through which the matters to be judged upon are to be set. The court's referral can be achieved as well through other legal means but they do have the main character. Thus, in accordance with article 341 paragraph (7) point 2 letter c) CPP, the judge sitting in the preliminary chamber referred with a complaint against the solution of not to indict in a case in which the criminal proceedings were initiated, whilst granting the complaint, may order the initiation of the judgment when the evidences lawfully administrated during the criminal investigations are sufficient. In these circumstances, the conclusion (resolution) of the judge sitting in the preliminary chamber who ordered the initiation of the judgment[11] is the deed of intimation for the court. Also, within the special procedure of plea bargaining agreement (article 478-488 CPP) the court's referral is accomplished by the convention (agreement) concluded between the subjects of the criminal proceedings: the Public Ministry and the defendant.

To accomplish its function as deed of intimation, the indictment must conform to a predetermined format, with mandatory content elements, that must be limited to the fact and the person for which the criminal investigation was conducted and must meet national and conventional standards aimed at ensuring both the effective exercise of the judicial functions as the effective protection of the defendant. Thus, by the formal removal of the active role, the court is required to deploy the activity specific to its judicial function within mandatory specific limitations, drawn following its legal investiture. The possibility of extending those

[9] *I. Neagu, M. Damaschin*, op. cit., special part, p. 101, the authors explain the etymology of the term starting from the Latin principle *requisitus* (investigated, required, solicited).

[10] *N. Volonciu*, Treaty of criminal procedure, Special Part, 2nd volume, 3rd edition, Paiedeia Publishing House, 1997, p. 99; *V. Dongoroz, and others*, op. cit., 2nd volume, p. 62.

[11] In disagreement with the opinions expressed in the specialized literature *(M. Udroiu*, Criminal procedure. Special Part, 3rd edition, CHBeck Publishing House, 2016, p.131, etc.) I consider that, although the law does no longer expressly qualifies it as deed of intimation, the complaint submitted to the judge against the not-to-indict solutions remains the main factor in accomplishing the atypical deed of intimation, as per article 341 CPP. This complaint, as an unofficial act, together with the resolution of the judge sitting in the preliminary chamber for the initiation of the judgment will determine the factual elements of the investiture.

investiture's limitations by appropriate means, known to the old legislation (the extension of the criminal proceedings, the extension of the criminal trial) as well as the possibility of refusing the benefits of the investiture (the return of the case to the prosecutor's office during the judicial investigation) are no longer currently allowed. Therefore, per article 349 paragraph (1) CPP, the court *is obliged to resolve the case submitted to trial*, within the mandatory limits of its investiture.

The responsibility for the accurate and complete setting of these limits (boundaries) lies therefore with the judge sitting in the preliminary chamber, to whom has been transferred the functional competence to verify the legality of the prosecution and to ensure the remedy of the irregularities in the deed of intimation. The judge sitting in the preliminary chamber contributes actively to the court investiture as this is achieved by the combined action of two distinct acts: the indictment for the arraignment, establishing the *object of judgment* (by indication of the fact and person to be judged) – the deed of intimation, and the conclusion of the judge sitting in the preliminary chamber who finalizes *the limits of the judgment* (through the remediation of the material required to solve the case) - the investiture act.

But even in the context of this joint action, the deed of intimation lodged with the court of law remains the exclusive prerogative of the prosecuting authorities. In this regard are as well the provisions of article 329 paragraph (1) CPP, which provides that the indictment is the deed of intimation lodged with the court of law. Therefore, the legal and the complete referral of the court must be reported to the mandatory content of the deed of intimation, as foreshadowed by the provisions of article 328, with reference to article 286 paragraph (2) CPP, in which the requirement to indicate the offense incriminating the accused is specifically mentioned. The fact must be indicated in its materiality as the court is not vested with a legal qualification (determination) but with a fact. *The fact* is the material premise of the criminal proceedings, which terminates when its object has been accomplished – the criminal liability. Consequently, the fact, in its material dimension, is the first element to be set for a proper solution of the criminal proceedings. A symmetry is relevant, in this respect, between the procedural act ordering the prosecution (article 327 letter a) of the CPP and the act through which the criminal proceedings is solved in first instance, in the sense of the conviction [article 396 paragraph (2) CPC], acts that are materially based on the same three elements: *offense (fact), person* and *guilt.*

The requirement to indicate the actual offense incriminating the defendant, by mentioning the time and place elements, by describing how the offence was committed (especially with alternative incriminations), by specifying the number of material actions, by identifying the separate elements and the type of connection existing in case of plurality of crimes has an essential character, serving not only to meet the requirements related to the establishing of the object of judgment but also the requirements related to the exercise of procedural rights, guaranteed as fundamental principle. Moreover, beyond the explicit and implicit guarantees of the right to a fair trial and the right to defence, the solving itself of a criminal case is accomplished by the court, under the article 349 paragraph (1) CPP, with the guarantee of the compliance with the procedural rights. This is the reason why the material description of the offense incriminating the defendant requires both a complete individualization of the facts which compose the content allegedly criminal as an indication of the correspondence between each factual element and evidence on which it is based.

Regarding the obligation to describe in full the facts that form the content of the criminal charge brought against the defendant, beyond the national regulation, the deed of intimation lodged with a court of law must also comply with a conventional standard designed to ensure the fairness of the proceedings and the effective exercise of the right to defence. In this regard, the European Court of Human Rights[12] held that article 6 paragraph 3 of the Convention recognizes the right of the accused to be informed in detail not only regarding the cause of the accusation, meaning the material facts of which he is charged with and on which the accusation is grounded, but also regarding the nature of the accusation, meaning a legal qualification of the facts.

Also, the European Court of Human Rights[13] held that the right to a fair trial was violated because the information contained in the accusation regarding the essential details on place and time of the offense was vague and contradictory so that the defendant has not been able to prepare a practical and effective defence.

The Court held that an accurate and full information on the facts incriminating the accused and a legal qualification represent an essential condition for the fairness of the judicial proceedings, and this must be done including throughout the indictment that must not be characterized by vagueness about the essential details. In its jurisprudence[14] the European Court of Human Rights explained what it means by the cause and nature of the accusation against a person throughout the indictment, showing that they relate to the material facts on which the accusation is grounded, to the legal qualification of the accusation as well as to the existing aggravating circumstances, and that the detailed information on the facts being charged and on their legal qualification should not be, in any

[12] The Judgment from March 23, 1999, *Case of Pelissier and Sassi v France*, recital 51, as well as in the Decision from January 23, 2001, *Case of Dallos v. Hungary*.

[13] The Judgment from July 25, 2000, *Case of Mattoccia v. Italy*, recitals 59 and 61.

[14] Through the Judgment from October 24, 1996, *Case Salvador Torres v. Spain*, recital 28.

circumstance, follow the indictment. Such findings determined the doctrine[15] to appreciate in a pertinent manner that the requirements under which the ability of the indictment to apprehend and validly invest the court is assessed should start from the same criteria under which the European Court has ruled on the quality of the law to be predictable. To this regard, taking into consideration the need to ensure real and effective protection for the defendant in relation to the acts he is being charged, the description of the fact in the indictment must be sufficiently precise to enable the defendant (who can call for specialized consultancy/advice of a lawyer, either chosen or appointed ex officio) to understand the fact of which he is accused, its legal qualification and the punitive treatment[16]. Moreover, even in a case rendered against Romania[17] the European Court recalled that fairness is determined in relation to the procedure as a whole. The provisions of article 6 paragraph 3 express the need to pay special attention to the notification of the "charge" brought to the concerned person. The deed of intimation plays a decisive role in the prosecution: after the notification, the person prosecuted is officially notified in writing on the legal and factual basis of the charges against him. Article 6 paragraph 3 letter a) recognizes for the accused the right to be informed not only about the cause of the accusation, meaning the material facts of which he is charged with and on which the accusation is grounded, but also regarding the legal qualification of the facts, and this in a detailed manner. In criminal matters, an accurate and precise information about the charges against a person therefore on the legal qualification the court may hold against him is a prerequisite condition of the fairness of the proceedings. Finally, there is a connection between letters a) and b) of article 6 paragraph 3 and the right to be informed of the nature and the cause of the accusation must be considered from the perspective of the accused's right to prepare his defence *(Pelissier* and *Sassi* v. France recitals 52-54). The clarity in describing the facts as acknowledged in the deed of intimation lodged with the court falls within broader requirements, regarding the right to information in criminal proceedings, the standard accepted at the national level transposing provisions imposed at the European level[18].

In this context, the constant case-law[19] the High Court of Cassation and Justice (both before and after the entry into force of the new Code of Criminal Procedure) held that the fact described in the deed of intimation lodged with the court of law must not represent only the mere reference to a given action mentioned in the sequence of the defendant's activities, but a detailed description of that action in a manner likely to produce legal consequences, namely to invest the court.

Finally, in terms of the finality of the indictment it should be noted that the in the new regulation this act has lost its ability to cause the indictment of the accused, its issuance being subjected to the preliminary initiation of the criminal proceedings. Even if it is not expressly provided for, in terms of the drafting technique, the indictment retained the tripartite structure consisting of an introductive, expositive and operative part. It is no doubt that the expositive part of the indictment is prefigurating its operative part and, naturally, the prosecutor, whilst drafting the indictment, will indicate, in the expositive part, the evidence of the prosecution, and the operative part will materialize the will's manifesto of the representative of the Public Ministry to order the arraignment[20]. The indictment has a subpoena part, in which the persons that must be subpoenaed are indicated, mentioning their quality in the trial and the place where they are subpoenaed. Any irregularities identified in this segment cannot determine the impossibility to establish the object and the limitations of the judgment. In subsidiary, depending on the possible acts of disposition that it may include, the indictment may also contain provisions as to not to indict, in complex cases involving a plurality of facts and perpetrators. In this context, the provision not to indict may be accompanied by complementary measures determining the initiation of different procedures. Thus, if the same indictment is ordering the arraignment, the waiver of prosecution as well as the apprehension of the judge sitting in the preliminary chamber regarding the confiscation or the closure of a document in case of dismissal, considering that the judicial procedures being initiated involve different rules [on the procedure of preliminary chamber under the articles 344-346 CPP, on the confirmation of the waiver of prosecution under the article 318 paragraph (12) - (16) and on the issuance of an order by the judge sitting in the preliminary chamber, under the article 549^1 CPP], these provisions, although embedded in the same act must be handled administratively as three different complaints and assigned to different judges sitting in the preliminary chamber. Also, the indictment may incorporate proposals for preventive measures, precautionary or safety, in which case, per articles 330 - 331 CPP it is no longer required to draw up separate documents. In all these situations, considering its main purpose – the apprehension of the court, the indictment remains a *unique act* being always drafted in a single

[15] *M. Udroiu,* Special Part, op.cit., p.152-153.

[16] Judgment from July 13, 1995, *Tolstoy Miloslavsky v Great Britain,* recital 37, cited in *M. Udroiu,* op cit., P.153

[17] *Adrian Constantin v. Romania,* judgment from April 12, 2011, www.echr.coe.int.

[18] Per article 3 from the 2012/13 / EU Directive on the right to information in criminal proceedings, "...Member States shall ensure that no later than at the presentation of the merits of the prosecution in court, *detailed* information is provided on the accusation, including the nature and the legal qualification of the offense and the form of participation of the accused."

[19] Supreme Court of Justice - panel of nine judges, Criminal judgement no.74/2001, High Court of Cassation and Justice – Criminal judgment no. 389/May 22, 2004, High Court of Cassation and Justice – Criminal judgment no. 892/2014, www.scj.ro.

[20] *I. Neagu, M. Damaschin,* op.cit., p.102.

copy, even if the prosecution's activities concern several facts or more persons and even if they get different solutions. However certified copies are made of the indictment, which are communicated to the defendants regardless of their status (free or in custody). To satisfy the requirements of an efficient information, the indictment must be translated if the accused does not speak Romanian or it must be communicated as well in a mother-tongue translation if the accused, Romanian citizen belonging to a different nationality, requests it. The provision, provided by article 329 paragraph (3) CPP, transposes into national law the provisions of the Directive 2010/64/EU of the European Parliament and of the Council, on the right to interpretation and translation in criminal proceedings, as pertinently noted in the literature[21].

3. Practical issues regarding the types of types of irregularities of the indictment

Overall, to achieve its function act deed of intimation, the indictment must be verified in terms of legality and validity by a prosecutor of higher-level to the one who drafted it. This requirement is a form of transposition of the principle of the hierarchical control governing the activity of the Public Ministry and involving a functional subordination and not an administrative one. The generation of the legal effects of the indictment shall be subject to the submission of this procedural act to a form of *enablement*[22] from a higher-level prosecutor. This verification concerns equally the observance of the legal provisions in the work of drafting the deed of intimation as the validity of the solutions it incorporates in relation to all prosecuting acts performed in the case and the evidence being administrated. In accordance with the article 328 paragraph (1) CPP, the verification is performed by the head of the office (first prosecutor or general prosecutor) where the prosecutor who drafted it belongs, and when the indictment was drafted by the latter the verification of the indictment is performed by a higher-level prosecutor. When it was prepared by a prosecutor within the prosecutor's office attached to the High Court of Cassation and Justice, the indictment is verified by the prosecutor chief of the section, and when the indictment was drafted by the latter, the verification is accomplished by the general prosecutor of this office. The law does not establish a term for the indictment to be verified by the higher-level prosecutor, pointing out only that in cases with arrested persons, the verification is accomplished urgently and before the expiry of remand in custody. From the material point of view, the legal operation of the verification is realized by applying on a mark *checked in terms of legality and validity* on the indictment, accompanied by the signature of the prosecutor who conducted the verification[23]. The lack of mention attracts the irregularity of the deed of intimation that can be invoked and remedied within the preliminary chamber procedure, without determining the impossibility to establish the object and the limitations of the judgement[24].

The verification of the indictments prepared by the prosecutors within the National Anticorruption Directorate is made under the terms of article 22^2 of Government Emergency Ordinance no. 43/2002 – *the indictments prepared by the prosecutors within the territorial services of the National Anticorruption Directorate are verified by the chief prosecutors of these services, those drafted by the chief-prosecutors of the territorial services as those drafted by the prosecutors within the central structure of the National Directorate Anticorruption are verified by the chief-prosecutors of the sections and when the indictments are drafted by the chief prosecutors of the sections within the National Anticorruption Directorate, their verification is made by the chief prosecutor of this directorate.* The application of this provision in the causes in which the indictment was drafted by a chief prosecutor of a territorial service (but in which, amongst prosecution acts, there are also orders issued by the Chief Deputy Prosecutor of the directorate which infirm some dismissal solutions) involves the establishment of an exclusive competency for the chief prosecutor of the directorate in accomplishing the verification of the legality and validity of the deed of intimation.

In practice and in the specialized literature as well a question was raised on how to accomplish the verification of the indictment when the prosecutor hierarchically superior to the one who drafted the indictment was the one who conducted criminal proceedings in the cause. In doctrine[25] it was validly considered that in these circumstances the hierarchically superior prosecutor is obliged to submit statement of abstention based on article 65 paragraph (1) reported to article 64 paragraph (1) letter f) CPP as

[21] *I. Neagu M. Damaschin,* op cit., P.103.According to the provisions of Article 3 of the Directive, "Member States shall ensure that suspected or accused persons who do not understand the language of the criminal proceedings concerned are, within a reasonable period of time, provided with a written translation of all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings. Essential documents shall include any decision depriving a person of his liberty, any charge or indictment, and any judgment.".

[22] *N. Volonciu,* op.cit., 2nd volume, p.101-102.

[23] The absence of an express provision indicating the nature of the act in which the result of the verification is materialized determined the doctrine to appreciate, still under the rule of the previous regulation, that the act confirming the indictment translates into a written resolution on the indictment - V. Dongoroz, and others, op. cit., 6th volume, p.71.

[24] In this regard, there are still applicable the judgements issued by the High Court of Cassation and Justice in resolving appeal in the interest of the law under the old regulation – High Court of Cassation and Justice, the Joint Chambers, Judgement no. 9 / February 02, 2008 (OJ no. 831 of December 10, 2008).

[25] *M. Udroiu,* op.cit., Special Part, 2nd edition, p.74.

there is a reasonable suspicion that his impartiality in evaluating the legality and validity of the deed of intimation might be affected. But since in practice[26] this solution was not always shared a few additional clarifications are required.

Per article 62 paragraph (2) of the Law no. 304 / 2004, the prosecutors are deploying their activity within the Public Ministry, in accordance with the principles of legality, *impartiality* and hierarchical control. This general provision is implemented as well on the particular plan and on the work carried out by the prosecutors of the National Anticorruption Directorate which, in accordance with the article 2 of the Emergency Government' Ordinance no. 43 / 2002 exercise their powers only under the law and for its enforcement. The legality of the acts being accomplished in carrying out the judicial functions of prosecution supposes as well, inter alia, the absence of any prejudice or any preconceived ideas on the solution ordered by the prosecutor during at the termination of the criminal prosecution, issue that doesn't concern the independence but the impartiality of prosecutor. In terms of justice, the existence of a reasonable suspicion that the impartiality of the prosecutor is affected determines the occurrence of the incompatibility as provided by article 64, letter f), applicable to the prosecutor under the article 65 paragraph (1) CPP. If the incompatibility was not remedied by internal tools (restrain) or external (disqualification) provided to that end, *the act* accomplished by an incompatible prosecutor it is affected by a legality vice (flaw).

Thus, in the said cause, the judge sitting in a preliminary chamber circumscribed the reasons invoked for the support of the criticism regarding the incompatibility of the prosecutor who verified the indictments to the case of incompatibility as foreseen by article 64 paragraph (1) CPP, *"in the current cause he conducted the criminal prosecution or he participated as a prosecutor in all proceedings before a judge or a court"* case that obviously is not applicable to the prosecutor in accordance with the article 65 paragraph (1) CPP. According to the opinion of the judge sitting in a preliminary chamber these arguments cannot be extended to the broader incompatibility case, as foreseen by article 64 paragraph (1) letter f) CPP, which had been raised expressly, given that article 6 paragraph 1 ECHR covers only an *independent and unbiased court.* In disagreement with this assertion, we consider that the incompatibility status of the chief prosecutor of the territorial service, proven by the direct involvement in accomplishing the criminal prosecution and in making accusations against the defendant sued, based in part on the same material elements cannot be circumscribed to another incompatibility case than the one foresee in article 64 paragraph (1) letter f) CPP, having the nature to allow to retain a reasonable suspicion that the impartiality of its extremely important work of control of legality and validity of the deed of intimation was affected.

The regulation under the form of a distinct case of incompatibility, applicable to the prosecutor, as established in article 5 paragraph (1) CPP, *of the suspicion of lack of impartiality* implements in the matter of incompatibility the constitutional principle of impartiality of the activity of the Public Ministry, provided for in article 132 paragraph (1) of the Constitution. In the case-law of the Constitutional Court[27] the *impartiality* was analysed as a corollary to the principle of legality, and which generates the requirement for any prosecutor to perform his duties in an objective, without any other predetermined general purpose and without bias. In the current regulation, the incompatibility case based on the reasonable suspicion of lack of impartiality was designed as a *general case,* in which, depending on the particularities of each case, multiple circumstances can be assimilated, some of which have been covered in previous Code as distinct cases (article 48 of the CPP from 1968 - circumstances out of which result the interest, in any form, enmity result) while others must be justified.

Therefore, it was an option assumed by the legislator to extend the concept of impartiality from the conventional area corresponding to the notion of *court* as well to the judicial bodies exercising the other main function, the function of prosecution, due to the nature and consequences of acts in which this exercise is materializing.

Secondly, in a wrong manner, the judge sitting in the preliminary chamber considered that the direct accomplishment of criminal prosecution in the pending case or in another case (but to a degree of connection that allowed the judicial body to take measures and evidences) by the prosecutor who is required to verify the legality and validity of the deed of intimation issued in the case shall not have the nature as to create a reasonable suspicion that his impartiality could be affected. In our opinion, the incompatibility status of the chief prosecutor of the territorial service is of an obvious nature, the materials prerequisites that generated it being in fact recognized even by the prosecutor who drafted the indictment. It is undeniable the risk of bias of the prosecutor who not only conducted criminal prosecution that led to obtaining important evidence but also expressed *in a judicial context* his opinion on the factual circumstances envisaged in this case as well as to the possible guilt of the defendant being prosecuted.

Thus, examining the prosecution performed in another case (in which he is the prosecutor of the case), the chief prosecutor of the territorial service expressed his opinion on the *"the extensive criminal activity of the defendant, which is actual and presents a particularly high social danger".* To this respect, by the ordinance through which the criminal proceedings against the

[26] The resolution of the judge sitting in the preliminary chamber within the High Court of Cassation and Justice through which the commencement of the judgement was ordered in the case no. 292 / 1 / 2015, not published.

[27] *The Decision of the Constitutional Court* no.311 / 2005, Official Gazette 749 of August 17, 2005.

same defendant were extended, the prosecutor who subsequently verified the indictment expressed clearly his opinion also with regard the activity that constitutes the object of the current case, pre-constituting his opinion on circumstances and statements which represents as well the foundation of the charge for which the defendant was indicted. Therefore, the concrete modality in which the chief prosecutor of the territorial service involved himself in performing the criminal prosecution and in ordering procedural measures against the defendant justifies the retention of the reasonable suspicion that, at the verification of the indictment for the same defendant, his impartiality was affected. To this respect, the doubt or suspicion about the lack of impartiality, as element of subjective nature, covered a reasonable form since it was objectified in materially verifiable elements, having the nature to confirm the state of inadequacy in which the head of the prosecutor's office finds himself.

Thus, the conviction of the chief prosecutor of the territorial service about the criminal activity of the accused who guided and controlled in fact companies that he no longer had any stake and which, moreover, are estimated to be the instruments through which in this case the defendant committed the offense of bribery, materialized in acts and measures ordered in the case in which he acted as prosecutor of the case. Or, all these measures were based on the pre-constituted opinion of the chief prosecutor of the territorial service that the defendant carried out during 2000-2015 a comprehensive criminal and extremely dangerous activity, which include the facts for which he was indicted in this case.

In essence, the reasonable suspicion that the impartiality of the chief prosecutor of the territorial service was affected is supported both by the direct involvement and coordination in conducting the proceedings that deliberately targeted the defendant being indicted, as through the fact that, in reality, the prosecutor called to verify the legality and validity of the deed of intimation filed *criminal charges* against the defendant (in the opinion of article 6 paragraph 1 ECHR) due to the expansion of the prosecution and the criminal proceedings in the case in which he acted as prosecutor of the case, circumstance which is likely to infringe the procedural rights of the defendant and the fairness of the proceedings. Third, the judge sitting in the preliminary chamber wrongly considered that no procedural harm was produced, due to the verification of the indictment under the mentioned condition and that, anyway, if such harm would exist, it might be remedied directly before the judge or the court.

In our opinion, in the absence of the verification with impartially, the indictment drafted by the prosecutor's office of the National Anticorruption Directorate is in fact an indictment unconfirmed, that was not subject to an effective control of legality and validity, being unable to perform, in accordance with the article 328 paragraph (1) CPP the function of deed of intimation to be lodged with the court of law. The processual damage caused by the non-observance of the provisions governing the impartiality of the prosecutor [article 132 paragraph (1) of the Constitution, article 62 paragraph (2) of the Law no. 304 / 2004, article 65 paragraph (1) reported to article 64 paragraph (1) letter f) CPP] consists in depriving the defendant of internal, effectively control performance on the legality and validity of the deed of intimation. By the will of the law, the functionality of the deed of intimation to be lodged with the court of law (to determine the investiture and to set the limitations for the judgment) is subject to *implicit confirmation* (after verification) issued by a prosecutor hierarchically superior to the one who drafted and that thus materializes *in conditions of impartiality,* the principle of the hierarchic subordination governing the activity of the Public Ministry.

This internal control of the deed of intimation, even if it does not exclude the judicial review performed in the procedure of preliminary chamber cannot be exercised *omisso medio,* directly by the judge or the court as this is contrary to the requirements of the principle of separation of the judicial functions, provided for by article 3 CPP, and affects the independency in the functioning of the Public Ministry. The verification of the deed of intimation to be lodged with a court of law does not represent a formal requirement but it is a guarantee for ensuring the legality and validity of the prosecuting proceedings, being instituted as an essential prerequisite for the operation of the functional transfer of competence between different categories of judicial bodies. In fact, in the special procedures of the plea agreement as well, the compulsoriness of the internal control is materialized in the requirement for the endorsement - by the prosecutor hierarchically superior - of the agreement concluded by the prosecutor of the case, in accordance with the article 478 paragraph (2) CPP. Consequently, given the situation of incompatibility described above, we consider that for the proper application of article 22^1 paragraph (1) of the Emergency Government Ordinance no. 43 / 2002 in relation to article 328 paragraph (1) CPP, the verification of the indictment drafted in the current case should have been accomplished by the prosecutor hierarchically superior to the head of the prosecutor's office where the prosecutor who drafted the indictments was functioning, namely the prosecutor chief of section within the National Anticorruption Directorate - the central structure.

Perhaps the most common form taken in practice by the irregularity of the indictment is the one related to the incomplete or unclear description of facts, which prevents delimitation of the contribution of each defendant or the identification of all material acts, the impossibility to establish, in cases of offenses with alternative content, the modality incriminating the

defendant[28]. In this regard we consider to be appropriate to present a solution in which, without justification, the commencement of the criminal trial was ordered in the conditions in which the indictment unequivocally presented such an irregularity[29].

Regarding this issue, the judge sitting in the preliminary chamber found that the indictment in the mentioned case has 387 pages, out of which 234 are dedicated to describing the actual state of affairs, with reference to the evidences from which the prosecutor considers that this state of affairs results, and appreciated that there is, in the indictment, a detailed description of the facts charged to the defendant, containing all circumstantial elements necessary for the identification of the accusations brought against the defendant. The judge sitting in the preliminary chamber took into consideration as well the fact that the defendant did not invoked the problem throughout the entire prosecution, although at the time of the initiation of the criminal proceedings the accusations were brought to his knowledge and the defendant, during the prosecution, gave the statement regarding the accusations.

In matters related to the insufficient description of the offense of traffic of influence in a repeated form, the judge sitting in the preliminary chamber invoked the case-law in accordance to which, in case of the objective impossibility to describe all the material acts of a continued offense, it is sufficient to indicate a period of time during which the material acts composing the offense were committed, if in this way it is possible to determine the object (scope) and limits of the judgment. It was also shown that the issues regarding the compliance of the elements of a continued offense, of a natural unity of crime or of a plurality of offenses are a matter of legal qualification of the fact, which cannot be questioned during the procedure of preliminary chamber. Similarly, the existence or the inexistence of the actions which the prosecution claim to constitute the material acts of the continued crime or if there are evidences proving their existence are matters regarding the merits of the case and not the regularity of the deed of intimation.

In our demurral, made against the resolution of the judge sitting in the preliminary chamber within the Court of Appeal Brasov, we show – *in advance* – that by invoking some problems related to the incomplete description of the material facts incriminating the defendant it was not aimed to provoke an anticipated evaluation of the evidences nor to attempt to discuss questions as to whether the allegations made against the defendant are valid. This is the reason why the issues related to the legal qualification given to the facts through the deed of intimation were not discussed, aspect that exceeds the processual framework of the preliminary chamber[30]. We invoke the fact that the deed of intimation is imprecise in terms of correspondence between legal qualification, as held by the prosecutor, and the facts described, which takes the form of an *irregularity* of the deed of intimation. This irregularity must be remedied in the preliminary chamber procedure - and not through a possible change of the legal qualification, submitted for the parties' discussion during the judicial inquiry, under the article 386CPP 386 - since it determines the *impossibility to establish the object (scope) and the limitations (boundaries) of the judgment*, affecting as well requirements related to the exercise of procedural rights guaranteed as fundamental principle. The description of the fact must not be confounded with the reproduction only of the constitutive content of the offense, as described in the criminality norm. The description of the offense within the indictment must consider all circumstances of place, time, means, mode, aim to which the offense was committed, with consequences on the constitutive elements of an offense and on its qualification in a specific criminality text. To meet the legal requirements for the establishment of the object of judgment it is necessary that the fact is presented in the indictment with all elements of criminal relevance, thus creating the possibility for the court to rule on that fact and for the defendant to defend himself efficiently[31].

Per article 371 CPP, *the judgment is limited* to the facts *and persons shown in the deed of intimation.* The deed of intimation is the indictment. Per article 328 paragraph (1) CPP, the indictment is limited to *the fact* and the person for whom the criminal investigation was conducted and contains *factual data* adduced against the accused and its legal qualification. Therefore, the indictment must contain a description in a reasonable manner of the facts incriminating the defendant. The judgment on the merits cannot take place unless the indictment describes in a clear, understandable and concise manner the facts which the defendant presumably has committed, so the court may understand from the beginning what are the charges being brought, may provide clarifications and explanations to the defendant in the early phase of trial under the article 374 paragraph (2) CPP and, at the same time, to be able to assess in terms of the article 100 paragraph (4) letters a) and b) CPP whether the claims made by the defendant to administer new evidence are justified (assessment that requires a full understanding of the subject of the evidences in relation to the facts indented to be proven).

Beyond the need for the court to precisely determine the procedural framework, a clear description of the facts is important for the defendant as

[28] *I.Kuglay* Code of Criminal Procedure. Comment on articles, coordinated by *M.Udroiu*, CHBeck Publishing House, 2015, p.918.

[29] The resolution of the judge sitting in the preliminary chamber of Brasov Court of Appeal ordering the commencement of the judgment in the case registered under the no. 345/64/2016, unpublished.

[30] For the same interpretation, *C. Voicu* in The Code for criminal procedure commented, coordinator N.Volonciu, 2nd edition, Hamangiu Publishing House, 2015, p.927.

[31] Court of First Instance Constance, the resolution no. 156 from April 30, 2014 cited in *C. Voicu*, the New Code for Criminal Procedure commended, op cit., P.927.

well. He can effectively exercise his right to defence only if, as a priority, he understands the charges being brought, at least at the level of factual situation. Through the indictment no. 259 / P / 2015 from May 17, 2016, the defendant was indicted for the offense of trading in influence, *"foreseen in article 291 paragraph (1) Criminal Code, with the application of article 35 paragraph (1) Criminal Code and article 5 Criminal Code".* This offense was placed in the charge of the defendant as being committed in a continued form, during September 2006 - spring of 2013. As it can be seen, there is no indication whatsoever of the number of material actions that are part of this continued crime. The judge sitting in the preliminary chamber appreciated that the situation was determined by an objective impossibility to describe all the material actions, invoking practice to this respect.

In our opinion, this appreciation is wrong, because the deed of intimation lacks not the *description* of the material actions, but their very individualization in space and time. The indictment contains a state of facts covering a long period, subsequently qualified as traffic of influence in a repeated form. The reproach brought to the indictment consists in the circumstance that, while retaining the repeated form of the offense, it does not individualize the material actions falling within the content of the continued offense in relation to the facts described. Therefore, what we understand to submit to the analysis is not the status quo, but the circumstance that, although it refers to the continued form of the offense, this status quo was not shared by the prosecutor in any way, so that the defendant can understand primarily how many material actions (in terms of numbers) he is being accused from, what are they, when were they committed, each of them (at least the approximate time). In these conditions the defendant cannot build an effective defence because he cannot determine whether a factual circumstance that the Public Ministry encompasses within the described status quo is being charged to him as a distinct material action in relation to another circumstantiated fact. Moreover, this type of irregularity of the indictment is expressly indicated by the legal doctrine as likely to affect the establishment of the object of the judgment[32]. The jurisprudence invoked by the judge sitting in the preliminary chamber in the resolution being challenged is undoubtedly justified. It is difficult to ask the prosecutor, from obvious reasons related to the extent of the indictment, to describe each individual material action, especially if their number is high and the similarities between them are major. However, we consider that these cited judgments *have no relation with the issue being addressed* in the cause because, as noted above, it is not the description of the facts that is missing, but its individualization based on the different material actions. The description of these material actions was not possible because, in fact, they were not separately identified by the prosecutor (which is why their number was not listed), and they were appreciated as an overall factual situation.

Without the indication of the *number* of the material actions, of the elements relating to the *time of occurrence* of each of them (for which temporal coordinates are not indicated, but only the whole period of the continued offense, as legal unity), of the *specific ways of committing the offenses* (act committed or omitted, alternative or successive committed personally or through intercessor etc.), we appreciate that the object of the judgment cannot be legally established, as the acts of judicial inquiry can be made only regarding the issues completely defined. This incomplete way to describe the offense of traffic of influence affects as well the right of defence of the defendant guaranteed not only in the form but also in its exercise because he is being rendered unable to prove the unreal appearance of an argument if it is not individualized. Only in relation to a precise fact a real defence can be made, and one of the core tasks in the work of the prosecutor is to formulate clear, rigorous accusations *"and not to create a puzzle that would eventually be settled by the defendants"*[33].

We underline as well that the need for such additional indications is justified by the fact that, from the material point of view, the offence of traffic of influence involves *demanding, receiving or accepting the promise of money or other benefits,* and on the other hand, in accordance with article 35 paragraph (1) Criminal Cod, one of the conditions of the continued offence is that *each action or inaction taken as material action has to present the content of the same abstract pattern of criminality.* Or, if the material acts - to which the prosecutor refers implicitly when holding the continued form of the offense - are not individualized separately, the defence also cannot analyse the accomplishment in relation to each part of the condition foreseen in article 35 paragraph (1) Criminal Code. The continued offense represents a form of the legal unity of offense, through which criminal actions capable by themselves to achieve the content of the offense are joined by the will of the legislator in a single offense (because they are committed under the same criminal intention). The material actions entering the content of the continued offense, being themselves criminal actions, must be presented in the indictment with all the elements having criminal relevance under the content of the offense, whilst being necessary that the will of the prosecutor to manifest in the sense of the arraignment. If the material actions are not individualized it cannot be verified if each of them meets the standard of the norm of criminality, and the defendant cannot thus defend against the charge being brought to him. Finally, we show that the exercise of the two antagonistic procedural functions (accusation -defence) before the court of law is inextricably linked to the object of the judgment which is however unilaterally established by the accusation. Or,

[32] *I. Kuglay* in M. Udroiu (coordinator), *The Code for criminal procedure. Comments on articles,* CH Beck Publishing House, 2015, p.906.
[33] Suceava Court of Appeal, Criminal Division and for cases involving minors, resolution of the judge sitting in the preliminary chamber no. 36/2014, cited in *C. Voicu* The New Code for Criminal procedure commented, op.cit., p. 926.

in this case, the object of the judgment cannot be established, the charge brought against the defendant being a formal one, unspecified from the material point of view, which sets the defendant unable to formulate an effective defence.

For the support of the denial of the requests for irregularity of the resolution, the judge sitting in the preliminary chamber argued using the fact that the defendant did not invoked, throughout the prosecution, the problem of the insufficient description of the facts he was held with, although at the time of the initiation of the criminal proceedings he was informed about the accusations and he gave a statement regarding the accusations during the criminal proceedings. In our opinion, this argument adds to the law. To invoke problems regarding the unlawful referral of the court is not subject to the procedural attitude of the defendant during the criminal investigation, since the law does not contain any indication to that effect. On the other hand, the initiation of the criminal proceedings by the prosecutor is not the procedural act setting the object and the limitations of the judgment. Therefore, it is irrelevant to determine whether the allegations are understood upon indictment. The object of the judgment is fixed through the indictment, which is the deed of intimation. So, based on this act, it is essential to determine if the action has been fully described.

In relation to the issues presented, the description in a reasonable manner of the facts being apprehended represents a prerequisite for the regularity of the deed of intimation, since the establishment of the object of judgment depends, in a determinate manner, on the clarity of presentation of the accusation, the court losing in the current processual system the capability to reconfigure the object of the judgment and thus complement the initial shortcomings of indictment. The importance of ensuring a regular notification of the court was still observed under the old regulation when, anyway, the court, under its active role expressly recognized[34], had at its disposal the appropriate procedural remedies to help during the proceedings to the extension or the abbreviation of the object of the judgment. In this sense, in the specialized literature it has been appreciated that the verification of the regularity of the deed of intimation has priority over the verification of the courts' competence, being possible to accomplish or provoke the remedy of the irregularities by a court of law that did not have jurisdiction to resolve the merits of the case in question[35].

4. Conclusions

The national regulation is undoubtedly deficient in terms of implementing the conventional standards established in the field of requirements that must be met by the main act in which the accusation formulated against a person in criminal proceedings is materialized. The absence of provisions that would develop the minimum requirements in relation to which the function of verification of the legality of the indictment is exercised was most of the time compensated by the courts.

Taking into consideration the functional relation between the subjects applying the procedural norms and the authorities establishing them, this circumstance do not remove the need to improve the regulatory framework in the domain.

A legislative intervention aimed at ensuring not only the guarantee of the rights of the participants in the trial and a fair trial as well as the effective exercise of the powers of the judicial bodies will help to strengthen the safeguards of a modern process system.

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[34] In accordance with article 287 paragraph (1) CPP from 1968, the Court shall exercise its powers actively to find the truth and to achieve the educational role of the judgment. The provision was confirming one of the primary principles of the criminal procedure, *the obligation*, that had as important consequence the procedural rule to promote *ex officio* – "the task for the judicial bodies to work on own initiative by performing all acts and formalities prescribed by the law of criminal procedure" *(Tanoviceanu I.,* Treaty of Criminal Law and Criminal Procedure, 4th volume, 2nd edition of the Course of criminal law and criminal procedure, reviewed and completed, doctrine by *V. Dongoroz*, Curierul Judiciar Publishing House, 1926, p.38-39).

[35] see to that sense *V. Dongoroz, and others*, op.cit., 6th volume p.149.

THEORETICAL AND CASE-LAW CONSIDERATIONS ON THE PROFESSIONAL NEGLIGENCE OF DOCTORS THAT COULD RESULT IN CRIMINAL, NOT ONLY CIVIL, LIABILITY

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Abstract

In this study we aimed to analyze guilt, in the form of negligence, that is governed in Romanian criminal laws in Article 16 paragraph (4) of the Criminal Code, as follows:"An offence is perpetrated in negligence when the offender:a) foresees the outcome of his actions but does not accept it, deeming that it is unlikely for it to occur; b) does not foresee the outcome of his actions, although he should and could have."This form of guilt applies in the case of all incriminations stipulated in the criminal law perpetrated in a negligent manner, while keeping in mind that, in accordance with Article 16 paragraph (6) of the Criminal Code "an offence committed in negligence amounts to a criminal offence when expressly provided by law".

Keywords: *guilt, negligence, criminal liability..*

In a modern State, with a strongly developed economy and technology, a wide range of professions, jobs and other such activities useful for the society are undertaken, but which also pose a risk factor for some of the social values protected under the criminal law. That is why, the State steps in and, within the limits of a risk accepted by the society, regulates and lays down the legal frame appropriate for the performance of certain hazardous professions, jobs or other activities, in order to prevent consequences inconvenient for the society.

All these regulations specific in the performance of certain professions, jobs or other activities hazardous for the public, compels the practitioners of the above to conduct their professional activities with particular care, attention, to act in a prudent and diligent manner in fulfilling their professional obligations, in line with the legislative enactments governing the relevant activity.

Having regard to this reality of the hazard posed by the performance of certain professions, jobs or other similar activities, the Romanian criminal law maker incriminated the negligent perpetration of actions inconvenient for the society, as a result of the practitioners of such hazardous professions (jobs) failing to comply with the professional obligations originating from the governing legal frame. In that respect, as far as the Romanian criminal legislation is concerned, two incriminations are material, in particular: manslaughter [Article 192 paragraph (2) of the Criminal Code] and involuntary bodily injury [Article 196 paragraph (3) of the Criminal Code].

In both of the legal texts referred to above, the law maker provides more severe penalties for manslaughter and involuntary bodily injury, where the outcome results from "the failure to comply with the legal provisions or precautionary measures in exercising a profession or job, or for the performance of a certain activity".

Mention is to be made that, both in respect of manslaughter, and involuntary bodily injury committed by the practitioners of professions (jobs) hazardous for the society, harsher penalties are imposed than in the case of manslaughter or involuntary bodily injury perpetrated by other individuals.

The explanation for the difference in the criminal treatment, more severe in the case of the practitioners of jobs (professions) hazardous for the society, who commit manslaughter or involuntary bodily injury, as compared to other persons who commit the same offences, is simple, although, objectively speaking, the outcome is the same, more specifically death or bodily injury of another individual. Thus, there is a principle in place, according to which persons conducting activities that are hazardous for the members of the society have an obligation to act in a prudential, more careful manner and use their best endeavors in fulfilling their professional duties, so that to avoid the violation of the social values protected by the criminal law, because they are, by virtue of the nature of professional activities performed, a latent source of jeopardy for the members of collectivity.

For instance, a driver should follow with great responsibility the traffic rules on public roads and slow down when encountering crosswalks, so as not to cause traffic accidents resulting in human victims, because he is driving an automobile which, when not driven in accordance with the requirements stipulated by law, turns into a source of major jeopardy for traffic participants. On the other hand, a pedestrian who does not stop at the red traffic light, is not a source of jeopardy for traffic to the same degree as the imprudent driver who ignores the red traffic light, because the car he drives could cause irreversible consequences.

Conversely, the practitioners of hazardous jobs (professions) are trained in their field of activity by education, training or other specific forms of education, which means that they are well aware of the risks their

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activity poses to the public and of the need to conduct such job (profession) in strict compliance with the stipulations of legislative enactments and regulations governing their professional activity.

Precisely in light of these features (characteristics) of the practitioners of hazardous jobs (professions), in relation to the other members of society, the law maker deemed that their failure to fulfill their professional obligations, which led to the perpetration of offences set forth in the criminal law, should be subject to more severe punishment (for instance, simple manslaughter is penalized by 1 to 5 years imprisonment, while manslaughter further to the failure to observe legal obligations in exercising a profession, job or another activity, is penalized by 2 to 7 years imprisonment).

Given the existence of regulations set out in Articles 192 and 196 of the Criminal Code, concerning manslaughter and involuntary bodily injury resulting from the failure to comply with legal provisions of precautionary measures in exercising a profession or job or in performing a certain activity, criminal doctrine created, for such cases, the phrase of "professional negligence", as a variation of negligence.

Professional negligence occurs "when the agent fails to fulfill or inappropriately fulfills his legal or regulatory duties (the rules for exercising most professions are laid down in professional, technical and ethics regulations) by lack of prudence, care or attention to the given circumstances; he fails to foresee what an ordinary professional would have foreseen in similar conditions. The same applies to the person who fails to foresee, although he should and could foresee the outcome of an action, either by lack of knowledge which he should possess, or for lack of certain qualities, proficiency or skills"[1].

In the definition of professional negligence given above, we may identify all the ingredients necessary in defining a doctor's professional negligence.

Furthermore, the law maker himself has defined medical professional negligence (medical malpractice) in law no. 95/2006[2]. Thus, in accordance with Article 653 paragraph 1 letter B) "malpractice is the professional error perpetrated while performing a medical or medico-pharmaceutical act, which may generate damages for patients, involving the civil liability of medical personnel and of the provider of medical, healthcare and pharmaceutical products and services". The second paragraph of the same article stipulates that "medical personnel shall be held under civil liability for damages caused by error, which also included negligence, imprudence, or insufficient medical knowledge for exercising that profession, through individual acts during prevention, diagnosis or treatment procedures". In accordance with paragraph (3) of the same article, "medical personnel shall also be held under civil liability for damages deriving from the failure to comply with the regulations in this section in respect of confidentiality, informed consent and obligation to provide medical care": Paragraph (4) of the same article provides that "medical personnel shall additionally be held under civil liability for damages occurred during the performance of a profession when the limits of competence are exceeded, save for emergency cases, where medical personnel of required competence is not available". Finally, paragraph (5) of Article 653 sets forth that "civil liability regulated by law does not preclude criminal liability, if the offence having caused the damage is a criminal offence, under the law".

From the regulation of Article 653 in Law no. 95/2006, as a whole, the general conclusion may be drawn in the matter of interest herein, that a doctor's tort civil liability lays the basis for criminal liability for professional negligence.

It is well-known that, among all professions and occupations, the most special and peculiar is the profession of doctor, because, by the very nature of this

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[1] Narcis Giurgiu, *Drept penal general*, Contes Publishing House, Iași, 2000, p. 142; definitions in the same respect may also be found in the works of other authors. Thus: B.A. Sârbulescu, in *Reflecţii cu privire la culpa profesională ca formă a vinovăţiei (II)*, in R.D.P., no. 3/195, p. 56, stating that: "the concept of professional negligence refers to a certain variety of negligence and occurs as a subjective element in certain categories of criminal offences, of a peculiar nature: criminal offences committed while performing or in relation to the performance of activities of a professional nature, which could entail jeopardy for the society". The perpetrator, B.A. Sârbulescu states in the cited paper p. 54-55, "is held under professional negligence whenever he knew the specific rules for performing an activity (and, implicitly, the requirements of diligence he should have foreseen) and acted lightly, not heeding them. Furthermore, a perpetrator will be held professional negligence when he acted in a reckless manner, not knowing such rules, although he should and could have known them". As concerns a doctor's professional negligence, definitions may be found in medical literature. As such: "failure to fulfill obligations pertaining to professional deontology, in the form of unpardonable severity, amounts to the doctor's professional negligence" (Ion Turcu, *Dreptul sănătăţii. Frontul comun al medicului şi al juristului*, Wolters Kluwer Publishing House, Bucharest, 2010, p. 299); Malpractice is "the illicit action committed with guilt, which generated damages – committed while performing a medical or medical-pharmaceutical act and involving the civil liability of medical personnel and of the supplier of medical, healthcare and pharmaceutical products and services" (Gabriel Adrian Năsui, *Malpraxisul medical. Particularităţile răspunderii civile medicale*, Universul Juridic Publishing House, Bucharest, 2010, p. 395); Cristian Stan, in the paper *Malpraxisul medical*, Etna Publishing House, Bucharest, 2009, p. 15, asserts that "malpractice is the professional error committed while performing a medical or medical-pharmaceutical act which caused the patient to incur damages, involving the civil liability of medical personnel and of the supplier of medical, healthcare and pharmaceutical products and services"; In another definition, medical malpractice is "a system of legal medical liability exclusively correlated to the field of legal liability" (Gheorghe Bălan, Diana Bulgaru Iliescu, *Răspunderea juridică medicală în România*, Hamangiu Publishing House, Bucharest, 2015, p. 55).

[2] Law no. 95/2009 on health reform, was republished in Official Gazette of Romania no. 490 dated 3 July 2015. Title XII of the law (Articles 376-411) contains regulations for the medical profession in Romania; chapter III of Title XII governs the "organization and operation of the Romanian Doctors' College" (in Articles 412-449), and section VI of the same law governs doctors' disciplinary liability, Articles 450-459; In the same law, Title XIII (Articles 476-562) governs "the performance of the dentist medical profession and the organization and operation of the Dentists' College". Title XIV (Articles 563-651) of Law no. 95/2006, republished, governs the performance of the pharmacist profession and the organization and operation of the Romanian Pharmacists' College.

profession, a doctor is working with people, saves lives, cures or alleviates patients' suffering. The cases where a doctor may found himself face to face with his commandments and the purposes his profession are so numerous, and in certain circumstances so full of unpredictable risks, that sometimes it is difficult to determine the requisite nexus between the medical act and the damage caused by it. The medical doctrine considered that the "regulations on the performance of the medical profession are still insufficient, as it is often necessary for the correlations between doctor and patient, between their mutual rights and obligations to be treated in the light of ethics principles"[3], but also Law no. 46/21 January 2003[4].

Precisely in consideration of the complexity attached to the medical act and the consequences it may entail, doctors conduct their professional activity which may entail negligent legal liability in a highly extensive legal frame.

Thus, performance of the medical profession takes place in a legislative area made up of: Law no. 95/2006 on health reform, republished; the By-Laws of the Doctors' College, Medical Ethics Code[5] and Law no. 46/2003 on the patients' rights.

In this sequence of legislative enactments governing the delivery of the medical profession, it may be noticed that the Medical Ethics Code is one of them. As already emphasized in medical literature, "medical profession required the recording of doctors' ethics obligations in ethics codes and setting up of professional organizations, colleges or ethics orders to foster principles of ethical conduct, to ensure that they are observed, and penalize departures from the rule"[6]. Insofar as the failure to comply with ethics regulations entails the perpetration of offences stipulated under the criminal law, the doctor will be held under criminal liability.

Through its increasing complexity, the "medical act requires increasingly wider knowledge and more advance specialization, and certain circumstances occur more and more frequently where the skills of a single individual (doctor, note added) is insufficient. Therefore, the need ensues to set up more or less cohesive, more or less structured teams, with an unexpected legal impact in determining the potential damages which may occur[7].

For professional negligence in general to exist, as deriving from the provisions of Article 192 paragraph (2) and Article 196 paragraph (3) of the Criminal Code, it follows that certain requirements need to be met. These conditions are:

a) the perpetrator is a professional, a handyman or an individual performing a certain activity;
b) an offence has been perpetrated during the performance of the profession, job or of a certain activity;
c) there shall be certain legal provisions, rules of conduct or prudential measures for the performance of the profession or job or of a certain activity;
d) the offence committed further to the failure to comply with legal provisions or prudential measures in the performance of a profession, job or of another activity regulated under the law shall amount to an offence stipulated by the criminal law;
e) the requisite nexus shall exist between the offence committed further to the failure to comply with legal provisions or prudential measures in the performance of a profession, job or of another activity and the criminal outcome.

In criminal court practice, there have been cases where the courts of law have held, in the doctor's charge, negligence subject to hardship and have sentenced him. Here is one of them:

By means of the indictment issued on 16 March 2009 by the Prosecutor's Office attached to Piteşti Local Court, the defendant G.C. was sent to trial, without being detailed, for having perpetrated the criminal offence of manslaughter, as provided in Article 178 paragraphs (1) and (2) of the old Criminal Code. The court noted that the defendant, being a gynecologist in the County Hospital of Argeş, failed to provide appropriate medical treatment to the person named C.I., which resulted in the latter's demise on 21 March 2006.

The evidentiary material existing in the case file revealed that the material element of the criminal offence of manslaughter materialized in actions attributable to the defendant: failure to comply with medical ethics rules, substantially consisting of having omitted to recommend certain para-clinical investigations/medical analyses in order to determine a full diagnosis, having omitted to determine such diagnosis in a timely manner and to prescribe an appropriate and full medical treatment, having omitted to have a gynecological therapeutic conduct able to preclude the complications which have led to the patient's demise.

The court noted that no routine medical investigations have been performed, generally applied to any patient admitted to a hospital section, or specific investigations, mandatory in case of threatening miscarriage, which could have shed a light on the etiology of this case and on the status of the conception outcome. The court decided that, between the immediate consequence (the patient's demise) and the

[3] Almas Bela Trif, Vasile Astărăstoae, *Responsabilitatea juridică medicală în România*, Polirom Publishing House, Iaşi, 2000, p. 47.
[4] Law no. 46/21 January 2003, on patients' rights, was published in Official Gazette of Romania no. 51 of 29 January 2003.
[5] By-Laws of Romanian Doctors' College and Medical Ethics Code were adopted by the Romanian Doctors' College by Decision no. 2 of 30 March 2012, published in Official Gazette of Romania no. 298 of 7 May 2012.
[6] Almaş Bela Trif, Vasile Astărăstoae, *Responsabilitatea juridică medicală…*, op.cit., p. 47.
[7] Almaş Bela Trif, Vasile Astărăstoae, *Responsabilitatea …*, op.cit., p. 8.

defendant's inactions there is a direct cause-effect relationship, and the form of guilt is negligence while foreseeing the result or recklessness (the defendant foresaw that the diagnosis determined upon the patient's admission to the hospital meant that the fetus could have died at any time, but thought, without any ground, that this would not occur and did not conduct any para-clinical investigation, not even the customary one, which would have helped him determine the full diagnosis of intra-uterine death of fetus, with the consequence that he failed to apply an appropriate medical conduct)[8]. The arguments issued by the court for the doctor's negligence, in this case, comply with the general pattern laid down in the doctrine in respect of negligence while foreseeing the outcome, within the meaning that the "author deems that the outcome would not occur precisely based on certain objective circumstances, which, however, are misinterpreted. Therefore, it may be said that the ground does not miss, but proves to be insufficient"[9].

This case, as well as others contained in the criminal case-law, draws attention to the form of guilt noted by the court, in particular negligence while foreseeing the outcome, in the case of the defendant doctor.

Whereas, in the case of other professional negligence instances, there are no difficulties in the court holding negligence while foreseeing the outcome, in our opinion, in the case of professional negligence of a doctor, a more thorough investigation could lead to another conclusion. Thus, in our opinion, a doctor performing his profession, but who, while delivering a medical act, departs from the regulations governing his professional obligations, as it happens in the case at hand, the court may not rule on guilt in the form of negligence while foreseeing the outcome, but always as negligence in the form of recklessness.

In making this assertion, we do not mean to criticize the rulings of "negligence while foreseeing the outcome" issued by courts in everyday practice, because they rely on the criminal law and specialized doctrine, on the contrary, our aim is to also emphasize another potential approach to professional negligence, only for the specific case of a doctor who is the active subject of a criminal offence.

Thus, the active subject of the criminal offence foreseeing the socially hazardous outcome, as indicated in Article 16 paragraph (4) letter a) of the Criminal Code cannot be brought into debate in a doctor's case, as this contradicts the very idea of medicine and the doctor's existence rationale, since doctors dedicate their lives to saving the lives or ameliorating the health of their patients. Therefore, in our opinion, the consecrated idea that, in case of a doctor's professional negligence he foresees the socially hazardous outcome (for instance: the death of his patient as a result of his actions or omissions during diagnosis and treatment) considering, in an unjustified manner, that it would not occur, is untrue and misleading. It would be absurd to believe that any doctor, while fulfilling his professional obligations, foresees the death of his patients, but he "considers in his inner belief, in reliance upon objective circumstances, that this would not occur" and would not immediately act in the meaning of precluding the patient's death.

The doctor, as the one in the case described above, in light of his education and experience in his field of activity, upon the patient's admission to the hospital, did not have "ab initio", at any time during the performance of the medical act, such as it was performed, the representation of the fact that she would die because of him, however, this outcome did occur as a result of the fact that he acted in a negligent manner, after the patient was admitted to the hospital, in the medical conduct adopted in treating the patient in this case, and failed to do everything he was supposed to, in accordance with the best medical practices available to him. The patient's demise which occurred after her admission to the hospital, is, in our opinion, in terms of guilt, attributable to the doctor, in the form of simple negligence, recklessness. Because of cases of hospital doctors' recklessness related to the deaths of certain patients, there is a folks' saying that "one goes to the hospital alive and gets out dead".

In our opinion, the cases of professional negligence which have resulted in the death of bodily injury of patients are not cases particularly difficult to solve, from the medical perspective, but curable in light of medical science and which should lead to a positive outcome, in the patients' benefits, but which, precisely because of the doctors' recklessness in their approach to the diagnosis and treatment applied, have a tragic end.

In all this cases of medical malpractice with criminal implications, in our opinion, the doctors' negligence while foreseeing the outcome is excluded, as the form of guilt will always be that of simple negligence or recklessness.

According to the current regulation in matters of guilt, in respect of professional medical negligence, the trial should prove whether, although the socially hazardous outcome was foreseen, the doctor also had the strong belief that such an outcome would not occur. This is particularly important to be decided during the trial, because this is the only way of segregating, in an actual case, between negligence while foreseeing the outcome and indirect intention for the socially hazardous outcome to occur. Thus, if, in performing the medical act, the doctor estimates that a socially hazardous outcome could occur – for instance, the patient's death – and persists in that act, failing to take the measures required to preclude the outcome threatening the patient, and that outcome, more specifically the victim's death, occurs, the offence will

[8] Pitești County, criminal judgment no. 496 of 14 February 2012, referred to by Judge Roxana Mona Călin in the paper *Malpraxis – răspunderea medicului şi a furnizorilor de servicii medicale, practică judiciară*, Hamangiu Publishing House, Bucharest, 2014, p. 285.

[9] Florin Streţeanu, *Tratat de drept penal, partea generală*, volume I, C.H. Beck Publishing House, Bucharest, 2008, p. 453.

be held in his charge as manslaughter in the form of guild consisting of indirect intention, excluding the negligence while foreseeing the outcome.

For instance, in observance of the contract between the doctor and the patient, the former undertakes to cure the latter by applying a certain treatment. In fulfilling his obligation, the doctor progressively applies the treatment, but after the first procedures applied, the patient's condition worsens, and then the doctor realizes that undesirable consequences occur, which, if left unattended and continued, would further impair the patients' health and he could no longer fulfill the obligation incumbent upon him. Therefore, any undesirable consequences that could occur need to be removed by the doctor, who has to step in and stop those procedures, changing the treatment. However, undesirable consequences which endanger the patients' life or health need to be prevented or removed precisely by a more diligent control held by the doctor in respect of the patients' health and the evolution of their illness.

The regulations in the matter of guilt, in Article 16 of the Criminal Code, set forth that in certain circumstances, negligence while foreseeing the outcome may be tangential with indirect intention, and in many cases which have come before the supreme court, it was decided that the form of guilt is not negligence while foreseeing the outcome and indirect intention. Given the many such cases, where some courts have ruled, in specific files, that the guilt was negligence while foreseeing the outcome, and the supreme court decided that indirect intention applied, the question may be asked: why did that happen? The answer is that, as already emphasized in the doctrine, "the phrase used by the Romanian criminal law maker in defining negligence while foreseeing the outcome – the offender foresees the outcome, but does not accept it, believing, in an unreasonable manner, that it will not occur, may create confusion"[10]. Court practice confirms this remark.

Other authors are more decided, deeming that, in principle, the law maker did not give a scientific regulation for the concept of guilt, a remark with which we agree. Besides, the doctrine claims that the "variants of intention, as well as of negligence, should be removed for good from criminal science, which, precisely because it is a science, is not allowed to use concepts so equivocal as that of «direct intention» and «negligence while foreseeing the outcome»"[11].

We opine that, in the case of criminal medical malpractice, the concept of negligence while foreseeing the outcome and of negligence while foreseeing the outcome converted into indirect intention does not apply in the exceptional case of doctors who, in light of the noble art they fulfill in the society, but also in observance of the contract concluded with the patient, have a sacred mission of saving human lives, not end them. If, however, as a result of professional negligence, damaging outcome occurs, such as the patients' death or bodily injury, this is solely and exclusively due to their negligence in performing a medical act.

The fact that medical liability as the doctor's civil liability for the prejudice caused while performing a medical act relies on the traditional idea of negligence (error)[12] and/or the concept of professional error brought forth by Law no. 95/2006 on health reform[13], could also amount to an argument and, as far as the doctor's criminal liability for professional negligence is concerned, consideration shall only be placed on negligence in the form of recklessness (error).

Negligence while not foreseeing the outcome (recklessness or mere negligence) is referred to in most unintentional criminal offences, as it also happens in the case of doctors' professional negligence. This variant of negligence contains two important items, setting it apart from negligence while foreseeing the outcome, in particular:

a) the doctor's obligation to foresee the socially hazardous outcome
b) the doctor's actual ability to foresee that outcome.

A doctor's obligation to foresee the outcome relates to an obligation of prudence or diligence imposed upon him in connection with the medical act he is about to perform, so that the act at issue does not entail a consequence able to prejudice a social value protected by the criminal law. The obligation of diligence or prudence incumbent upon the doctor may be contained in a legislative enactment governing the medical profession, in other laws, such as the patients' rights law, the doctors' ethics code, Government Emergency Ordinances or Orders of the Ministry of Health.

The doctor's ability to foresee that a socially hazardous outcome would occur as a result of the medical act or its omission shall be analyzed against the actual conditions in which the action took place (against the standard reference doctor), but also taking into account the subjective features of that doctor.

In court practice, it was decided that "in objective terms, upon determining the obligation to foresee the outcome, consideration shall be placed on the circumstances in which the offence was committed, so as to ascertain if anyone in the category of the offence had, at the time when it was committed, the ability to

[10] Florin Streţeanu, *Tratat de drept penal…*, *op.cit.*, p. 453.
[11] Mioara Ketty Guiu, *Elementul subiectiv şi structura infracţiunii (doctrină, jurisprudenţă, comentarii)*, Juridică Publishing House, Bucharest, 2002, p. 102.
[12] Roxana Maria Călin, *Malpraxisul…, op.cit.*, p. 129.
[13] In accordance with Article 653 paragraph (2) of the law, "medical personnel shall be held under civil liability for damages caused by error also including recklessness, imprudence or insufficient medical knowledge in delivering the profession, by individual acts in respect of prevention, diagnosis or treatment procedures".

foresee the outcome. If, in light of the circumstances of the case, it is decided that the outcome could not have been foreseen, than the perpetrator would not have had the obligation to foresee it"[14].

In subjective terms (if the doctor could have foreseen the outcome), the court ought to determine the doctor's professionalism, experience and training in the field, wit, expedience in finding ad-hoc solutions or the physical fatigue existing at the time when the medical act was undertaken.

In a specific case, the court ruled that the surgeon, after having performed a C-section, forgot in the plaintiff's body a surgery equipment fragment operator which caused her harm. The court, in that case, ruled that the "doctor's omission of taking out a foreign item from the patient's body amounts to negligence" on his part[15].

In court practice, it was decided that "recklessness is the omission of doing what a slightly imprudent individual, under the guidance specific to a prudential conduct, would do or acting in a manner in which a prudential and diligent individual would not. Recklessness in medical practice comes in the form of haste, superficiality, undutiful performance of obligations. Recklessness may take the form of: inappropriate consultation case history; failure to perform a suitable clinical examination; failure to undertake routine para-clinical examinations"[16].

Medical negligence by failing to foresee the outcome was largely described and explained in medical literature. Thus, it was stated that "failure to foresee the outcome, the reasonable inability of foreseeing it, are a mere variant of professional negligence involving the frustration of a professional's average, normal ability to foresee the outcome, but also and the possibility to foresee it. On the contrary, the impossibility to foresee any outcome is equivalent to a fortuitous case, when faced with risks implicit to medicine, which are specifically referred to as unfortunate or tragic cases"[17].

Specialists in the medical field opine that "the need to foresee the outcome ought not to become excessive prudence, especially in the context of current medical practice, where the risks are sometime overwhelmingly present in medical practice"[18].

Given that risk is implicit in performance of the medical profession, and may sometimes entail unfavorable consequences, we deemed necessary to emphasize several theoretical considerations in connection with medical risk.

Risk is a future event. In common language, the term of risk is synonymous with "jeopardy, danger, unfortunate event, objective threat"[19].

Any medical procedure or surgery intervention performed for a diagnosis or therapeutic purpose poses a potential risk of accident totally unconnected with the primary pathology or with medical error, but whose severity could result in the patient's demise or infirmity[20].

In every therapeutic act, there may be severe and exceptional risks involved, or frequent risks[21].

Risk goes hand in hand with medical act. One may never know, in undertaking a medical act when, where and why risk occurs. That is why, medical doctrine underlined that "the difficulty in determining the existence of therapeutic risk which does not originate from medical negligence, requires careful consideration of each and every case by experts, so that to remove any suspicion related to the surgeon's lack of dexterity or inappropriate handling of the patient by the medical team in charge of his care"[22]. It was further emphasized that "any medical procedure cannot escape a certain element of risk, which could lead to unsuccessful cure or to side effects. Risk forms part of the medical procedure itself, in most medical interventions, the risk of unfavorable evolution occurs independent of the doctor's fault"[23].

Doctors always accept risk exclusively for the best interest of the patient. In their turn, patients also freely and strongly accept risk both for their interest, but also in order to cover the doctor's responsibility. In accordance with Article 6 of Law no. 46/2003 on patients' rights, "patient shall have the right to be informed on his state of health, on the medical interventions proposed, on the potential risks attached to each procedure, on the alternatives available for the procedures proposed, including on the failure to undergo treatment and comply with medical recommendations, but also on the diagnosis and forecast". In accordance with Article 13 of the above-mentioned law, patients shall also be entitled "to stop a medical intervention, undertaking liability in writing for their decision; the consequences deriving from refusing or from discontinuing medical acts shall be explained to the patient". Objectively speaking, the doctor and the patient accept the risk by solving a medical necessity. The doctor not undertaking the risk in a particular case could have unfavorable repercussions. Thus, this matter was detailed in medical literature, and attention was drawn to the fact that

[14] The High Court of Cassation and Justice, criminal division, decision no. 2259/4 April 2005, in *Culegere de decizii ale I.C.C.J. pe anul 2005,* p. 4.
[15] Bucharest Tribunal, Third Civil Division, decision no. 515A of 18 May 2012, referred to by Roxana Maria Călin in the paper *Malpraxis…, op.cit.*, pp. 145-146.
[16] Bucharest Court of Appeals, civil decision no. 150A of 23 April 2013, referred to by Roxana Maria Călin in the paper *Malpraxis…*, *op.cit.*, 158;
[17] Gh. Scripcaru, M. Terbancea, *Coordonatele deontologice ale actului medical*, Medicală Publishing House, Bucharest, 1999, p. 194.
[18] Aurel Teodor Moldovan, *Tratat de drept medical*, All Beck Publishing House, Bucharest, 2000, p. 383.
[19] Ion Turcu, *Dreptul sănătăţii. Frontul comun al medicului şi al juristului*, Wolters Kluwer Publishing House, Bucharest, 2010, p. 197.
[20] Cristian Stan, *Malpraxisul medical*, Etna Publishing House, Bucharest, 2009, p. 77.
[21] Ion Turcu, *Dreptul sănătăţii…, op. cit.*, p. 196.
[22] Cristian Stan, *Malpraxisul medical…, op.cit.*, p. 77.
[23] Idem, *op.cit.*, pp. 77-78.

"failure to undertake the risk, because of the doctor's unjustified caution, limited skills or even indolence, becomes of form of negligence known under the name of refusal to intervene"[24].

10. We deemed necessary to also refer, herein, to a series of practical variants of medical negligence in general, also widely known by lawyers, which may result in civil or criminal liability, as the case may be, placed on the doctor. It is good to know that all these instances of negligence derive from the doctor's breach of professional obligations, such as:

- an obligation of diligence in the treatment applied to patients;
- an obligation of result in certain dentistry treatments;
- an obligation of correct diagnosis of the patient's suffering;
- an obligation of caution the patient on the risks involved in the treatment he is about to undergo;
- an obligation of permanent supervising the patient's evolution, following an applied treatment;
- an obligation of monitoring the patient.

These obligations listed as examples, in addition to many others, are set forth both by the enactments delineating the general legal frame in which medical profession is conducted, but also from Law no. 46/2003 on patients' rights.

In medical literature[25], from the perspective of the manners which could result in medical malpractice, a segregation was made between:

a) negligence by doing ("in agendo"), a case in which malpractice is committed by the doctor following his clumsiness, imprudence, lack of skill, lack of dexterity, indifference to the patient's needs; caution not justified by need, inappropriate use of working conditions or failure to work with particular care or prudence;
b) negligence by not doing ("in omitendo"), which takes place when the patient loses the chance to be cured or survive because of the doctor's failing to take necessary actions. Omission itself may manifest as the doctor's indifference, failure to take note or recklessness, and the doctor will be held liable if the requisite nexus is identified between his negligence and the damage incurred;
c) negligence "in eligendo", consists of the doctor choosing the wrong technical procedure, delegating certain obligations to an unsuitable person, or delegating his own obligations to someone else, in breach of the principle according to which "delegated obligations shall not be further delegated";
d) negligence "in vigilando", consists of the doctor infringing a duty of collegiality as regards the request and obligation to attend an inter-clinical examination, by failing to provide aid, by failing to inform on the patient's fate or by inappropriate supervision of subordinates.

The criterion against which negligence will be appraised is the customary – reasonable professional conduct of a doctor who, under the same working conditions, would not have committed the error.

To conclude, we want to emphasize that intense publicity of various cases of medical malpractice may incite an attitude of revolt and reproach from the public to the doctors who were in charge of patients who, because of their negligence, have died or suffered bodily injury. At the same time, excessive publicity of malpractice forces medical professionals to conduct their professional activity under the pressure of public eye, which could be prejudicial to the image of the medical profession.

Therefore, we have sought to combine here medical and criminal considerations and set out commented theory and court practice on doctors' criminal professional negligence, in order to better understand, from the legal perspective, the immense responsibility carried by doctors in performing medical acts, while having regard to the risks of this profession.

Medical criminal liability needs to be correctly understood by doctors, within the meaning that when they err and should not have, they will pay, but also by the families of those who suffered from professional medical negligence, because the process of curing a patient is a long road, sometimes full of unforeseen events and complications, along which the doctor endeavors to use all his art in the patient's favor, to save him, and not to end his life. If, however, this happens, this ought to be food for thought for medical professionals, who cannot take patients' lives easy and should use more wit, precision and diligence in performing a medical act.

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[24] Aurel Teodor Moldovan, *Tratat de drept medical…., op.cit.*, p. 388.
[25] Almoş Bela Trif, Vasile Astărăstoae, Responsabilitatea juridică medicală în România…, op.cit. pp. 67-68.

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The Consent of the Victim as Legal Defence in Cybercrime cases

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Abstract

The rise of Cybercrimes provides with great concerns among users, industry, banking sector or public institutions in terms of how much secure their computer systems or computer data are. Both Ethical and Non-Ethical hacking came-up as viable solutions for any natural or legal person willing to perform its own security checks. Taking into consideration the nature of such security evaluation techniques, that in certain situations may be regarded as cybercrimes, there should be a proper understanding of the circumstances when the victim may grant permission to the attackers to perform specific tasks against its own systems or data, especially when these belongs to a public institution.

Keywords: *cybercrime, Ethical Hacking, criminal law, consent, computer system, legal defence*

1. Introduction

Considering the scary statistics about the real level of Cyber-related crimes and offences in the nowadays modern and technological society we live in, and the dark forecast provided by the Cybersecurity researchers, more and more individuals and organisations are keen on taking precautions and perform various tests and scans of their own computer systems in order to evaluate the risk of becoming a Cybercrime victim, with all known consequences: stolen virtual or real identity, stolen or damaged data, financial or even property loss, privacy disturbance, affected business or current activities, information leakage and so on.

To prevent this happening, both individuals and legal persons are in pursuit for the best solutions available on the market to assess their cyber vulnerabilities, ranging from simple AV protection to complex hacking-style techniques.

But, asking professionals from both Ethical and Non-Ethical hacking communities or IT security companies to perform such complex penetration tests or vulnerability scans means to accept your computer systems being hacked, personal of financial data being compromised (even temporarily), IT infrastructure being affected (for a while) or remotely controlled by others. In other words, there are some risks that the willing natural or legal person should take on when deciding to let a hacker or an external IT security specialist to perform hacking-style tasks on your systems.

Knowing that their hacking-type actions may be regarded as computer crimes, the Ethical Hackers or the IT security professionals are taking precautions and choose to conclude specific commercial/civil contracts with the clients, while seeking for a legal approval for their further activities against clients' computer systems or computer data.

This means that even if they technically commit a cyber-related crime (e.g. hacking, access to a computer system, data or system interference, data interception, data transfer or alteration), every such act may be considered *per se* as "authorized", "legal" or "with right", and thus they are exempted from being charged or prosecuted for committing a crime (according to the law).

While in the case of a natural person (individual) the situation is clear and a valid approval given represents the legal ground for the other party (the "attacker") to not be prosecuted, things are a little bit complicated in the case of a legal person, as it will be detailed below.

2. Doctrine views on Consent as Legal Defence

In the Romanian Criminal Code, the "consent of the victim" is regarded as a clause that justifies the commitment of a crime. The legal provision states that "*it is justified the act described by the law when committed with the consent of the injured party, if the party could legally dispose of the affected or endangered social value*"[1].

In the same time, the same provision states that "*the consent of the injured person does not produce any legal result in case of crimes against life, as well as in the situations when the law itself excludes the justifiable effect*".

Most of the authors agree that, with any occasion the law does not explicitly forbid, the owner or the holder of the social value (ex. computer system, computer data etc.) may accept any threat, risk, damage or prejudice to that value, considering that the act by which the value was endangered or affected in any way

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[1] Article 22 align. 1 of the Romanian Criminal Code

is legal, authorized or with right (*volenti et consentienti non fit injuria*)[2].

In Cyberspace this justification clause operates only based on the following conditions:

The consent should be granted only by the owner or the legal holder of the further affected value. So, there is a need to prove the link between the consenter and the computer systems or the computer data that may be endangered by the hacking-type evaluation techniques.

Another condition is that the consent regards a value/good the consenter has a legal right to dispose of. This way, we may consider just a few situations when the consent is valid and justifies a possible cyber-related crime.

Things are more clear and simple when the person authorizing the hacking is the real owner of the affected value and has the legal ability to dispose of his own values (ex. computer system, computer data).

The scenario becomes more complicated when the values protected by the law belongs to the state – through the patrimony of a public institution/authority.

According to many authors, if the values targeted by the perpetrator's actions are bound to so-called *collective rights* (such as national security, state authority, public trust, public safety, family etc.), these values cannot be protected by the justifiable clause (legal defence) of consent.

While the owner of the goods can transfer to a third party the right to alter of affect in any way its own goods (including computer systems and data), the public institution – acting as the administrator of the state goods and interests - has certain limitations in what regards the capacity of disposal of those goods in such manner.

But the more important aspect of this analysis resides in the primary condition for the existence of consent, as an accepted legal defence: the existence of a crime. Unless a crime occurs, there is no need for a justification, chiefly not for a consent.

Based on an opinion[3] we should agree with, if the lack of consent is one of the main conditions for a certain activity to legally be considered a crime, therefore the existence of such a consent (whether is a permission, authorization, provision of a law or a contract) places the respective activity out of the criminal code provisions, due to the missing typicality requested by the principles of criminal law.

3. The legal characteristics of the Cyber-related crimes

The Cyber-related crimes have all got a specific condition: to be committed "without right". In this respect, it is worth mentioning that the Romanian legislator took over the Council of Europe Convention on Cybercrime's provisions and also considered that "without right" means: a) that the perpetrator has no authorization based on a law or a contract, b) even if an authorization exists, the perpetrator exceeds its limits, or c) the perpetrator has no permission – from the individual or legal person competent, according to the law, to grant it - to use, administer, control a computer system or to undergo any scientific research or to perform any other operation in a computer system.

As envisaged by the CoE Convention, the Romanian legislation also took into consideration the necessity to criminalize the intentional and unlawful behaviour of a person regarding a computer system or computer data.

Moreover, the CoE Convention, in its Explanatory Report, stated that the "without right" provision reflects the insight that the conduct itself may be legal or justified "not only in cases where classical legal defences are applicable, like consent, self-defence or necessity, but where other principles or interests lead to the exclusion of criminal liability"[4].

So, basically, the term "without right" is set forward to cover any other situation (scenario) where the hacking activity is not performed in the general framework of legal defences, excuses, justifications or undertaken based on a formal authorization, whether legislative, executive, administrative, contractual or consensual.

In other words, if the cyber-related activity is "with right", there should be no crime and no criminal liability for the eventual Ethical Hacker.

The "right" to perform any actions against computer systems or data relies on the ability of the person which either owns or just administers (control) the target system or data. And, while the owner has a commonly recognized and legal right to do whatever act against his goods and values, not the same regime may apply in case of a public institution, where the manager has the responsibility to preserve and to protect the safety of the goods and values he administers or possesses.

4. Conclusion

As revealed by the above analysis, in the Ethical Hacking scenarios (hacking with consent), there is a legal problem posed by the existence of an authorization for the performance of specific cyber-attacks and hacking techniques against computer systems and data, while these computer systems and data belongs to the state.

Considering the theory of the consent, as a legal defence mentioned by the Criminal Code, the authorization issued by the management of a public institution for cyber-attacks is a condition for not claiming the existence of any computer-related crime,

[2] Vasile Dobrinoiu, Ilie Pascu and co-authors, *New Criminal Code commented. General Part*, Universul Juridic Publishing House, 2016, page 185.
[3] C. Mitrache, C. Mitrache, *Romanian Criminal Law, general part*, Universul Juridic Publishing House, 2014, page 189
[4] https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800cce5b – point 38

but, in the mean time, the question remains to what extent the management of the respective public institution indeed has the right to issue such authorization for the performance of specific computer-related activities, by a third party, against the computer systems and data that are covered by a national interest.

While there should be a right for the public institution manager to issue an authorization/permission for the performance of certain hacking-type activities in order to identify the vulnerabilities related to the state-owned computer systems and data he has a legal obligation to protect and secure, certain limits and restrictions may also be considered in this respect, as the protection of the state interests and values needs a broad approach, from both legal perspective and cyber-security concerns.

Therefore, a possible solution may be for the management of a public institution to allow only certain specific hacking techniques to be applied or used by the pen-testers. The kind of techniques that do not harm, interfere or affect in any way the good functioning of the systems or the confidentiality, integrity and availability of the data stored or processed by the target systems.

In this way, the need for cyber-security will meet the other legal aspects related to the right of disposition (of the public institution manager) and the permission to be granted to the IT security specialists to perform their tasks with the confidence that no crime is committed and no law is trespassed.

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BEATING BANKS THROUGH KNOWLEDGE

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Abstract

In Romania, in the last decade, a significant number of solutions favorable to consumers with foreign currency denominated loans were obtained in courts against the banks or non-bank financial institutions. The judges noted the unfairness of the contractual terms inserted in the loans agreement and absolute nullity of these clauses. Also, in the context of the global economic and financial crisis triggered by the collapse of the banking system with the consequence of depreciation and/or sudden and high fluctuation of domestic currencies against the "safe-heaven currencies", the theory of unpredictability becomes a particularly important institution.

This paper deals with the concepts of „abusive clauses", „unfair commercial practices" and „providing untruthful information to consumers to influence their choices". It is also presenting a view of good faith and equity on the performance of contract and the "distribution of the risk" of the contract in the conditions of applying to the "unpredictability theory" in the context of terms of law doctrine and the relevant case law.

The objective of this study is to demonstrate that by applying the theory of unpredictability to the occurrence of currency risk associated with loans in foreign currency and by subjecting to examination by court to the clauses whereby the consumer must assume the risk given by the changing of the circumstances of the execution of the contract can be obtain by the consumer or a rebalancing of the understanding of the parties or the cancellation clause which significantly unbalanced the consumer's obligation to bear any risk.

Keywords: *„abusive clauses", „unfair commercial practices" and „providing untruthful information to consumers to influence their choices", "distribution of the risk", "theory of unpredictability".*

1. Introduction

In the last ten years, Romanian courts had to face a large number of files in which the National Agency for the Protection of the Consumers and/or the consumers requested the lack of effects of the abusive clauses included in the agreements of bank credits entered into between consumers and professionals. Although for most of the times the courts established the presence of abusive clauses and admitted the complaints, other contracts of the same type belonging to the same professional continued to produce their effects. Moreover, that final solutions obtained in court did not stopped the professionals from concluding other contracts whose content include the clauses qualified by the court as abusive. Starting from this reality and in order to stop its continuation in the future, certain aspects on abusive clauses of the Law no 193/2000 were modified in 2010. Given that the problem of the over indebtedness of the consumers due to the contracts concluded before the economical and financial crisis starts, the existence of the abusive clauses in loan contracts is currently an important topic of public debate in Romania, as well as in other European States.

Although it is prohibited by law for professionals to insert abusive clauses in contracts (paragraph 3 of art.1 of Law 193/2000 regarding abusive clauses from the contracts concluded between professionals and consumers, republished), the Romanian credit contracts contains unfair terms which stipulates e.g.: risk commissions, account administration fees, unilateral increase in interest rates, modifiable fixed interest, variable interests which vary and increase only upward, even if they where connected to the ROBOR/ EURIBOR/ LIBOR indexes or variable interests calculated following an internal and non transparent bank indexes. Also we can meet clauses providing for the extension of mortgage in favor of the bank or terms excluding the consumer's right to undertake legal actions or to exercise a different legal remedy or the obligation of the consumer to give up to all legal actions in course and to any pretention when concluded a novation of contract in the case for the initial contract the consumer is having a dispute in front of the court.

1.1. The Romanian legislation regarding abusive clauses

The European Directive 1993/13/CEE, whose provisions were transposed into Romanian legislation by Law 193/2000, defines abusive clauses as being those contractual clauses which have not been negotiated directly with the consumer, and will be considered abusive if by themselves or together with other provisions generate disadvantage for the consumers and, in a manner contrary to good faith, a significant imbalance between the rights and obligations of the parties.

The abusive clauses from the contracts concluded between the professionals and the consumers are being

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enumerated by the Law 193/2000 and we can enumerate from it:

The trader's exclusive right to interpret the contractual clauses;

The trader's right to unilaterally alter the terms of the contract;

Provisions that limit or cancel the consumer's right to demand indemnifications in case the professional does not comply with his/her contractual obligations.

The consumer's obligation to obey some contract terms he never had the real possibility to know when signing the contract;

Provisions that restrict or cancel the client's right to denounce or to unilaterally cancel the contract, in cases when the professional either unilaterally changed the contractual clauses, or he/she did not fulfil his/her obligations or he/she imposed to the client clauses regarding payment of a fixed amount (in case of unilateral denunciation);

According to Law no. 193/2000, the provisions regarding the abusive clauses are applicable to those juridical reports that take place between consumers and traders. Art.1, paragraph 1 of this law, provides that any contract concluded between traders and consumers for the sale of goods or for providing services will include clear contractual clauses, in no uncertain terms, for their understanding not being necessary specialty knowledge.

These clauses are mentioned in contracts of adhesion and the consumers does not have the possibility to negotiate the terms of the contract with the bank. The biggest problem for the consumers is that the bank has the possibility to appreciate discretionarily when financial imbalance occurs in the market. The consequence is the modification of the contract terms without any real negotiation between the parties. Furthermore, if the consumers do not agree with these terms, the banks notify them to pay back in advance the money (ECJ, Kušionová v. SMART Capital a.s, 2014) within 30 days.

2. The Theory of unpredictability in Romanian Civil Code

During the execution of the contract, might appear certain circumstances which can make the execution of the contract excessively burdensome for the consumer. Sometimes, during their execution, contracts are exposed to certain events related to the economic conjuncture. Most often, they are related to currency fluctuations. An example represent the acceleration growth of the currency in which the loan was granted which leads to an increased monthly installments owned to the bank. We can mention the case of Swiss franc which in 2007 had a rate of 1.9 RON and in 2015, a rate of 4.6 RON.

In this case, should be applied the principle of unpredictability.

Art.1.271 New Civil Code, in paragraph 1 provides that "The parties are bound to fulfil their obligations even if their fulfilment has become more onerous, either due to the increase in the costs of fulfilling their own obligations or due to the decrease of the value of counter performance"

Art.1.271 paragraph 2 provides "However, if the contract execution has become excessively onerous due to an exceptional change in circumstances, which would render the binding of the debtor to fulfil the obligation evidently unjust, the court of law may order: a) the adaptation of the contract in order to equitably distribute between the parties the losses and benefits resulting from the change in circumstances; b) the termination of the contract at the moment and under the conditions established by it".

Art.1.271 paragraph 3 provides that "The provisions of para. 2 are applicable only if: a) the change in circumstances intervened after the conclusion of the contract; b) the change in circumstances as well as their extent were not and could not have been reasonably considered by the debtor at the moment of contract conclusion; c) the debtor did not undertake the risk of the change in circumstances and it could not have been reasonably considered that he had undertaken that risk; d) the debtor tried within reasonable term and in good faith to negotiate the reasonable and equitable adaptation of the contract."

The Romanian Civil Code of 1864 did not expressly regulate unpredictability, but doctrine and case-law accepted it as per art. 970 para.2 Civ. Code of 1864 (the current 1.272, paragraph 1 N.C.C.). Art. 970 paragraph 2 Civ. Code of 1864 provided that: "They (the agreements) bind not only for what is expressly contained in them, but for all consequences, what equity, custom or law endue the obligation with, according to its nature."

According to Art. 1170 from the New Civil Code, "the parties must act in good faith, at the negotiation and at the signing of the contract, and also during its execution. They cannot remove or limit this obligation" which means that the risk of the grown of currency of the loan has to be assumed properly, by both parties, the creditor and the debtor.

The modification of consequences is relevant only in exceptional cases. The principle according to which agreements lawfully concluded between the parties are legally binding is not absolute, sacrosanct. When occurred events have the capacity to fundamentally alter the balance of the contract, there results the exceptional situation which the theory of unpredictability refers to.

In the context of the global economic crisis triggered by the collapse of the banking system, the theory of unpredictability becomes a particularly important institution. These circumstances affected the execution of loans contracts. Major discrepancies appeared between the value of performance on the conclusion of the contract and the value of performance on the date of fulfilment of obligations. It became

excessively onerous (in the case of the debtor). In other words, we will refer to the category of loan contracts in which, during their execution, an event that may produce a severe imbalance in value between the parties' performances is likely to occur. At the beginning of the financial crisis, the national currency depreciated against euro by up to 50% and more than doubled against Swiss franc, placing consumers with forex denominated loans in an extremely difficult position.

Good faith in contract execution was the most viable argument to justify the necessity of accepting the theory of unpredictability. In the case of unpredictability, the bad faith of the debtor in triggering the modification of circumstances cannot be considered. The lack of fault of the debtor is a fundamental condition, also considered in the regulation of the theory of unpredictability in the NCC.

Regarding the bank credit agreements, in judicial practice, the contract for personal loans by mortgages has a special legal nature, the debtor's obligation consisting mainly in repaying the loan within the time limits specified in the document. As regards payments due, the substantial change of the debtor's financial opportunities can give to the consumer the possibility to invoke the unpredictability, especially when initially the debtor has respected even partially his obligations. The abusive character of some contractual clauses determines according to the theory of unpredictability a significant imbalance between the parties to such contracts. The theory of unpredictability applies to long or open term contracts and sometimes to fixed term contracts. Even if the possibility that unpredictability may be invoked regarding other types of contracts is not excluded, it preponderantly applies to long-term contracts. The category of long-term contracts includes successive performance contracts and some contracts that are under suspensive conditions (legal, conventional, judicial).

Even that the Romanian Constitutional Court (CCR) decided through 62/ 7.02. 2017 that the conversion of loans in Swiss francs at historical rates is unconstitutional, basically the Romanian Constitutional Court in the motivation of the Decision confirms what we want to prove, namely, extract from the decision: 49 (...) "Adapting to the new conditions may be performed inclusive through the conversion of the payment of the monthly installments into Romanian national currency at an exchange rate established by the court related to the particular circumstances of the case in order to rebalance the obligations, an exchange ratio which can be those at the date of conclusion of the contract or at the date of occurrence of unpredictable event or at the value at the date of conversion."

So, if the court finds the intervene of unpredictability, it can balance the contract by converting the balance of the credit at the foreign exchange rate from the date of concluding the contract or at the date of the appearing of unpredictable event or to order recalculation the monthly installments in foreign exchange at a ratio determined by the court as in Civil Sentence 21.02.2017a 1920/2017 of District Court of 2nd Sector Bucharest.

In short, if unpredictability is proven, then the court may include in the decision, a solution to freeze the exchange rate at the time of occurrence the state of unpredictability.

The Decision 62/2017 also does not intervene in any way on the possibility of declaring as unfair the terms of the contract related to the assuming the entire currency risk, so that consumers will be able to choose between appealing to law 193/2000 and subsequently to obtain the freezing of the exchange rate at the date of conclusion of the contract or will request the balancing of the contract, due to occurrence of unpredictability.

Among the conditions listed above for finding unpredictability is reflected negative condition of not assuming the risk of exceptional change of circumstances by one of the parties to the contract.

Customizing to the situation of credit agreements in foreign currency, in the event that there is a clause aimed award-added risk over this negative condition can not be considered fulfilled.

Finally, the remaining unresolved issue is the delicate relationship between clauses related to risk theory unfair and unpredictability. Sketch primary indicates the prevalence of the idea that it would be necessary to invoke the unfairness of a term (of course this can be covered and indirectly - the judge is not bound to rule effectively on invalidity, but may ignore the impact of this clause if it considers abusive.

A compatibility between theory unpredictability and performance of contracts for credit is only possible if the indexation clause is regarded as unfair because it covers risks not contemplated at the time of contracting (possibly associated with the idea of lack of information on the risk of over-added.

The normal risk is defined as being: "predictable fluctuations of the value of performances by considering the nature of the contract and the original balance established by the parties." The initial situation represents the landmark to which the current situation is compared in order to establish the fundamental alteration of the contractual balance. 2. The non-existence of a clause to maintain the contract value – the premise for applying unpredictability under the conditions of art. 1.271 NCC A.

The contracting parties, by their agreement, may intervene with the purpose of rebalancing the contract by concluding an agreement to adapt it to the new conditions. Furthermore, they will be diligent in the sense that they will anticipate certain unpredictable events that may occur during the execution of the contract and even in the contract that regulates the legal relationship between them (the initial contract), to regulate certain clauses that are aimed at maintaining the contract value. In order to apply the theory of unpredictability, as it is regulated in art.1.271 para.2 and 3 of the NCC, it is necessary that the contract does not contain a clause whose aim is to maintain the

contract value, a preventive unpredictability clause. If a clause to maintain the contract value existed (preventive unpredictability clause), then what would apply is the legal regime of that clause, by virtue of the principle of contractual freedom, and not the provisions of art.1.271 para. 2 and 3 of the NCC. It is preferable, of course, and even recommended that the parties, when they conclude a contract, be cautious and provide clauses for its maintenance. This is also recommended in practice, considering the exceptional nature and the limited scope of unpredictability, as the fulfilment of all the conditions for unpredictability is rarely possible. As a result, the parties may provide in the contract more flexible clauses with regard to the restrictive conditions of unpredictability regulated by art.1.271 of the NCC

In case of adhesion contracts – like the loan contracts – that comprise abusive clauses, the law authorizes certain control authorities to notify the court from the professional's domicile or headquarters and to request his/her obligation to change the contracts under developments, by removing the abusive clauses, as it is provided by art.12 of Law no.193/2000. These authorities are represented, according to art.8 of the law, by the National Authority for Consumers' Protection representatives, as well as by the authorized specialists of other public administration authorities, according to their competencies. Besides them, the consumers prejudiced through the respective contracts have the right to address to the court.

In this case of unpredictable event, the Civil Code points out, the court can order "the updating of the contract, to fairly distribute between the parties both the losses and benefits" or "the cessation of the contract." Both options can be ordered by court only if "the change in circumstances occurred after the contract was signed" and "was not and could not have been foreseen by the debtor," provided "the debtor did not take on the risk of changing circumstances" and if "the debtor tried, within a reasonable period and in good faith, to negotiate the reasonable and fair updating of the contract."

The court cannot change itself the clauses considered abusive from the contract, but it will be able to force the professional to change all adhesion contracts in development, when there is observed such a clause exists in the contract, as well as to eliminate the abusive clauses from the pre-formulated contracts which are meant for use in the professional activity, as it is provided by art.13 paragraph (1) of the law to which we refer to. In case the court observes that there are no abusive clauses in the contract, it will cancel the report issued by the official examiner according to the law.

According to the civil provisions, nobody can exercise any right with the purpose of being detrimental to or to prejudice another person excessively, unreasonably and contrary to good faith, without being penalized for reasons of abusive exercise of rights (art.15 Civil Code). In the juridical literature, it is considered that the penalty applied to the abusive clauses is the nullity of the contract included by it. Actually, the penalty of nullity is also based on the legal provisions comprised in art.1 paragraph 1 of Law no. 193/2000, according to which any contract must include clauses which are clear, in no uncertain terms and easy to understand for all parties. Actually, the nullity has as basis also incompliance with the basic condition for the validity of a contract regarding its cause which must be licit and moral, due to the fact that an abusive clause has as grounds bad faith at concluding the contract. Having in view the fact that through inserting an abusive clause, only a part of the professional's will is corrupted by the bad faith at concluding the contract, breaching the legal condition regarding the cause affects only a part of the contract, respectively the abusive clause. This partial nullity will demolish only one part of the contract concluded, respectively the clause considered as being abusive and the contract remains partially valid. In case the abusive clauses do not produce effects against the consumer client, then, with his/her agreement, the contract will continue to produce effects, if the contract can be continued following to eliminating the clauses under discussion. In case the contract cannot produce effects following to eliminating the abusive clauses, then the consumer has the right to pretend its cancellation, according to art. 7 of Law no. 193/2000, case when he/she is entitled to obtain indemnifications also, the professional's responsibility being a liability in tort. Both in practice and in the doctrine there are numerous discussions based on the penalty of the abusive clauses motivated by the reality that the law regarding these clauses does not refer to a juridical procedure through which to be removed the effects of the abusive clauses, as it is provided by other legislations, like the French or Quebec region legislations. The existence of the abusive clauses must be proved by the one who invokes it, respectively by the consumer / client, according to the civil provisions in force, through evidences provided by the Civil Procedure Code; Law no. 193/2000 does not comprise special provisions in the domain. The object of the evidence can be represented by any of the three conditions necessary to the existence of such a clause: lack of negotiation, lack of good faith, the presence of a significant imbalance.

3. Conclusions

Into the loan contract where there is a series of clauses that already breach the legal norms and a certain clauses have already been proven as unfair, they can be considered as being abusive clauses, not being able to be directly negotiated with the client and not being in his/her favor, as well as being contrary to good faith. It would be desired to be brought modifications to the actual Romanian law regarding the abusive clauses for clarifying these aspects that refer to the above mentioned juridical mechanism to remove the effects of these clauses.

The court cannot change itself the clauses considered abusive from the contract, but it will be able to force the professional to change all adhesion contracts in development, when there is observed such a clause exists in the contract, as well as to eliminate the abusive clauses from the pre-formulated contracts which are meant for use in the professional activity, as it is provided by art.13 paragraph (1) of the law 193/2000. In case the court observes that there are no abusive clauses in the contract, it will cancel the report issued by the official examiner according to the law.

These abusive clauses in loan agreements must be eliminated even in cases where the consumers have not denounced them yet. The economic imbalance between consumers and banks is obvious and the lack of predictability of consumers is seriously affected. In contracts of adhesion, the consumers have no option but to adhere to the contract, negotiation being impossible. So, we believe it is necessary to eliminate all the abusive clauses and ensure predictability of the contracts if we want to protect the consumers. To legislate the consumers' rights to be fully, correctly and accurately informed on the main characteristics of the products and services provided by the trading companies, which is attained through the elements of identification and characterization provided by law.

Although there is still a long way to go, Romanian consumers do not lose hope that their rights will be better protected through the harmonization of European Union legislation with national legislation and after the years of fights against the abuse of economic power the first step in defending their rights would be a better quality legislation.

The situation of Romanian consumers may not be unique in Europe and it seems the same pattern can be seen in most of situations: low level of consumers' financial literacy, lack of any responsibility from the banks in lending, weak reaction from the authorities, not only to the methods used by the banks, but also in regards to the involvement in public education. The situation has begun to change, painfully slow for those affected, although it still faces a very strong reaction from the banks. It is very important the things our organization warned about even since 2004-2005, such as over-indebtedness or irresponsible lending, are in the public discussion and there are small steps taken to improve the situation of those affected and to prevent such situations to appear in the future.

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PRACTICAL ASPECTS REGARDING THE CLAIM FOR THE ANNULMENT OF THE RESOLUTIONS OF THE GENERAL MEETING OF SHAREHOLDERS, FROM A SUBSTANTIAL AND PROCEDURAL PERSPECTIVE

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Abstract

The purpose of this paper is to provide a brief analysis of the legal framework regarding the procedural and substantial dispositions governing the claim for the annulment of the resolutions of the general meeting of shareholders. The main objective is to render a practical tool both to stakeholders and third parties who are interested in the legal means available for blocking the implementation of any measures which are contrary to the company's interest.
Further to the amendments brought through the New Civil Procedural Code, the claim for annulment of the resolutions of the general assembly must be analyzed from a procedural point of view, as well as from a substantial standpoint. The shareholders must be aware of the grounds for challenging a general assembly's resolution to properly safeguard their rights. One common issue which is invoked as grounds for annulment is the abuse of majority of the majority shareholder. However, the difficulty of alleging such a reason is left to practitioners. Therefore, its application, although not wide, is highly imaginative.

Keywords: *joint stock company, limited liability company, majority shareholder, minority shareholder, grounds for annulment*

1. Introduction

This study aims to support young practitioners in establishing preliminary guide marks by assessing the possibility to file a claim in annulment of company resolutions based on the dispositions of Law no. 31/1990.

Although recent doctrine is emphasized on the substantial grounds for the annulment of general assembly's resolutions, few studies focus on practical matters which the claimant or the defendant may encounter. Therefore, this study represents an introduction into the basic practical knowledge one must be aware of in its capacity as shareholder in a Romanian company or in its capacity as legal practitioner if attempting to suspend or annul the resolution of the general meeting of shareholders.

Its relevance and importance resides in the necessity for the shareholders and their legal representatives to be aware and actively assert their rights to oppose disagreeable resolutions. While there is unanimity in accepting that the common will of the shareholders represents the core of the company, in practice there are frequent situations in which there is substantial disagreement between the shareholders' points of view, frequently leading to adopting resolutions without considering the minority shareholder's input. Since these disagreements must be resolved prior to the company to continue conducting business, it is mandatory for the shareholders to effectively express their point of view in a manner in which the company's interests are protected through the independent filter of the court.

The utility of the below analysis lies in the fact that although it reviews general concepts, it is focused on the conclusions of recent case law, outlining specific issues which are not covered by legal provisions and their solution.

1.1. General considerations regarding the legal framework applicable for Romanian companies

- The functioning and operation of companies in Romania is regulated by the New Civil Code, which constitutes the common legal framework for both civil companies and companies destined for commercial activity.
- The New Civil Code which entered force in October 2011 establishes the general principles for Romanian companies which are not oriented for lucrative purposes, whereas the special norms comprised in Law no. 31/1990 regarding companies for commercial activity ("**Law no. 31/1990**") set out rules for companies aimed at creating profit, by conducting production activities, commerce activities or supply of services.
- Although Law no. 31/1990 does not contain a precise definition of the company for commercial activity, this concept has been delimitated from simple company through certain characteristics as described by legal scholars[1]:
- the company for commercial activity has legal personality and becomes a different legal subject apart from the simple company, established based on the New Civil Code, which is generally a company without legal personality and the company for commercial activities, which becomes a new subject of law, able by itself to enter commercial relations with other subjects

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[1] Vasile Nemes, Commercial Law according to the New Civil Code, Hamangiu Publishing, 2012, p. 84.

of law,

- the company for commercial activity is fundamentally different from a civil company given the nature of its operations. While the company for commercial activity conducts production and commerce activities or supply of services aimed to obtain profit, the civil company carries out activities which are not aimed to obtain profit.
- as opposed to the civil company, which does not require special formalities for its incorporation, apart from those deriving out of the assets contributed as share capital or from special norms, the company for commercial activity must observe special rules dictated by Law no. 31/1990**.**

2. Legal nature of de general assembly of shareholders' resolution

The legal nature of the general assembly of shareholders' resolutions is somewhat controversial in Romanian doctrine. While some authors characterize the resolution as a agreement between the shareholders who aim to satisfy their own purpose, other believe have implied that the shareholders resolution represents a convergent manner of manifesting the their will. The most truthful opinion[2] outlines the *sui generis* character of the general assembly of shareholders' resolution. Therefore, the resolution of the general meeting of shareholders conveys the will of the shareholders aimed to fulfill both their purpose and the company's purpose.

3. Means for invoking the irregularities of the general assembly of shareholders' resolution

Law no. 31/1990 stipulates two different claims, based on the procedural standing of the party invoking the grounds.

As such, art. 132 of Law no. 31/1990 opens the way of the claim for the annulment of the resolution to shareholders, third parties having an interest, the company's directors and the company's censors, who can invoke absolute or relative grounds for nullity.

It is generally asserted in legal writings[3] that breaches of the dispositions of the Articles of association are sanctioned with relative nullity, since the clauses of the Articles of association aim to safeguard the shareholders' personal interest.

Law no. 31/1990 stipulates a special means of challenge for the company's creditors and for any other persons prejudiced by the resolutions of the shareholders adopted to the amendment of the company's constitutive act, Law no. 31/1990 stipulates two different claims, based on the procedural standing of the party invoking the grounds.

As such, art. 132 of Law no. 31/1990 opens the way of the claim for the annulment of the resolution to shareholders, third parties having an interest, the company's directors and the company's censors, who can invoke absolute or relative grounds for nullity.

It is generally asserted in legal writings[4] that breaches of the dispositions of the Articles of association are sanctioned with relative nullity, since the clauses of the Articles of association aim to safeguard the shareholders' personal interest.

Law no. 31/1990 stipulates a special means of challenge for the company's creditors and for any other persons prejudiced by the resolutions of the shareholders adopted to the amendment of the company's constitutive act, through the opposition governed by article 61. Shareholders are not entitled to file the opposition[5] since Law no 31/1990 expressly stipulate the special claim for the annulment of the resolutions for this category of claimants.

Generally, the purpose of such opposition is not to obtain the annulment of the resolution but to repair the prejudice produced by its adoption. Romanian courts[6] have established the distinction between the opposition and the claim for the annulment of the resolution of the general meeting of shareholders considering that the approval of the opposition freezes the effects of the resolution against the opponent, until the requested damages for repairing the prejudice produced by the resolution are repaired. It is only when the material prejudice is not repaired that the opposition may lead to the annulment of the resolution itself.

The opposition may be filed by means of a claim addressed before the trade registry where the company is registered. The trade registry shall then forward the opposition to the competent tribunal within the range of the company's registered office for judgment.

As per article 62 of Law no. 31/1990, the term for filling the opposition is of 30 days as of the date of publishing the resolution in the Romanian Official Gazette.

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4. Conditions for filling the claim for the annulment of the general assembly of shareholder's resolutions. Legal procedural standing

In compliance with art. 132 of Law no. 31/1990, the persons entitled to file a claim for the annulment of the general assembly of shareholder's resolutions must fall under the following categories:

- the company's shareholders who participated at the adoption of the general assembly of shareholders' resolutions and who voted against the matters approved by the general assembly, if their objection has been included in the minutes of the general assembly,
- the company's shareholders who did not participate at the adoption of the general assembly of shareholders' resolutions,
- the company's directors, in order to prevent any prejudicial consequences for the company itself,
- the company's censors,
- any person justifying an interest for the annulment of the general assembly of shareholders' resolution.

Therefore, while the shareholders may invoke both absolute and relative nullity as grounds for the annulment of the resolution, other third parties who justify an interest may request the annulment only based on its absolute nullity[7]. As such, their claim shall not fall under any statute of limitation.

Also, as opposed to other categories of claimants, the shareholders do not have to prove their interest in requesting the nullity of the resolution since Law no. 31/1990 presumes that the interest directly derives from their capacity as shareholders and is an expression of the social character of the claim[8], which is aimed to support both the shareholders and the company.

Based on the above, Romanian courts[9] have interpreted that a shareholder who participated in the general assembly and expressed its intention to abstain from voting in favour or against the matters discussed on the agents of the meeting is not allowed to file the claim for the annulment of the resolution.

From the interpretation of art. 132 par. 5) of Law no. 31/1990, Romanian courts[10] have rightfully reached the conclusion that passive legal procedural standing in a claim for the annulment of a general assembly of shareholder's resolution can only be granted to the company itself, which shall be represented by its board of directors or its directorate.

5. The competent court and means of appealing the ruling of the first court

In compliance with art. 63 of Law no. 31/1990, the competence for filling the claim for the annulment of the resolution of the general meeting of shareholders is within the competence of the tribunal within the territorial range of the company's registered office.

The ruling issued by the tribunal is subject only to appeal which shall be judged by the higher court of appeal.

Once the ruling over the annulment of the resolution of the general meeting of shareholders is delivered, it shall be published in the Official Gazette. Starting from the date of publishing, the ruling shall be opposable to all the shareholders, per article 132 par. 10) of Law no. 31/1990.

6. Grounds for the annulment of the general assembly of shareholders' resolution

6.1. Legality vs Opportunity of the Resolution

Prior to an analysis of the grounds which certain shareholders and interested third parties must prove for the annulment of a general assembly of shareholders' resolution, it is relevant to mention that the court entrusted with such a claim may proceed to analyze exclusively arguments related to the legality of the resolution.

Therefore, as many courts[11] have decided, the opportunity for the adoption of a general shareholders' resolution is outside the scope and object of a claim aimed for the annulment of said resolution. As such, any reasons pertaining to the profitability of the shareholders' decision for the company or for the shareholders' themselves cannot be duly analyzed by the court. For example, the court vested with a claim in annulment of a resolution approving a credit agreement cannot decide that the conclusion of a credit agreement leads to the bankruptcy of the company. However, the court can dispose the annulment of the resolution approving the conclusion of a credit agreement, if the conditions disposed by Law no. 31/1990 for the adoption of said resolution are breached.

This solution is based on the fact that the cases when the court is allowed to intervene in the prerogatives reserved for the company's shareholders are expressly provided by law and thus, it would be inadmissible for the court to act as one of the company's organs in lack of any such provisions in this respect.

The general resolution of the meeting of shareholders is meant to express the general will of the

[7] Bucharest Court of Appeal, VIth Commercial Section, Decision no. 604/2002, published in Bucharest Court of Appeals' Practice Collection, 2002, p. 149.

[8] Stanciu D. Carpenaru, Commercial Law Treaty, Universul Juridic Publishing, 2016, p. 212.

[9] Bucharest Court of Appeal, VIth Commercial Section, Decision no. 1290/2003, published in Bucharest Court of Appeal's Practice Collection, 2003, Ed. Brilliance, Bucharest, p. 230.

[10] Former Supreme Court of Justice, Commercial Section, Decision no 2142/2003, published in the Jurisprudence Bulletin.

[11] Former Supreme Court of Law, Commercial Section, Decision no. 6200/2001, published in the Jurisprudence Bulletin and in Judicial Courier no. 9/2002, p. 55).

company in deciding its future trajectory. Therefore, all resolutions are governed by the principle of majority, meaning that the will of shareholders must be formed through the shareholders' involvement and is mandatory for its shareholders. While the court cannot analyze and determine whether the measures adopted by the shareholders are appropriate for the company, the court is entitled to rule on the legality of the resolution or on its compliance with the Articles of association[12].

As pointed out in legal literature[13], the ground for the annulment of the resolution of the general meeting of shareholders may be either the absolute nullity, for breaching norms securing the public order and general interests or the relative nullity, for violating norms securing the personal interest of the company's shareholders, which are mostly related to the shareholders' will or capacity.

From this perspective, the claim in annulment cannot completely solve the problems encountered within the company which lead to disagreement among the shareholders. The court may only intervene insofar as to verify the legality of a resolution, in compliance with Law no. 31/1990 itself or in compliance to the law of the parties expressed through the company's Articles of association. Therefore, even though the resolution is annulled, the court cannot replace and supplement the shareholders' will for that particular operation or suggest its amendment so that both shareholders are accommodated with the result.

It is also relevant mentioning that Law no. 31/1990 prohibits the directors to file a claim for the annulment of a resolution when the object of the resolution is the revocation of said directors, as per article 132 par. 4).

6.2. Suspension of the resolution of the general meeting of shareholders

Law no. 31/1990 also grants the person requesting the annulment of the resolution of the general meeting of shareholders the right to ask the court to dispose the interim suspension of the resolution's execution, until the main trial for the annulment of the resolution is definitively resolved. The suspension may be granted pursuant to article 133 of Law no. 31/1990 and to article 997 of the New Romanian Procedural Code.

In order to obtain such a suspension, the claimant must prove the fulfillment of several conditions before the competent court. One of these conditions is the urgency for the court to dispose the suspension. Another condition is that the appearance of rightfulness belongs to the claimant. Also, the claimant must prove either that the suspension is necessary for conserving a right which would otherwise be prejudiced through the delay in obtaining the suspension, or for the prevention of a damage which could not otherwise be repaired or for the removal of any difficulties arisen with the enforcement.

For the court to dispose the interim suspension, the claimant may be asked to pay a bail, computed as a percentage established by the court.

6.3.Frequent grounds encountered in practice for filling the claim in annulment

6.3.1.Some cases of expressly stipulated grounds for invoking nullity, as mentioned under Law no. 31/1990

Law no. 31/1990 comprises a series of cases when the legislator believed it is important to specify the nullity sanction. Out of these expressly mentioned cases, some stand out through their frequency in practice, such as breaches of convocation formalities and breaches related to the length of the representation powers of a third party for a shareholder participating in a meeting.

A. Breaches of convocation formalities, sanctioned with absolute or relative nullity, as the case may be

Pursuant to article 117 of Law no. 31/1990, a summoning notice must comprise the date and time of the meeting, along with a detailed agenda of the items envisaged to be discussed. If the court is vested with analyzing the lack of observance of the convocation formalities for the adoption of a resolution by the shareholders and from the evidence administered by the parties, the court[14] concludes that the convocation formalities have been breached, it shall dispose its annulment.

This case covers any situations in which either a shareholder was not duly summoned for the general meeting or the agenda transmitted through the summoning notice lacked some or all of the points which were discussed during the meeting, thus making the it difficult for the shareholder's will to be duly formed. Any type of agenda comprising general items such as the economic situation of the company while the shareholders are voting the sale-purchase of shares represents a breach of legal dispositions and is sanctioned with the annulment of the resolution, as decided by the High Court of Cassation and Justice[15].

Another case when the court[16] considered the resolution of the general meeting of shareholders is null is when it acknowledged that the meeting has been convened at the registered office of one of the shareholders which conflicted with another shareholder.

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[12] Constanta Court of Appeal, Decision no. 330/COM/2004, published in the Judicial Bulletin 2004, Lumina Lex Publishing, Bucharest, 2005, p.66.
[13] Stanciu D. Cărpenaru, *Treaty of Romanian Commercial Law,* Universul Juridic Publishing, 2016, p. 213.
[14] Former Supreme of Justice, Decision no. 51/2002.
[15] High Court of Cassation and Justice, Ruling no. 966/09.03.2007.
[16] High Court of Cassation and Justice, Ruling no. 2690/28.09.2006.

However, the High Court of Cassation and Justice[17] deemed that if the reference date was missing from the summoning notice sent to the shareholders of a joint stock company, this circumstance does not trigger the nullity of the resolution if the claimant does not prove a specific damage deriving from the lack of the reference date.

If the summoning formalities have not been at all fulfilled or have been performed by persons who are not entitled to perform them at all, the applicable sanction is the absolute nullity of the adopted resolution, as confirmed by recent case law[18].

B. Shareholders were represented in the general assembly by members of the board of directors, by members of the directorate and of the supervision council or by the company's employees

Article 125 of Law no. 31/1990 stipulates a specific case when the resolution of the general meeting of shareholders is deemed null in case the shareholders were represented in the general assembly by members of the board of directors, by members of the directorate and of the supervision council or by company employees. Since the interest protected through art. 125 is a general one, the applicable sanction is the absolute nullity of a resolution adopted with its breach.

Although the company's shareholders are allowed to be represented at the general meeting, article no. 125 of Law no. 31/1990 establishes an interdiction for shareholders to be represented by the same company's members of the board of directors, of the directorate and of the supervision council or by its employees.

If Law no. 31/1990 would allow for shareholders to be represented by the directors or by employees, then there might be doubts whether the will of the company is duly born or whether it is impeded as a result of the involvement of other members functioning within the company, who may have contrary interests to the ones of the company.

Besides the claim in annulment of the resolution of the general meeting of shareholders where the latter breached the provisions of article 125, as outlined by the legal doctrine[19], the company and the other shareholders may file a claim requesting damages from for the repair of the prejudices caused because of such violations.

6.3.2. A case of indirect nullity, which is not expressly stipulated by Law no. 31/1990

6.3.2.1.Majority abuse, sanctioned with relative nullity

In case the company is formed by shareholders with different participations and who have different views regarding the politics of the company, it opens the gate for frequent misunderstandings related to the guidelines of the company. These disputes are manifested most actively in cases when the will of the company should be congruent, however it lacks common vision and consistency in the decision process. It is often the case that a shareholder owning a participation sufficient to grant him the possibility to determine the adoption of a certain decision without the support and approval of other shareholders with a significantly lower participation when the majority shareholder shall force passing the decision, irrespective of the other shareholders' point of view. In this case, there are no formal breaches of the law or of the Articles of association.

If this type of decision, although not contrary to the Articles of association or to the law, is contrary to the company's best interest while being supportive of the majority shareholders' interest, then we can consider that a majority abuse was committed.

Article 136^1 of Law no. 31/1990 expressly stipulates that shareholders must act in good faith and exercise their rights while observing the legitimate rights and interests of other fellow shareholders.

Legal scholars[20] have identified specific criteria for the identification of an abuse of majority participation, as folloews:

- exercising a shareholder right without the observance of law and of morality,
- exercising a shareholder right in bad faith,
- exercising a shareholder right by exceeding its limits,
- exercising a shareholder right without the observance of the social and economic purpose of its regulation.

Using a right abusively has been also regulated in the civil legislation, through article 15 of the New Civil Code, which states that no right may be exercised with the direct purpose of harming another person in an excessive and unreasonable manner, contrary to goof faith. Legal scholars[21] have determined that for an abuse of rights to be acknowledged as such, the right must be exercised in bad faith and must be inappropriately used, outside its normal limits.

Nonetheless, a shareholder's majority participation is not always a signal of an abuse of majority since its dominant position must be concretely manifested in a resolution regarding a specific operation. The accusation of having a dominant position should be interpreted in connection to a relevant issue and it is related to the shareholder's conduct in a given situation and not in general.

[17] High Court of Cassation and Justice, Ruling no. 3505/ 09.11.2011.

[18] Bucharest Court of Appeal, Decision no. 195/11.04.2006, published in Bucharest Court of Appeal's Practice collection for commercial trials, Wolters Kluwer Publishing, 2007, p. 31-33.

[19] SS. David în St. D. Cărpenaru, S. David, C. Predoiu, Gh. Piperea, *Companies Law. Comments*, IIIrd Edition, C.H. Beck Publishing, Bucharest, 2014, p. 414.

[20] Lucian Saulean, *Commercial Companies. General Meetings of shareholders*, Hamangiu Publishing, p. 213.

[21] Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei, *New Civil Code Comments*, Hamangiu Publishing, 2013, p. 15.

7. Effects of filling the claim for the annulment of the general assembly of shareholders' resolution

Once a claim for the annulment of the general assembly of shareholders' resolution is filed before a court of law and approved by the latter, certain effects derive out of this situation. The effects of the nullity are the same, regardless whether the nullity is absolute or relative.

Since the resolution is mandatory for the shareholders, once it is invalidated by the court, the shareholders must be restored to their position prior to adopting the resolution. With respect to the company's management, the latter is obliged not the enforce the resolution once it has been invalidated by the court. As regards the company itself, it shall abstain from enforcing the resolution. Also, any registrations before the trade registry based on the resolution shall be erased, as it was outlined by legal scholars[22].

However, as Romanian courts have established[23], trade registry mentions cannot be erased solely based on filling a claim for the annulment of the general assembly of shareholders' resolution.

Once the court definitively annuls a resolution of the general meeting of shareholders, any subsequent resolutions which are directly connected with the annulled resolution are therefore annulled. As shown in recent case law[24], if the subsequent resolutions are not connected with and are not the result of the annulled resolution, then the latter's nullity shall not affect them.

Given that the any valid resolutions are mandatory for the shareholders, irrespective if they have voted in favour or against them, once the court issues a final ruling for their annulment, there resolutions are no longer mandatory for the shareholders or for third parties.

Conclusions

While the main aspects for filling the claim in annulment of the resolution of the general meeting of shareholders may be stipulated by the legislator, in order to supplement these findings one must turn to case law, since Romanian courts have extensively interpreted the grounds for obtaining such an annulment.

Although the claim in annulment generally represents a means of protection for the minority shareholder who disagrees with the majority of shareholders, their protection within the legal dispositions should be increased de lege ferenda, since the court cannot supplement the will of the shareholders if the latter do not reach an agreement. In such case, the minority shareholder's rights are difficult to be asserted and so are the breaches perpetrated by the majority shareholders in their abuse of majority.

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[22] Marian Bratis, *The establishment of the joint stock company*, Hamangiu Publishing, 2008, p. 521.

[23] Cluj Court of Appeal, Commercial and Administrative Contentious Section, Decision no. 171/2004, published in National Jurisprudence, 2004-2005, Ed Brilliance, Bucharest, 2006, p. 378.

[24] High Court of Cassation and Justice, Commercial Section, Decision no. 1353/2006.

THE COMPOSITION – A REHABILITATION PROCEEDING

Corina Georgiana COSTEA*

Abstract

As a consequence of the onset of financial crisis at national level, the number of the companies facing financial difficulties has risen significantly. The financial difficulties have turned into insurmountable obstacles for many companies, which gradually became insolvent. Taking into account the necessity of a judicial instrument that ought to support the companies in financial difficulty, the Law no. 381/2009 regarding the composition and the ad-hoc mandate was adopted. Subsequently, by adopting the Law no. 85/2014 regarding pre-isolvency procedures and insolvency procedures, the Law no. 381/2009 was repealed. The composition, as suggested by its very name, aims to prevent the transformation of the state of financial difficulty into insolvency, by setting an arrangement between the debtor and its creditors whose claims sum up to three quarters of the general body of creditors. The main purpose of this paper is performing an analysis of this legal instrument, taking into account the amendaments operated by the Law no. 85/2014. This analysis aims to present the preventive composition's mechanism from an economic and legal point of view, as well as the measures regarding the identification, diagnosis and treatment of financial difficulties.

Keywords: *composition, insolvency, rehabilitation, financial difficulties, debtor in financial difficulty.*

Introduction

The composition is a contract whose objective is to safeguard the debtor, that aims its recovery based on a restructuring plan, while avoiding the onset of insolvency proceedings. The contracting parties are the debtor, on one side, and its creditors whose accepted and unchallenged claims sum up to 75% of the general body of creditors, on the other side. The legal nature of the composition is interesting in terms of the effects it produces also against the creditors that didn't vote in favor of the composition. Until the entry into force of Law no. 85/2014 regarding the pre-insolvency and insolncy proceedings[1], the composition was regulated by the Law no. 381/2009 regarding the composition and the ad-hoc mandate[2]. Subsequently, the Law no.381/2009 was repealed[3], a part of its' provisions being taken over by the new regulation. However, the Law no. 85/2014 covers other essential aspects, which are to be analysed in this paper. Although the legislator has provided this legal instrument, it has been observed that it is rarely applied. In most of the cases, the debtors don't adopt precautions measures on time, ending up in the inevitable situation of being subject to insolvency proceedings. An interesting aspect is that, unlike the previous regulation, the fundamental principles[4] listed in article 4 of Law no. 85/2014 are also applied to pre-insolvency proceedings, emphasizing the need of the debtor's safeguard and also his maintenance in the economic cycle. One can easily notice some similarities between the composition and the judicial reorganization proceeding, as well as many notable differences, which will be outlined throughout the paper. The composition procedure commences by filing an application at the competent court, and acquires the legal nature of a contract once it has been approved by the judge. In the current economic context, too few debtors seek this form of safeguarding, trying to search appropriate remedies when it's too late. Although the insolvency proceedings provide a recovery method, through the judicial reorganization proceeding, it wouldn't be optimal for a financially distressed company, but it would be optimal for an insolvent one. Considering the hypothesis in which debtors would recourse to the composition at the appropriate time, the number of applications regarding the insolvency proceedings commencement would certainly decrease. We consider that the correct diagnosis of the company is the factor that leads to the specific proceeding that should be applied. For this reason, a limitation between financially distressed companies and insolvent companies is crucial. This paper aims to approach the composition proceeding from the participants' perspective, as well as outlining the main differences brought into force by the new Law.

1. The Composition

According to the Law no. 85/2014[5], the composition is a contract signed by the financially distressed debtor, on one hand, and creditors that hold at least 75% of the value of accepted and unchallenged

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[1] Published in the Official Journal of Romania, Part I, no. 466 from 25th of June, 2014.

[2] Published in the Official Journal of Romania, Part I, no. 870 from 14th of December, 2009.

[3] According to article 344 letter b) of Law no. 85/2014 regarding pre-insolvency and insolvency proceedings.

[4] The fundamental principles of pre-insolvency and insolvency proceedings have been inspired from the World Bank principles.

[5] Article 5 point 17 from the Law no. 85/2014.

claims, on the other hand, approved by the syndic-judge, a contract in which the debtor proposes a rehabilitation and a repayment plan, that is ratified by the creditors who support the debtor's efforts of overcoming the financial difficulties faced. The composition is a pre-insolvency proceeding, which has a judicial nature and whose objective is to rehabilitate the financially distressed debtor through a recovery and a repayment plan. The financially distressed debtors to which the proceeding can be applied are illustrated in art. 3 from the Law no.85/2014, according to which the proceeding applies to proffesionals, that are defined by the Civil Code as those who exploit an enterprise. The enterprise exploitations is also defined by the Civil Code[6]. Thus, in the current regulation, pre-insolvency and insolvency proceedings apply to natural and judicial persons who are recognised as proffesionals[7]. However, article 16 from the insolvency Law presents the debtors which cannot apply the proceeding. Unlike the previous regulation, the debtors excluded from applying the proceeding are also the ones who have applied it in the past, without

fulfilling its purpose. Also as a novelty, the list of crimes committed by the debtor or by its shareholders/ limited partners or by the debtor's administrator, which prevent the proceeding's commencement has been wided[8]. From the legal definition of the preventive composition, we understand that the state of financial difficulty represents an admisibility requirement in order to initiate the proceeding. The financially distressed debtor is defined[9] by the Law no. 85/2014, as the debtor which, although executes or is able to execute its due obligations, has a low short term liquidity ratio and/or a high long term debt ratio, which may affect the contractual obligations fulfillment in relation to the resources generated by the operational activity or to the resources raised through the financial activity. The definition takes into account the liquidity and indebtedness ratio, which reflect the debtor's state of financial difficulty. These indicators are presented in the debtor's accounting documents. Furthermore, the state of financial difficulty may affect the contractual obligations fulfillment, or it may even threaten the operational activity's sustainability, through the risk it causes. Thus, the debtor may take into consideration the application of this legal instrument, by filing an application of preventive composition commencement, at the competent court. However, companies can be balance-sheet insolvent but still liquid enough to fulfill their obligations[10]. The ideal scenario would be

the one in which the debtor has a trustful relationship with its creditors, so that they could be open to the possibility of sustaining the debtor's efforts to overcome the financial difficulties faced. The life of a company runs among creation, growth, development, state of financial difficulties and liquidation[11]. By preventing insolvency, the company's maturity could be prolonged, or in other words, its life. It is notable that the Law no. 85/2014 presents a different purpose in comparison with the previous regulation, by emphasizing the possibility of granting a chance of the debtor's rehabilitation, when it is possible. Furthermore, also as a novelty, the Law no. 85/2014 provides the fundamental pre-insolvency and insolvency principles, illustrated in article 4 of the Law. A part of these principles governing the proceedings reffer to pre-insolvency proceedings and outline the possibility of granting a chance to rehabilitation.

1.1. The Initiation Of The Proceeding

The preventive composition proceeding is initiated by filing an application to the court, within whose jurisdiction the debtor is registered. The right to request this proceeding's initiation belongs exclusively to the debtor. We believe that this is a matter of course, given that by fulfilling the due obligations, the creditors have no interest in filing an application themselves. Furthermore, the debtor is the most entitled to analyse its economic and financial state, and to establish the source of the difficulties faced. The application filed by the debtor will be judged in the council room, and the parties will be subpoenaed within 48 hours after the application[12].

The sentences ruled by the syndic-judge are executory and can be apealed, within 7 days from pronouncement or communication. According to article 8 from the Law no. 85/2014, the appeal doesn't suspend the execution of the sentence. Through the application filed, the debtor will propose the appointment of a provisional conciliator, among the authorised practitioners in insolvency. By admitting the application filed, the sydic-judge will confirm the conciliator appointed by the debtor. Once the conciliator is confirmed, he and the debtor have 30 days to elaborate the list of creditors and the composition proposal. A very interesting aspect is found in Regulaion (EU) 2015/848[13], point (17), which provides that its scope should extend to proceedings which are triggered by situations in which the debtor faces non-financial difficulties, provided that such

[6] The Civil Code defines *enterprise exploitation* as the systematic exercise, by one or more persons, of an activity consisting in the production, administration or alienation of goods and services, whether it aims for profit or not.

[7] Stanciu D. Cărpenaru, *Tratat de drept comerical român*, ediția a V-a, actualizată, ed. Universul Juridic, 2016, p. 713.

[8] Nicoleta Ţăndăreanu, *Codul insolvenţei adnotat*, ed. Universul Juridic, 2014, p.66.

[9] Article 5 point 27 from the Law no. 85/2014.

[10] Irit Mevorach, *Who may go bankrupt or how*, Course presented at Insol Europe High Level Course On Insolvency Law In Eastern European Jurisdictions, Bucharest, Caro Hotel, Module I, 2 feb 2017.

[11] Viorica Munteanu, *Aspecte privind prevenirea şi previziunea insolvenţei,* Revista de insolvenţă Phoenix, nr. 31, ianuarie-martie 2010, pag. 4.

[12] According to article 18 from the Law no. 85/2014, any request filed by virtue of Title I will be judged in the same conditions.

[13] European Union's Official Journal, series L 141/2015.

difficulties give rise to a real and serious threat to the debtor's actual or future ability to pay its debts as they fall due. By adopting the mentioned Regulation, the european vision has reformed the concept of insolvency. Other difficulties faced by the debtor[14], that could generate the risk of financial distress instalation, are taken into account.

Regarding the current activity of the debtor, as a result of preventive composition commencement, it is narrowed to the usual limits of the business, according to article 33 paragraph (1) of the Law no. 85/2014. This legal text is relevant because it narrows the debtor in taking risks that are not compatible with its current activity and that could have effects over the claims held by creditors. Furthermore, the same legal text provides for doing business under the supervision of the conciliator, so, if we consider the legal definition[15] of supervision, the current activity will be conducted with the prior approval of the measures involving the debtor's assets and of the measures regarding to conduct to its rehabilitation. The creditors' interests are therefore protected, through the conciliator's supervision, offering them the trust of the assets' correct administration, with the final purpose of the debtor's rehabilitation.

1.2. The Composition Proposal

The composition proposal will include the rehabilitation plan, with the attached declaration of the debtor's financial distress declaration, as well as the list of known creditors, indicating the amount and the preference causes. The composition proposal is the proceeding document under which the debtor may petition the syndic-judge to order a provisional stay of individual enforcement actions. According to article 25 of the Law no. 85/2014, the petition will be performed in virtue of the Code of Civil Procedure. Regarding the list of creditors, the good-faith debtor will have to indicate all of the creditors, in order for their claims to be inscribed in the list. If a creditor obtains an eforcement title against the debtor, during the preventive composition, there are two possibilities. The first is to file an application to join the preventive composition, and the second is to satisfy his claim through any other methods provided by the law[16]. From these statutory provisions, we conclude that a creditor who obtains an enforcement title against the debtor during the preventive composition can satisfy his claim in virtue of the common law, since the composition's effect regarding the stay of enforcement titles are only applied to the creditors who are parties in the preventive composition. The effect of the stay of enforcement titles, as a consequence of the composition's approval by the syndic-judge, operates only for the creditors that are parties in the proceeding. The only effect that is applied to any creditor is the one which blocks the commencement of insolvency proceedings. Unlike the insolvency proceedings, which do not allow the suspension of judicial actions against codebtors and guarantees[17], the effects of the preventive composition are extended also to them, according to article 33 paragraph (2) from the Law no. 85/2014. Furthermore, not only the effect of the preventive composition regarding the stay of enforcement titles are extended to the codebtors and guarantees, but also measures such as claim modifications. This is what differenciates the pre-insolvency and the insolvency proceedings, through the effects they produce. The preventive composition proposal will be transmitted to the creditors whose claims are registered in the creditor's list, so they can express their vote. Unlike the previous regulation of the preventive composition, who provided a majority of two thirds of accepted and unchallenged claims so that the composition would be considered accepted, the current regulation provides a majority of three quarters of the accepted and unchallenged claims. Also, one can observe the fact that in the preventive composition's case, there are no provisions regarding categories of creditors. They gain a vote by reporting their claim to the total body of creditors.

1.2.1. The Rehabilitation Plan

The rehabilitation plan is the proceeding document in which the debtor and the conciliator propose rehabilitation measures for the debtor's business. The rehabilitation plan must present in detail[18]:

1. the analytical situation of the assets and liabilities, certified by an accoutant or audited by an authorised auditor;
2. the causes of the financial distress and, if it's the case, the measures applied by the debtor in order to overcome the financial difficulties it's facing, until filing the preventive composition proposal;
3. the projection of the accounting and financial evolution over the next 24 months. One can observe that the rehabilitation plan must expose in detail the financial situation of the debtor, and the reasoning behind these dispositions results from the fact that the financial distress is the condition for the admissibility of the proceeding's initiation. If the evaluation of the debtor's financial situation concludes in insolvency, an application of the preventive composition's initiation will be rejected by the Court. The debtor will also present the financial distress causes, since it knows its activity best, and is the most entitled to identify

[14] The Regulation exemplifies the loss of a contract, that is crucial for the debtor.
[15] Article 5 point 66 from the Law no. 85/2014.
[16] Article 32 from the Law no. 85/2014.
[17] Article 75 paragraph (2) letter b) from the Law no. 85/2014.
[18] According to article 24 from the Law no. 85/2014.

them. Nevertheless, , there are situations in which the financial difficulties can't be identified by analysing the financial situation. The projection of accounting and financial evolution is extended to the whole duration of the preventive composition, respectively

24 months, and it represents the financial perspectives that are to be applied in order to repay the creditors' claims. In addition to these requirements, the law stipulates that the rehabilitation plan would have to include an arrangement proposal and measures that aim the debtor's recovery as well as the repayment of the claims. The plan must be adapted to each business, and should include measures such as partial liquidation, division, fusion, refinancing or any other measures seeking the debtor's rehabilitation. The condition imposed by the law regarding the composition's conduction is the repayment of at least 20% of the creditor's claims. It is easily noticeable that the preventive composition is very flexible and could really have a positive impact if financially distressed debtors would appeal to it in due time. The content of the rehabilitation plan is very similar to the recovery plan provided by the judicial reorganization proceeding[19]. Through this document, the debtor names a conciliator, as well as his emolument for the following period. If the syndic-judge admits the application of preventive composition filed by the debtor, through the same decision the conciliator will also be confirmed, as well as his provisional emolument. Taking into account that the conciliator's emolument involves an additional expense, which will be repaid by the debtor, it is natural that it will be negociated with the creditors and subsequently confirmed by the syndic-judge. *Corporate financial distress and bankruptcy affect a firm s operations in cases where it is not cheap, quick and painless as presumed by neoclassical theory, but rather costly and dissipative.*

By standard, costs of financial distress are distinguished between direct and indirect costs[20]. If the debtor is financed during the preventive composition, the law provides the repayment with priority at distributions, but only after the proceeding expenses repayment. The maximum duration of the negotiations with creditors is 60 days. Regarding the rehabilitation's plan modification, the law provides that amendments can be brought, as a result of negotiations between the debtor and creditors. The creditor's vote upon the rehabilitation plan will be expressed by correspondence, in accordance to the principles of pre-insolvency and insolvency proceedings.

1.3. The Effects Of The Preventive Composition's Approval

As a result of the preventive composition's approval by the creditors, the conciliator will file an application of ratification to the syndic-judge, who will verify if the admissibility conditions are simultaneously fulfilled : (i) the value of the challenged and/or disputed claims doesn't exceed 25% of the general body of creditors and (ii) the preventive composition has been approved by the creditors holding at least 75% of accepted and unchallenged claims of the general body of creditors.

The composition proceeding is similar to the insolvency proceedings in which the debtor retains its administration rights. The concordat proceeding doesn't imply the loss of administration rights ; however, the debtor will manage the business under the conciliator's supervision. Before ratifying the composition, the syndic-judge will subpoena and hear the conciliator. The application shall be rejected only for illegitime reasons regarding the admissibility conditions. The main advantages of the composition are the stay of individual enforcement actions and the rehabilitation plan that imposes a more efficient management process. In the hypothesis in which the enforcement actions concernes the debtor's assets which are essential for the continuity of the business, the composition is the optimal safeguard proceeding, even more if the debtor is still liquid enough. In the lack of such a proceeding would lead to financially distressed debtors finding themselves in insolvency proceedings and ending up in liquidation and even bankruptcy. However, unlike the insolvency proceeding, in which the suspension of accumulation of interests and other accesory claims, born after the proceeding's initiation, operates *ope legis*, in the case of the composition, the creditors' expess consent in writing is requested. The suspension of interest accumulation can be requested by the conciliator and approved by the syndic-judge, but only under the condition of offering guarantees to the creditors. Another effect of the composition's approval is blocking the initiation of insolvency proceedings. The composition's ratification doesn't block the liquidation proceeding, because this ca be provided as a measure of business rehabilitation. For example, if one of the debtor's assets isn't productive or brings losses to the business, it can be sold through liquidation, or it may also be repaired or rented. Partial liquidation can be a solution for some debtors, depending on the value and nature of the assets.

1.4. The General Body Of Creditors

The creditors holding claims against the financially distressed debtor will be registered to the list of creditors, which will be attached to the rehabilitation plan, as well as the declaration regarding the state of financial difficulty. The debtor will also mention the amount and the preference causes of each claim. Creditors are given some atributions in the proceeding, after registering their claim in the list of

[19] Stanciu D. Cărpenaru, Mihai Adrian Hotca, Vasile Nemeş, *Codul insolvenţei comentat*, ed. Universul Juridic, Bucureşti, 2014, pag. 175.
[20] Philipp Jostarndt, *Financial Distress, Corporate Restructuring and Firm Survival: An Empirical Analysis of German Panel Data, (PhD diss.,* Deutscher Universitätsverlag, 2007).

creditors. These atributions are provided by the law, and they impose the active participation to the proceeding. The general body of creditors will be summoned only in the following conditions : either by the judge, either at the conciliator's request, or at the request of the creditors' holding at least 10% of the general body of creditors. The general body of creditors' session will be organised and held by the conciliator, according to the law. Any decision adopted in the session will be considered accepted if voted by the majority, by reference to the value of the present creditors' claims. The creditors express their vote by corespondence, which means that not transmissing the vote in due time quals to the disqualification of the vote over that matter. If the general body of creditors is summoned in a meeting, the debtor shall also be invited. The opportunity of every operation and measure included in the rehabilitation plan is subject to approval by creditors' vote.

1.4.1. The Accession To The Preventive Composition

The legislator took into account the situation of the creditors who obtain an enforcement title agains the debtor, during the composition proceeding. In these situations, the creditors have two options, either the accession to the preventive composition, either the realisation of the claim through other methods provided by the law. If they would chose the second option, the preventive composition would be jeopardised. The accession to the preventive composition will be filed for approval by the creditor who obtained an enforcement title during the composition, and adressed to the conciliator. This claim will be registered in the list of creditors. The condition of the preventive composition's continuity is repaying at least 20% of the total value of claims, and therefore it is recommended to carry negotiations even with creditors who could obtain an enforcement title. The composition is the optimal solution for debtors having a trust-based relationship with its creditors, who also support the efforts of overcoming financial difficulties.

1.5. The Preventive Composition's Closure

The closure of preventive composition proceeding care be realised either by the ascertainment of its success, or by its failure. Exceptionally, the preventive composition could be cancelled, by the creditors who voted against it, or even at the general body of creditors' request, in cases when the debtor has seriously violated its assumed obligations. Regarding the cancellation, the law doesn't specify express grounds of relative or absolute nullity, but the doctrine[21] has offered opinions regarding this matter. Thus, relative or absolute nullily reasons can be considered the violation of the legal provisions regarding the vote and those regarding the percentage of claims based upon which the composition is approved.

1.5.1. The Preventive Composition's Closure By The Ascertainment Of Its Failure

The law provides[22] the conciliator's possibility to file an application of the composition's closure. The reasons may consist in economic and social factors. If the application filed by the conciliator is approved, the claims' modifications provided by the rehabilitation plan will no longer be maintained.

1.5.2. The Preventive Composition's Closure By The Ascertainment Of Its Success

The law provides that only in this case, the modification of claims will be maintained. These provisions also apply to codebtors and guarantees. The success of the preventive composition will be confirmed by the syndic-judge.

1.5.3. The Composition's Closure By Cancelling It Or Confirming Its Nullity

The composition's cancellation can be requested by the creditors who voted against it. The maximum period in which this action can be exercised is 15 days from the syndic-judge's ratification. Regarding the ascertainment of the composition's nullity, the right to exercise the action is prescribed within 6 months on the composition's ratification.

1.5.4. The Composition's Closure Through Rescission Action

The composition proceeding could also end up in closure as a result of an approved rescission action, with the consequence of putting the parties in the previous situation. The persons who are able to file a rescission action are the creditors, and the underlying reasons are represented by the debtor's serious violation of the obligations assumed through the composition. The law exemplifies situations such as favoring one or more creditors, concealment or disposal of assets during the proceeding, or payments without consideration.

Conclusions

The preventive composition is one of the few safeguard proceedings, and therefore a distinction between financial distress and insolvency is imposed, in order to chose the right proceeding. Even if a preventive composition fails, with the consequence of insolvency proceeding initiation, the debtor could subsequently benefit from the judicial reorganization proceeding, if it fulfills the conditions imposed by the

[21] Nicoleta Ţăndăreanu, *Codul insolvenţei adnotat*, ed. Universul Juridic, 2014, p. 83.
[22] According to article 36 paragraph (2) from the Law no. 85/2014.

law, increasing its chances of recovery. We consider that the application of pre-insolvency proceedings in due time and at a higher rate wold have macroeconomic benefits, by sustaining the debtor's efforts to overcome the financial difficulty and to efficiently rehabilitate its business. In comparison to the insolvency proceedings, in any of its forms, the appliance of the preventive composition offers the necessary flexibility to an efficient recovery. Therefore, the debtor has the chance of avoiding the highest risk it's facing, namely the deregistration of the debtor from the registers in which it's registered.

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THE LEGAL REGIME OF THE MORTGAGE OVER THE SHARES AND SOCIAL PARTS IN THE CURRENT BUSINESS ENVIRONMENT

Florin CONSTANTINESCU*

Abstract

The present study aims to scrutinize the main legal traits of the mortgage over the shares (from a joint-stock company) and social parts (from a limited liability company) with focus on the modalities of establishment, the publicity, the real benefits for lender, the special situations related to the foreclosure process.
Also, one of the envisaged objective is to critically analyze the last amendments brought to the Romanian specific legislation and to submit proposals for amelioration aiming to better serve the business needs, on one hand, and to strengthen the legal security on the other hand.

Keywords: *Shares, Social Parts, Security Agreement, Joint-Stock Companies, Limited Liability Companies*

1. Introduction

1.1. Which is the area/domain covered by the theme of the present study?

The main objective of the present study is to present the legal regime of the movable mortgage over the shares (belonging to the joint-stock company) and social parts (related to the limited liability company) and to critically assess the important legal traits, the modalities of setting-up, the significant clauses contained by the security agreements, the benefits for the contracting parties, the contrastive analysis of the current legal framework and the foregoing legal framework, the corporate decision-making process regarding the approval by the shareholders of such guaranties, the publicity of the security agreements and some relevant situations deriving from the foreclosure operations.

The mortgage over the shares and social parts are currently used by the Romanian credit institutions to secure the repayment obligation towards a creditor.

In general terms, the movable mortgage is an institution specific to the civil law; prior to the entering into force of the new Civil Code (01.10.2011), the settlement of such guaranties was governed by the former VI th Title from the

Law no. 99/1999 on some measures for the acceleration of the economic reform that was a special law in comparison with the former Civil Code that represented the general law; furthermore, the special law had priority - in terms of its application - towards the general law. *So, the first covered area is the civil law.*

Bearing in mind that the guaranties are set over the shares and social parts that are linked to the trade professionals (joint-stock companies and limited liability companies) *the second covered area is the commercial law.*

It is important to be highlighted that pursuant to the current doctrine, the commercial law represents a deriving domain of the civil law. In other words, there is no contradiction between the two legal areas (the civil law and the commercial law)[1].

1.2. Why is the studied matter important?

The importance of the study mainly consists in:

a) making a global analysis of the legal regime of the mortgage over the shares and social parts with focus on practical issues;
b) augmenting the importance and the efficacy of such guaranties both in lending operations performed by the credit institutions and ordinary borrowing operations (which are not performed by the credit institutions, as defined by the law but they are performed by other companies);
c) the proposals to amend the legislation in force.

The pursued objectives of the study are:

a) to fortify the legal regime of such guaranties with the scope to be used on a higher scale in the current activity;
b) to point out the effective benefits versus disadvantages;
c) to highlight the way the corporative will is form aiming to establish such guaranties and the potential sanctions.

1.3. How does the author intend to answer to this matter?

The main modalities that will be used to furnish the needed answers are:

a) the contrastive legal analysis of the relevant former legislation and also the analysis of the current legislation;
b) the research of the relevant practice in the field;
c) the investigation of the relevant doctrine.

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1 Stanciu D. Carpenaru, *Treatise Of Romanian Commercial Law* (Bucharest: Universul Juridic Publishing House, 5th edition, updated, 2016), 24.

The research will be made through using mainly the comparative method, the historical-teleological method and the logical method.

1.4. What is the relation between the paper and the already existent specialized literature?

The existing doctrine has not extensively and specifically analyzed the following aspects:

a) the main clauses recommended to be inserted within the security agreements;
b) the corporate approvals regarding the establishment of the mortgage over the shares and social parts plus the potential sanctions;
c) some particular aspects concerning the criminal responsibility with regard to the guaranteeing operations occurring between the companies, pursuant to the Law no.31/1990 On Companies, further amended and completed;
d) some relevant aspects coming from the foreclosure process.

Taking into consideration the above, the present study aims to complement the existing specialized literature, providing new arguments and/or solutions desirably to be widely used by all the legal professionals (experts, professors, students, practitioners etc.).

2. The shares. Concept. Traits. Legal nature.

2.1. In accordance with the Article 91 from the Law no. 31/1990, the share capital is represented by the shares issues by the joint-stock company; taking into consideration the modality of transfer, the shares may be nominative shares or shares at bearer. The type of the share will be determined by the constitutive deed; on the contrary, the shares will be nominative. The nominative shares may be issues in material form (on paper medium) or in dematerialized form when they are registered in the shareholders' registry.

A joint-stock company is set-up by minimum 2 shareholders who contribute to the formation of the share capital (in amount of minimum RON 90,000) aiming to develop a commercial activity; the shareholders are liable up to the limit of their contribution to the share capital.

2.2. The commercial doctrine provided different definitions for the concept of share, as follows:

a) a share bears three meanings: I)each fraction of the share capital;ii)the totality of the rights and obligations that derives from the bylaws for shareholders;iii)the title by which the shareholders exert their rights and these rights are transferred to the third parties[2];
b) a share has the following meanings :i)an equal part of the share capital;ii)a credit title ascertaining the rights and obligations deriving from the capacity of shareholder;iii)the document which comprises the shareholder's right[3];
c) a share is a representative title of the shareholder's contribution, representing a fraction of the share capital which confers to the holder the capacity of shareholder[4].

2.3. Following the above-mentioned definitions, the main legal traits of the shares are:

a) the shares are fractions of the share capital having a certain nominal value. Based on the Article 93 from the Law no.31/1990, the nominal value of a share cannot be smaller than RON 0,1 ;
b) the shares must have the same value. As a consequence, the holders of the shares have equal rights fact that create the needed prerequisites for the decision-making process in the general shareholders meeting. The Law no.31/1990 enables to be issued-under the conditions of the constitutive deed- shares which confer different right to the holders (Article 94, 2nd paragraph from the Law no.31/1990).

The lawmaker has in view the preferential shares with precedent dividend without right of vote that grant to the holder:i)the right to a precedent dividend charged on the distributable benefit of the financial exercise before any other charge;ii)the rights conferred to the shareholders having ordinary shares, inclusively the right to take part in the general shareholders meeting except for the right of vote (Article 95, 1st paragraph from the Law no. 31/1990).

c) the shares are indivisible, as provided by the Article 102, 1st paragraph from the Law no. 31/1990.

This legal provision has an imperative nature, the pursued scope being to overcome the intention to excessively divide the shares into many other shares.

The law does not ban to exist more co-owners of one share but they are responsible to appoint a proxy aiming to exert the related rights or to pay the due contributions.

d) the shares are negotiable titles. As moment as the shares represent the equivalent of the shareholder's contribution to the share capital, it means that the share comprises a certain value. Bearing such value, the shares may be alienated to the third parties as stipulated by the law. The shares held by the companies listed

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[2] Cesare Vivante, *Traite de Droit Commercial. Les societies commerciales* (Paris: V.Giard & E. Briere Libraires-Editeurs, vol.II, 1911), 271.

[3] I.L.Georgescu *Romanian Commercial Law* (Bucharest: All Beck Publishing House, vol.2, 2002), 606.

[4] Stanciu D. Carpenaru, *Treatise Of Romanian Commercial Law* (Bucharest: Universul Juridic Publishing House, 5th edition, updated, 2016), 323.

with the Stock Exchange may be alienated under the conditions governing the regulated markets.

2.4. With regard to the legal nature of the share there are some relevant opinions as follows:

a) based on an opinion, the share does not display all the traits attributable to the titles of credit meaning the integration of the law, the autonomy and the literalness; a share holds only the first trait namely the integration of the law[5];

b) in compliance with another author, a share of capital represents an uncertain receivable against the company for a quota from the social fond in the final moment of liquidation[6];

c) the shares are special titles, called corporative titles, company titles or titles of participation.

Also, the shares are not autonomous titles towards the legal document they derive; the shares come from the bylaws. Moreover, in case of transmittal, the acquirer becomes the holder of a deriving right[7];

d) based on the new Civil Code, a share is a movable, in principle, incorporeal good, indivisible good which represents a special form of the parts of interests issued by the societies as regulated by the Civil Code.

A share tradable on the capital market is an incorporeal, fungible good. On the other hand, a share to bearer issued in material form by a company not listed to the Stock Exchange is a corporeal and non-fungible good[8].

2.5. The shares grant to the holders the following rights:

a) the right to take part in the general shareholders meeting personally or by proxy;

b) the right of vote. Any paid share confers the right to a single vote if otherwise is not stipulated by the constitutive deed (Article 101 from the Law no.31/1990). The shareholders may vote proportionally with the held shares. ;

c) the right to information with regard to the activity of the company. In this respect, the administrators, the members of the Directorate have the obligation to make available to the shareholders and to any other petitioners the information regarding the structure of the shareholding etc. (Article 178, 1st paragraph from the Law no.31/1990);

d) the right to cash the dividends. The dividends are paid proportionally with the participation to the share capital if otherwise is not stipulated in the constitutive deed (Article 67, 2nd paragraph from the Law no/31/1990);

e) the right to the amount deriving from the winding-up of the company.

2.6. The aspects highlighted to the po.2.1-2.6 are also applicable to the company limited by shares (R*om. societate in comandita pe actiuni*).

3. The social parts. Concept. Traits. Legal nature

3.1. The social parts form the share capital of the limited liability company.

A limited liability company has the following characteristics in the light of the Law no. 31/1990:

a) it is established by one or many persons (associates) based on the trust;

b) the associates contribute with some goods with the scope to perform a commercial activity and to share the attained profit;

c) the associates are liable up to the limit of their contribution to the share capital;

d) the share capital is of minimum RON 200.

3.2. The legal traits of the social parts are similar, in general, with the characteristics of the shares.

So, with regard to the social parts:

a) they are fractions of the share capital;

b) they must have the same value (minimum RON 10);

c) they are indivisible;

d) they may be not represented by negotiable titles;

e) the number of the social parts distributed to each associate is proportional with its contribution to the share capital;

f) the social parts may be alienated to the third parties under the restrictive conditions stipulated by the Article 202 from the Law no.31/1990 meaning only if the associates representing ¾ from the share capital approve such operation.

3.3. The social parts confer the associates the following rights:

a) the right to take part in the general associates meeting;

b) the right to vote;

c) the right to information with regard to the activity of the company;

d) the right to cash the dividends. The dividends are paid proportionally with the participation to the share capital if otherwise is not stipulated in the constitutive deed (Article 67, 2nd paragraph from the Law no/31/1990);

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[5] I.L.Georgescu *Romanian Commercial Law* (Bucharest: All Beck Publishing House, vol.2, 2002), 612.

[6] D.D.Gerota *The general theory of the commercial obligations towards the technique of the civil obligations* (Bucharest: Imprimeria Nationala, 1932), 163.

[7] Stanciu D. Carpenaru, *Treatise Of Romanian Commercial Law* (Bucharest: Universul Juridic Publishing House, 5th edition, updated, 2016), 325.

[8] Stanciu D.Carpenaru, Gheorghe Piperea, Sorin David *The Law Of The Companies. Commentary On Articles* (Bucharest: C.H. Beck Publishing House, 5th edition, 2014), 323.

e) the right to the amount deriving from the winding-up of the company.

4. Establishment of the security over the shares and social parts. Overview of the former and current legislation.

4.1. Prior to entering into force of the New Civil Code (01.10.2011), the establishment of the guaranty over the shares and social parts was governed by the former VI th Title from the Law no.99/1999 on some measures for the acceleration of the economic reform. Such guaranty was settled through a real movable guarantee agreement. For priority rank issues, the agreement was enrolled in the Electronic Archive. Regarding the real movable guarantee over the shares, one of the legal requirements (introduced by the Law no.441/2006) was to enroll also the agreement in the shareholders' register kept by the company. A similar requirement existed also for the real movable guarantee over the social parts.

4.2. In respect to the current legislation, the modality by which is settled such guaranty is the movable mortgage [Article 2389, letter d) from the Civil Code].There were maintained the legal provisions based on which the mortgage agreement over shares and social parts must be enrolled in the Electronic Archive and in the registers kept by the company. With regard to the shares belonging to the joint-stock companies listed with the Stock Exchange, the mortgage must be enrolled with the special accounts open on behalf of the settlor with the system held by the Central Depository (Article 96 from the Regulation no.13/2005 on the authorization and operation of the Central Depository, houses of compensation and central counterparts, issued by the Securities National Commission, further amended and completed).

5. Relevant clauses recommended to be inserted in the movable mortgages agreements

5.1. The settlor of the movable mortgage has the liberty to use, to administrate and to dispose by the mortgaged asset having the duty not to harm the creditor's rights (Article 2373 from the Civil Code).

It means that the mortgage right enrolled with the first rank in the Electronic Archive survives to any operation of sale of the mortgaged asset made by the settlor.

5.2. The settlor may not destroy, harm the mortgaged asset and also the settlor may not substantially diminish the value of the mortgaged asset only if such destruction, deterioration or diminishing of the value occurs during the normal use of the asset or in case of necessity (Article 2374 from the Civil Code).

In brief, this article imposes the general undertaking for the settlor to be diligent and to maintain the value of the mortgaged asset, except for the situations already stipulated.

5.3. The mortgage is extended over the fruits and products of the mortgaged asset and also over all the assets received by the settlor as effect of an operation of administration or disposition regarding the mortgaged asset. It is considered product of the mortgaged asset any asset that supersedes the mortgaged asset or the asset in which the value of the mortgaged asset is incorporated (Article 2392 from the Civil Code).

The main conclusion is that the mortgage covers also the right to cash the dividends stemming from the shares and social parts.

5.4. The creditor has the right to inspect the mortgaged asset without harming the activity of the settlor (Article 2394 from the Civil Code).

With regard to the shares and social parts, the meaning of the aforesaid article consists in the fact that the creditor is entitled to require and to receive any documents and/or information regarding the status of the mortgaged asset.

5.5. The mortgage agreement must contain a sufficiently precise depiction of the mortgaged asset.

In respect to the shares, the mortgage agreement comprises the type of the shares, the number of shares, the form of issuance, the value of the shares, and the numbering of the shares (if any).

Concerning the social parts, the mortgage agreement contains the number of the social parts, the value of the social parts and the numbering of the social parts (if any).

In general, the enrollment of the mortgage agreement both in the Electronic Archive and in the registers held by the companies also contain the interdictions of alienation and encumbrance.

6. Some special legal requirements regarding the approval of the guaranties over the shares and social parts

6.1. In respect to the shares, if there is needed a resolution issued by the general shareholders meeting, the creditor must pay a special attention to the formalities of convening the shareholders.

The convening of the shareholders must comprise the whole agenda of the shareholders meeting that will be held with an explicit depiction of all the items included on the agenda (the depiction of the guaranties, the object of the guaranties, the amount of the credit, the financing bank etc.).

The general rule is that the convening must be published in the Official Gazette of Romania, the IV th Part and in one of the widely spread newspapers from the locality where is the registered office of the company or from the nearest locality. The term for the convening of the general shareholders meeting may be not smaller than 30 days from the date when the convening was published in the Official Gazette of Romania, the IV Part (Article 117, 2nd and 3rd paragraphs from the Law no. 31/1990).

It is very important to be strictly followed the aforesaid conditions (especially the term of 30 days) because on the contrary the sanction is the absolute annulment of the resolution of the general shareholders meeting that ensues the cancelation of the mortgage over the shares.

The 4th paragraph of the Article 117 from the Law no.31/1990 establishes a derogation concerning the convening formalities as follows: if all the shares are nominative, the convening may be done through the recommended letter or, if the constitutive deed enables, through the letter sent via e-mail having the electronic signature incorporated, attached or logically associated at the shareholder's address mentioned with the shareholders' registry with 30 days prior to the date when the meeting will be held.

We stress that with regard to the convening formalities the general rule (publication of the convening in the Official Gazette of Romania, the IV th Part and in one newspaper as mentioned above) is applied on a higher scale in comparison with the derogatory rule established by the Article 117, 4th paragraph from the Law no.31/1990.

The convening formalities must not be performed when all the shareholders are present and there is the unanimous approval of the guaranties (Article 121 from the Law no. 31/1990).

Also it is important to be pointed pointed-out that the guaranties over the shares may be approved by the Board of Administrators/the Directorate if the value of the mortgaged asset is up to the half of the accounting value of the assets at the date when the legal document is signed (Article 153^{22} from the Law no.31/1990); on the contrary, the approval comes from the extraordinary general shareholders meeting.

In respect to the shares held by the companies listed to the Stock Exchange, the mortgage over the shares is approved by the Administrators/Directors if the value of the mortgaged asset does not exceed, individually or cumulatively, during the tenor of a financial exercise, 20% of the total value of the fixed assets, except for the receivables (Article 90 from the Law no.24/2017 on the issuers of the financial instruments and market operations); on the contrary, the approval comes from the extraordinary general shareholders meeting.

6.2. With regard to the social parts, the mortgage is legally approved by the associates representing ¾ of the share capital (Article 202, 2nd and 5th paragraphs from the Law no. 31/1990).

The convening of the general associates meeting is made in the form stipulated by the constitutive deed and, in lack of a special provision, the convening will be made by recommended letter sent with 10 days before containing also the agenda of the general associates meeting (Article 195, 3rd paragraph from the Law no.31/1990).

7. Novelties regarding the foreclosure process

7.1. The creditors of the associate may exert their rights – during the duration of the company- only:

a) on the part from the benefits due to the associate based on the balance sheet;
b) on the part that would be due to the associate after the winding up of the company.

The novelty consists in the fact that the social parts, according to the Article 66, 2nd paragraph from the Law no.31/1990 :

a) may form the object of the garnishment and **seizure** started by the aforesaid creditors during the duration of the company;
b) may be **sold** by the same creditors.

As effect, the Law no.31/990 (by the Article 66, 2nd and 3 rd paragraphs) has finally validated the existing practice, meaning the mortgage legally established over the shares and social parts may be foreclosed based on the law. The former doctrine expressed the opinion in conformity to which the social parts may be not foreclosed[9] and may be not form the object of a guaranty because of the *intuitu personae* trait of the social part; we highlight that the most of the practitioners did not follow it because it could mainly trigger a blockage of the business. Subsequently, the Administrators/the members of the Directorate are obliged to make available to the creditor/ foreclosure body, upon their request, the financial situations and any other documents or the information needed to assess the shares and the social parts and also to facilitate their taking-over.

The publicity of the seizure and garnishment it will be made upon the request of the foreclosure body without being applicable the provisions of the Article 71 from the Emergency Government Ordinance no. 116/2009, as provided by the Article 66^{1} from the Law no. 31/1990.

8. Special situations. Overview

8.1. A distinct attention must be paid to the guaranties furnished by and between joint-stock companies members of the same group.

We have in mind the provisions of the Article 144^{4} , 1st paragraph from the Law no. 31/1990 which expressly bans the crediting by the company of its administrators through some specific operations as: i)granting the loans to the Administrators;ii)granting financial benefits to the Administrators at the date or after the date when the company concluded with the Administrators operations of delivery of goods, services or performance of works;iii)direct or indirect guaranteeing, in whole or in part, of any loans granted to the Administrators, concomitantly or after the granting of the loan;i)direct or indirect guaranteeing, in whole or in part, of the performance by the Administrators of any

[9] Stanciu D. Carpenaru, *Treatise Of Romanian Commercial Law* (Bucharest: Universul Juridic Publishing House, 5th edition, updated, 2016), 377.

other personal obligations of those towards third parties;ii)direct or indirect guaranteeing, in whole or in part, of a claim that has as object a loan granted by a third party to the Administrators or other personal service of the Administrators.

The provisions of the aforesaid Article 144^4 , 1st paragraph will apply to the operations where are interested the spouse, the relatives or in-laws up to the fourth degree inclusively of the Administrator; also if the operation regards a company where one of the persons abovementioned is Administrator or holds, alone or together with one of the abovementioned persons, a participation of at least 20% of the subscribed capital. In case of breaching this provision (Article 144^4 2nd paragraph from the Law no. 31/1990), the potential sanction is the absolute annulment of the guaranty.

8.2. In the process of setting-up the guaranties must be followed inclusively the provisions of the Article 272, 1st paragraph, letters b) and c) from the Law no. 31/1990 which stipulates the criminal responsibility (imprinsonment from 6 months to 3 years or fine) of the founder, administrator, general manager, director, member of the supervisory council/directorate or legal representative of the company who:uses in bad faith, the assets or the credit, enjoyed by the company, for a purpose contrary to the interests of the company or in his benefit or favors another company in which he has interests, directly or indirectly;borrows in any form, directly or through an intermediary, from the company that he administers, from a company controlled by this company or from the company which controls the company which he manages, the borrowed amount being higher than EUR 5,000 or makes one of these companies to provide any guarantee for his own debts.

Besides the criminal responsibility, the guaranty becomes null.

8.3. Besides the abovementioned with the points 8.1 and 8.2 any guarantee provided by a company must be justified by an economic interest taking into consideration inclusively the principle of the specialty of the capacity of use applicable to the company.

9. Conclusions

9.1. Main outcomes of the study

The main outcomes of the present study are:

a) global presentation of the mortgage over the shares and social parts with focus on the legal traits of the shares and social parts, on the rights granted to the shareholders and associates, on the clauses advised to be inserted in the mortgage agreement, on the foreclosure process;
b) analysis of the relevant foregoing legislation and current legislation;
c) presentation of some relevant precedent formalities that may have major impact on the validity of the mortgage agreement;
d) overview of some relevant aspects regarding the criminal responsibility that may have major impact on the validity of the mortgage agreement;
e) proposal to be eliminated the enrollment of the movable mortgage over the shares and social parts from the registries held by company having in mind that the enrollment in the Electronic Archive is public being available to any diligent person;
f) proposal to be amended the Law no.31/1990 meaning to be expressly stipulated : (i) if the Article 144^4 regards only the joint-stock companies or not.

If not, to be expressly mentioned which are the envisaged persons; (ii) if the Article 144^4 and the Article 272 regard also the companies as active/qualified subject of the infractions.

9.2. Expected impact of the outcomes

The main expected impact consists in the followings:

a) to raise the awareness in respect to all the issues highlighted in the present study for all the cases when a mortgage over the shares and social parts is settled;
b) to become effective the recommendations mentioned with the po. 9.1, letters e) and f) from the present study.

9.3. Suggestions further research

Please see the recommendations mentioned with the po. 9.1, letters e) and f) from the present study.

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CONSIDERATION REGARDING THE LAW NO 77/2016 IN VIEW OF DECISION OF THE CONSTITUTIONAL COURT NO 623/2016

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Abstract

The forced giving in payment regulated by Law no 77/2016 has created a lot of polemics which are not necessarily solved by the Decision of the Constitutional Court. The present study represents an attempt to clarify some of the implications of the Constitutional Court Decision upon the Law no 77/2016.

Keywords: *giving in payment; hardship theory; loan ; constitutionality ; court.*

1. Introduction

Adopted upon the existence of a conflict, significantly emphasized by economic events – the global economic crisis, but especially that of the real estate market, the evolution of the exchange rates of some currencies, between consumers and banks, Law no. 77/2016[1] sparked ample controversy. The controversy manifested mainly socially, while law professionals were almost unanimously critical towards the said Law[2]. The present study, however, does not intend to analyze the said Law but only the implications upon it of Decision no. 623/2016 of the Romanian Constitutional Court[3].

The aforementioned Decision, which is by no means safe from any criticism, brought, both legally and socially, a satisfactory solution for all envolved interests. Without preventing the application the dispositions of the Law it criticised, as some authors had anticipated[4], the Constitutional Court established the interpretation, probably the sole possible one[5], by which these could be enforced without transgressing constitutional priciples and , also, without injuring the rights of one of the categories of subjects involved in the relations sought by the Law.

Below we wish to analyze some of the aspects involved by the passing of this Decision, both regarding civil substatial law and civil procesual law, but only, as the Constitutional Court did, with regard to loan contracts placed prior to the coming into force of the Law hereunder.

2. Content

Essentially, decision no. 623/2016 of the Constitutional Court provides that in order to enforce the dispositions of Law no. 77/2016 a court should verify the conditions regarding the existence of the hardship theory6. Starting from the premise that we are only looking at contracts placed prior to the coming into force of Law no. 77/2016 and targeting a rather practical approach, we will try finding answers to three questions, two of them regarding substantial law and one regarding procesual aspects.

2.1. Can the provisions of Law no. 77/2016 be applied to loan contracts placed prior to its enforcement?

Constitutional Court Decision no. 623/2016 (published January 18th 2017), analyzing the issue of the Law's constitutionality (of some of its provisions) exactly with regard to pre-existing contracts, did not deem it unconstitutional. Therefore, the Law will also be applicable to these contracts but only if the court (CCR analysis and disposition on art.11 of the Law) verifies the conditions regarding the theory of the conditions regarding the hardship theory. For that matter, pt. 121 of the Decision clearly states that, in the hypothesis in which the conditions of the hardship

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[1] Published in M.Of. no. 330 of April 28th 2016 and enforced on May 13th 2016.

[2] See, e.g. Law on Giving for Payment: arguments and solutions, Valeriu Stoica, Marian Nicolae, Marieta Avram; Bucharest, Hamangiu Publishing House, 2016.

[3] Published in M.Of. no. 53 January 18th 2017.

[4] M. Nicolae in Law on Giving in Payment: arguments and solutions, op. cit., page 96; C. Pintilie, D. Bogdan in Law on Giving in Payment: arguments and solutions, op. cit., page 121-147; L. Mihai, Amicus Curiae regarding giving in payment, https://www.juridice.ro/474428/amicus-curiae-cu-privire-la-darea-in-plata.html; C. Birsan, S. Tirnoveanu, I. Craciun, Law on Giving for Payment – critical exam of some (un)constitutionality and (un)convenyionality elements, https://juridice.ro/essentials/499/legea-privind-darea-in-plata-examen-critic-al-anumitor-elemente-de-neconstitutionalitate-si-neconventionalitate.

[5] The solution had already been brought forward by doctrine. See V.Stoica in Law on Giving for Payment: arguments and solutions op. cit., pages 22-29 and, a different view, M. Avram, About the Law on Giving for Payment: between juridical folklore and the reason of law, pt. 3, https://www.juridice.ro/455084/despre-legea-privind-darea-in-plata-intre-folclorul-juridic-si-ratiunea-dreptului.html.

[6] For an analysis on this cause of waiving the *pacta sunt servanda* principle see, prospective to the old law, C.E. Zamsa, The Hardship Theory. Study of Doctrine and Jurisprudence, Bucharest, Hamangiu Publishing House, 2006, and, prospective to the New Civil Code, G. Boroi, C. Anghelescu, Course of Civil Law. General Part, 2nd Edition, Bucharest, Hamangiu Publishing House, 2012, pages 212-215.

theory are met, the court can rule either the adaptation or the ceasing of the contract, as the application of the hardship theory cand be made "to the upper limit provided by Law no. 77/2016 (handing over the estate and erasing the main and accesory debt)". A counter argument invoking the dispositions of art. 3 of the Law, which refers to the derogation from the provisions of Law no. 287/2009 regarding the Civil Code, cannot be taken into account, because an eventual giving in payment, even if it pertains to a juridical relation risen prior to enforcement of the New Civil Code, would have been governed by its dispositions (and not by the old regulations) as long as it took pplace after October 1st 2011 (art. 112 of Law of application no. 71/2011). And, by hypothesis, an operation of giving in payment based on Law no. 77/2016 would be ulterior to the enforcement of the New Civil Code.

2.2. What is the effect of the RCC decision on the application of Law no. 77/2016 for the pre-existing contracts upon enforcement of this Law ?

We have already established that this Law is applicable to these contracts. But only in the hypothesis in which it is established (case by case) that the requirements of the hardship theory are met. That cannot be if there is only the possibility that the parties could bring the hardship theory into matter in front of the court, but it will be necessary for the court to effectively establish if the conditions of the hardship theory had been met. Surely, if the court is invested by one of the parties regarding giving in payment based on the provisions of Law no. 77/2016 (we will see to the procedural matters separately).

The existence of the conditions of the hardship theory determines the constitutionality of the Law upon application to pre-existing contracts. The possibility of such application is provided in art. 11 of the Law, but this disposition was deemed by the RCC decision to only be constitutional "as far as the court verifies the conditions referring to the existence of the hardship theory". In the minutes, the Court did not refer to the possibility of verification but to the actual verification (grammarly interpretation – mode of the used verb). Surely, in the reasons of the Decision there are points referring to the possibility of the judicial control, but overall the reasons regard the necessity of verifying the hardship theory (pt. 119 and 120 of the Decision). The Court deems Law no. 77/2016 as being an application of the hardship theory to loan contracts (pct. 115 of the Decision) and, therefore, it will not be applicable if the conditions of the hardship theory are not met. Furthermore, the Court considers unconstitutional "the hardship theory *ope legis*" which the legislator had in mind when adopting Law no. 77/2016, and the elimination of this trait (ope legis) requires actually establishing the existence of the conditions of the hardship theory (either by parties' agreement – but this option is not of interest, as the parties are free to decide to modify the elements of the contractual relations between them even if there is no special regulation -, or by ruling of the court).

Thusly, for the application of Law no. 77/2016 to pre-existing contracts it will be necessary to verify the fulfillment of the admissibility requirements provided in the Law (art. 4) but also the existence of the conditions of the hardship theory. In the hypothesis in which the existence of the conditions of the hardship theory is not established in one particular case, the solution (of admittance of the creditor's contestation, or rebuttal of thr debtor's claim for ascertaiment) will be also based on the inadmissibility of the procedure of giving in payment ruled by Law no 77/2016. Practically, the premise for the application of Law no. 77 to pre-existing contracts is the very identification of the conditions of the hardship theory.

As it is the case with the admissibility conditions provided by art.4 of the Law, with regard to the existence of the conditions of the hardship theory the debtor will also have their own view by which they will decide wether or not they can follow the procedure of giving in payment ruled by Law no 77/2016. If the debtor's evaluation has a positive outcome, they will send their creditor a notice, as provided by art. 5 of the Law. In turn, the creditor will assess the admissibility requirements under art. 4 but also on the hardship theory. This is where the lagislator's intervention might be necessary, as to modify art. 5, align. 1 in order to establish an obligation for the debtor to also detail in the notice the conditions of the hardship theory, thus making it possible for the creditor to fairly assess the situation. On the other hand, we think that, given the RCC decision, the debtor would already be forced to take on the hardship theory matter in their notice, or at least would be interested to. According to their evaluation's outcome the creditor will decide wether to lodge a contestation as provide by art. 7 or to give effect to the notice (surely there is a third option, respectively the creditor could wait, keeping the possibility of defending themselves in court in the case regarding the claim for ascertainment made by the debtor, however such a position would not serve their interests, given that the effect of the loan contract would remain suspended). Should the debtor not refer to the hardship theory in their notice, the creditor could lodge the contestation (surely, should they have assessments regarding the admissibility requirements under art.4 of the Law, they will mention them in the contestation) settling to affirm the inexistence of the conditions of the hardship theory.

Finally, should the parties fail to reach an agreement, the court will also assess the admissibility requirements under art.4 of the Law and the existence of the conditions of the hardship theory. To be mentioned that, as it is the case with admissibility conditions under art.4 of the Law, the existence or inexistence of the conditions of the hardship theory, as a premise for the application of the procedure ruled by Law no. 77/2016, (if the parties fail to agree) the court will assess either upon contestation by the creditor (as

per art. 7), or upon claim for ascertaiment mad eby the debtor (as per art. 8 of the Law).

The debtor's notice sent as provided by art. 5 of the Law will produce the effects provided by this law even if in one particular case the hardship theory conditions are not met (similar to the situation in which the admissibility conditions under art. 4 of the Law are not met). Surely, those effects would be removed when the ruling that establishes that the hardship theory conditions are not met remains definitive. The effects of the notice could only be avoided by priorly lodging a claim for ascertainment by the creditor, by which they ask for the establishment of the inexistence of the conditions of the hardship theory (but in such a claim, a matter of interst[7] would rise – as it would only be eventual – and, moreover, it is hard to imagine that a bank would lodge such claims regarding each contract placed rior to the enforcement of Law no. 77/2016).

Surely, we cannot exclude the hypothesis in which the debtor lodges a claim, distinct from the procedure of Law no. 77/2016, by which they ask for the verification of the conditions of the hardship theory. But such a claim's object could not be to ascertain the existence of these conditions (the rule of subsidiarity of a claim for ascertainment would be breached) but the effective application of the hardship theory, which would presume a course of action in accordance with common law, with no ties to the procedure under Law no. 77/2016. This would probably not serve their interests, given they would lose the advantage of by law suspension under Law no. 77/2016 and, on principle, also of exemption from paying court fees. Moreover, the court's ruling, assuming they establish the existence of the conditions of the hardship theory, would not be predictable, as it is highly unlikely it would exceed the advantage given by the giving in payment based on the Law hereunder.

And, as we have reached this point of the analysis, we must take into account pt. 121 of the RCC Decision. Therein the RCC hints that the court, establishing the existence of the conditions of the hardship theory (and of the admissibility requirements under art.4 of the Law) could rule any measure deemed necessary (adaptation or ceasing of the contract) to the upper limit provided by Law no. 77/2016 (handing over the estate and erasing the main and accesory debt). This option of the court could only be in the hypothesis in which they were invested with a claim based on common law.

If the debtor chose to follow the procedure under Law no. 77/2016, then either their step would be considered inadmissible (either because the conditions under art. 4 are not met, or those of the hardship theory) and it would remain without effect (in the end, after the courts decision remains definitive), or, should al the requirements for this procedure be fulfilled, it would have the outcome provided by law. The mention under pt. 121 of the Constitutional Court's Decision cannot have any actual effect, art. 2, align.3 of Law no. 47/1992 clearly stating the impossibility for the Court to alter or complete the legal dispositions submitted to their control. Thusly, a consequence of following the procedure under Law no. 77/2016 (assuming it is admissible) can only be the one mentioned in its provisions (giving in payment, respectively the extinction of the debt rising from the loan contract, accessories included, no supplementary costs, by the transfer towards the creditor of the ownership to the mortgaged asset)[8].

Besides, the principle of availability[9] precludes the court from ruling otherwise. As for the steps taken by the debtor under Law no. 77/2016, the court will be invested by claim made by either the creditor or the debtor. The creditor could file the claim under art. 7 , by which they contest the fulfillment of the requirements needed for the application of the procedure ruled by Law no. 77/2016. Should the court consider they were not fulfilled it will admit the creditor's claim without raising the matter of application of the hardship theory. And if they consider the coditions for application of the procedure are fulfilled they will reject the creditor's claim, without disposing any other measures (a counterclaim made by the debtor would lack interst and, anyway, if it would aim othe consequences, it would be subject to common law). In their turn, the debtor could file a claim provided by art. 8of the Law, but its object is pre-established by this provision (should they have other claims, the debtor would exceed the dispositions of Law no. 77/2016, choosing the way of the common law). So the court would either admit the claim (within the boundries of the expressed claims, the same provided under art. 8, align.1 of the Law), or reject it, in neither case could they rule other measures.

Surely, imposing a certain solution is not entirely in accordance with the idea of equity which stand as grounds for the hardship theory. And, indeed, it is possible that the solution chosen by the legislator reverses the situation, respectively generating an imbalance in reverse to the one they wished to remove (the value of the mortgaged asset could be clearly lower than that of the debt). But these are the provisions of Law no. 77/2016 (art. 3, art. 5, art.6, align. 6, art. 8, align.1 and art. 10), disposisions which have not been declared unconstitutional.

2.3. How can the court be invested to rule on the existence of the conditions of the hardship theory ?

We start from the premise that we are looking at the application of the procedure under Law no.

[7] For this requirement for lodging a civil claim see G. Boroi, M.Stancu, Civil Procedural Law, 3rd Edition, Bucharest, Hamangiu Publishing House, 2016, page 36.

[8] For a different opinion see M. Avram, Does forced giving for payment still exist after Constitutional Court's Decision no. 623/2016?, https://juridice.ro/essentials/760/mai-exista-darea-in-plata-fortata-dupa-decizia-curtii-constitutionale-nr-6232016.

[9] For an analysis of this principle see G. Boroi, M. Stancu, op.cit., pages 12-17.

77/2016, thus we will not address eventual claims made by the parties on different grounds (as per common law).

In this procedure, the court is invested by either the creditor, by claim as per art. 7 of the Law, or the debtor, by claim as per art. 8.

Let us first assess the case of the claim made by the creditor, as per art. 7, distinguishing between the situation in which the creditor refers to the hardship theory and that in which he makes no such reference.

Should the creditor, lodging the claim provided by art. 7 of the Law, contest the existence of the conditions of the hardship theory (we must include the case in which the creditor invokes reasons in which the court could include the inexistence of the hardship theory conditions, e.g. if the creditor invokes the inapplicability of the procedure under Law no. 77/2016) two hypotheses become possible.

In the first one the court will assess that the hardship theory conditions are not met and, consequently, will admit the creditor's claim. Of course there could be a discussion on the qualification of the creditor's claim's threads and on the solutions the court might give on each of them. On principle, the creditor will lodge a claim for ascertainment (to be ascertained that the hardship theory conditions are not met, that the procedure of giving for payment under Law no. 77/2016 is not applicable, that the debtor's notice of giving for payment lack effect or, as proposed based on the provisions of the Law, the ascertainment of the failure tu fulfill the conditions necessary for the debtor's right to extinguish the debt to arise). We do not think lodging any other claims makes sense. For example, *restitution in integrum* is an effect of the admission of the claim, it is not necessary for it to be object of a different thread (of course, here it would be necessary to establish the contents of *restitution in integrum* and, given the result, to be decided if such a claim in a different thread is necessary, but detailed – should it be deemed interest can be requested for the period the contractual effects were suspended, or if the debtor could be asked to immediately pay all the instalments which would have been due during the suspension).

In the second hypothesis, should it be deemed that the hardship theory conditions are fulfilled, the court will proceed to verify the other admissibility requirements (art. 4) contested by the creditor and will rule accordingly (admit the claim if the admissibility conditions are not met or reject it if they deem they are fulfilled).

Further, let us analyze the situation in which the creditor, filing the claim under art. 7, does not refer to the hardship theory (probably the case of claims filed prior to the ruling of the Constitutional Court).

Firstly, we must assess if the court could or could not analyze the fulfillment of the hardship theory conditions.

We deem that the court is called to check the existence of the hardship theory conditions even if the claimant (here, the creditor) fails to invoke they were not fulfilled.

This idea arises from the reasons for the RCC Decision (pt. 116, 119, 120), but also from its minutes.

Then, when solving the claim by which it was invested, the court must apply the dispositions of Law no. 77/2016 (art. 4 mainly), but their applicability (and that of the entire procedure ruled by the Law hereunder) to pre-existing contracts depends on art. 11 of the Law, and this article's constitutionality presumes establishing the existence of the hardship theory conditions. In other words, in order to assess the applicability of Law no. 77/2016 to a certain case, the court will have to firstly check the existence of the hardship theory conditions.

Therefore, the issue of breaching the availability principle cannot be taken into account by analyzing the hardship theory conditions, this analysis is necessary to establish the applicability of the procedure ruled by Law no. 77/2016. Doing so, the court does nothing more than checking the applicability of the special procedure to the contract regarded by the claim (and by the prior notice from the debtor).

And an eventual counterclaim from the debtor (notwithstanding litigation risen prior to the passing of the Constitutional Court's decision in which the moment by which a counterclaim could be filed could very well have passed – of course we could talk about a request for reinstatement within term in the 15 days following the passing of the RCC decision) would be hard to admit. Because we either appreciate that the court would have to check the existence of the hardship theory conditions anyway and then the counterclaim would lack interest, or we deem the court could not proceed to that matter and then it could not admit the claim based on the lack of the hardship theory conditions (or on the failure to prove them).

In the end, taking into account the Constitutional Court's decision, there are two possible solutions: either the hardship theory conditions are met and the application of the procedure under Law no. 77/2016 to pre-existing contracts does not breach constitutional provisions, or the hardship theory conditions are not fulfilled, in which case the procedure ruled by Law no. 77/2016 cannot be applied to pre-existing contracts. And the court not only can, but is forced to act for a correct application of the law, and in order to do that it must first establish the norms applicable to the case. And that presumes, as per the RCC decision, verifying the existence of the hardship theory conditions. The judge's active role principle[10] (art. 22 C.p.c.) prevents any doubt on an eventual breach of the availability principle (art.9 C.p.c.).

Thusly, even if the creditor (claimant) fails to invoke the failure tu fulfill the hardship theory

[10] See G. Boroi, M. Stancu, op. cit., pages 20-25.

conditions, the court will, however, proceed to analyze their existence.

Difficulties arise as for the solution the court should pass in the hypothesis in which, after analysis of the hardship theory conditions, they will not establish they exist (if it is assessed the hardship theory conditions have been met, then the court will rule according to the solidity of the creditor's contestation of the admissibility requirements under art. 4). In such case, the procedure ruled by Law no. 77/2016 would not be applicable to the contract under matter.

But let us see what are the possible solutions in case the creditor fails to invoke the lack of the hardship theory conditions.

Should the court fail to verify the existence of the hardship theory conditions three solutions are possible.

Thus, without checking the existence of the hardship theory conditions, the court could reject the creditor's claim verifying and assessing that the admissibility requirements under art. 4 are met (those contested by the creditor), with no reference (analysis) to the hardship theory. However, in such case, the court would pass a ruling regarding a pre-existing contract (by hypothesis, such contracts are subject of the matter here) based on art. 11 of the Law, though this article would only be constitutional if the hardship theory conditions are met (according to RCC decision). Without verifying the fulfillment of these conditions the court cannot apply art. 11, and if this article does not apply, the procedure ruled by Law no. 77/2016 cannot pertain to contracts placed prior to its coming into force.

In a second hypothesis, without checking the existence of the hardship theory conditions, the court could admit the creditor's claim, verifying and deeming that the admissibility conditions under art. 4 have not been fulfilled (those contested by the creditor), making no reference (analysis) to the hardship theory. But this situation is similar to the aforementioned. The court would rule in accordance with legal norms that might not be applicable to the contracts under matter, and they could not find base in the dispositions of art. 11 without checking the fulfillment of the hardship theory conditions. Surely, the interest of discussing such a hypothesis is fairly low, because, either the hardship theory conditions were met or not, the application of the giving for payment procedure ruled by Law no. 77/2016 would still be inadmissible.

Finally, without proceeding to effectively checking the existence of the hardship theory conditions, the court could admit the creditor's claim on grounds that the debtor failed to invoke and prove the existence of the hardship theory conditions, an aspect on which the admissibility of the applicability of the procedure ruled by Law no. 77/2016 to pre-existing contracts depends. However, if we were to consider that the court is prevented from analyzing the existence of the hardship theory conditions because of the availability principle, even more so we could not accept the passing os a ruling based on an aspect upon which the court had not been invested (and which was not brought into matter with the parties). And we must not omit the fact that the court's ruling (assuming it is mentained in appeal) would be *res judicata*, therefore there would be no more means to verify the existence of the hardship theory conditions in a new step based on the provisions of Lawu no. 77/2016.

Given the aforementioned, we deem the court will be forced to proceed to checking the existence of the hardship theory conditions. In this case there are also multiple possible outcomes.

Thusly, it is possible that the court verifies the existence of the hardship theory conditions and to assess they do exist, in which case they will also check the other admissibility requirements (art.4) contested by the creditor and will pass a solution accordingly (admits the claim if the admissibility requirement are not fulfilled and rejects it if it deems they are met).

In a second hypothesis the court may check but assess that the hardship theory conditions are not established. In which case the court should not proceed to analyze the fulfillment of the admissibility requirements under art. 4. Therefore solutions of admitting or rejecting the creditor's claim based on the failure tu fulfill the admissibility requirements should be excluded.

Two more possible solutions remain.

The court could admit the claim based on the inexistence of the hardship theory conditions. But this would mean admitting the claim based on a reason the creditor has not invoked. If the court would do so they would breach the availability principle, by changing the cause of the claim.

That is why we consider that the court should reject the claim, mentaining, though, in the reasons the inapplicability of the procedure ruled by Law no. 77/2016 (this is where the solution of rejecting the claim without analyzing the admissibility requirements contested by the creditor arises from). By such a ruling the court would abide by both principles under matter, the availability principle and the active role principle.

This last solution presumes an analysis of its consequences.

Although their claim has been rejected, the creditor wil be able to request payment of the amounts due according to the contract and can start or continue forced execution. The by law suspension of contractual effects will be deemed, in view of the passed ruling's reasons, as inoperable. Any opposition on behalf of the debtor, in any way, will be removed by *res judicata* which will include the reasons (decisive) for the solution[11] by which the creditor's claim was solved (including an eventual debtor's claim upon art. 8 of the Law).

The only unsolved issue for the creditor remains that of litigation costs. However, in case their claim was

[11] G. Boroi, M. Stancu, op.cit., pages 586-587.

filed prior to the Constitutional Court's ruling, we deem that, assessing the matter of procesual guilt, although their claim was rejected, they should not be forced to pay for litigation fees.

Finally, in case the creditor did not file a claim based on art. 7, or they have filed such a claim but it has been rejected and, in all cases, did not follow the debtor's notice, tha later could lodge the claim under art. 8 of the Law. We consider that, no matter if the debtor has or has not invoked the fulfillment of the hardship theory conditions, the court must check their existence, as well as that of the other admissibility requirements. Of course, the debtor's claim was preceeded by the one of the creditor (which has been rejected), *res judicata* of the ruling by which the creditor's claim was solved will be taken into account (for that matter, we think it should be considered that, in a litigation having the debtor's claim as object, the creditor will be able to invoke the failure to fulfill any admissibility or hardship theory condition, if those have not been invoked by their prior claim).

From the perspective hereunder (the hardship theory) the creditor will have to contest:

a) the fact that the execution of the contract has become excessively burdensome for the debtor;
b) the fact that the situation under pt.a) is due to exceptional changes of circumstances;
c) the fact that the change in circumstances took place after the conclusion of the contract;
d) or they should prove :
e) the fact that the change in circumstances, and also thir extent were or should have been taken into account by the debtor upon concluuin of the contract;
f) the debtor took the chance of changing circumstances or it could reasonably be considered that they took that chance;

As for the burden of proof, we think the debtor will have to prove the existence of the hardship theory conditions mentioned above under pts. a), b) and c) and the creditor should have to prove the aspects mentioned under pts. d) and e). Given that the failure to meet any of these conditions makes the procedure under Law no. 77 inapplicable (as the hardship theory conditions do not exist)and they can only be assessed consecutively (on principle, in the aforementioned order) it results that the debtor will firstly prove aspects under pts. a), b) and c) and only after that the creditor, in order to win the case, will have to prove the aspects under pts. d) and e).

Regarding the condition for applying the hardship theory consisting of the debtor having tried to negotiate a reasonable an equitable adaptation of the contract, we think the failure to do that cannot be taken into matter (in the procedure ruled by Law no. 77/2016) given that the solution of modifying the contract is mentioned by the legal dispositions and, moreover, the procedure starts by notice given by the debtor.

3. Conclusions

Therefore, the Constitutional Court's Decision cannot be deemed to generate the inapplicability of the procedure under Law no. 77/2016 to pre-existing loan contracts.

Thus, the necessity to set the terms in which the procedure ruled by the Law hereunder will be applied and these have been the very object of the present study.

Of course, we do not pretend to solve all the difficulties that might arise upon application of the law according to the conditions set by the provisions of the Constitutional Court's Decision, nor do we consider our proposals to be absolute. This article represents an attempt to help practitioners, courts or representatives of involved parties, which will be called to answer the questions above.

Naturally, as per the matter's actuality, it will be subject to far more ample anlyses in the specialty literature and the solutions brought forward will be either confirmed or denied by jurisprudence of courts which have already been invested with a significant number of claims under Law no. 77/2016.

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THE DISCERNMENT-REQUIRMENT FOR THE VALIDITY OF CONSENT

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Abstract

The provisions of the Civil Code 2009 have not sufficiently clarified the issue of lack of discernment upon conclusion of a juridical act. This study represents an attempt to clarify some of the aspects of this matter, that have been rarely analysed by the Romanian doctrine.

Keywords: *discernment; civil capacity; consent; presumption; factual situation .*

1. Introduction

The civil juridical act is a manifestation of will or, in some cases, an agreement of wills made with the intent to prodeuce juridical effects[1].

From the definition of the juridical act it results that its essence consists in the fact that it represents a manifestation of will made with purpose of producing juridical effects. In other words, the fundamental element of the juridical act is juridical will.

When establishing the concept of juridical will, the juridical literature gives relevance to just two of the phases in the forming of the the juridical will, respectively the exterior manifestation of the decision and the determinant reason, all the other being irrelevant from a juridical point of view.

In law, the exteriorized decision represents consent[2], and the determinant reason is identified as the cause[3] (purpose) of the juridical act.

Without going into details here, we will mention the obvious interdependence between the two elements of juridical will, both representing general and validity conditions of the juridical act.

This interdependence poignantly manifests in view of the validity conditions of each of the juridical will's elements.

According to art. 1.204 Civ.C., consent must be serious, free and knowingly expressed. This translates in the necessity to cumulatively meet three conditions: consent must come from a person having discernment; it must not be altered by any vice of consent; it must be expressed with the intent of producing juridical effects[4]. On the other hand, according to art. 1.236 Civ.C., for the cause of the juridical act to be valid, it must exist and it must be licit and moral. And it is deemed that the cause does not exist upon lack of discernement.

Prefiguration of determinant reason preceeds the expression of consent. Consequently, any circumstance deemed to affect freedom and awareness of consent, firstly – and necessarily – affects the prefiguration of determinant reason.

Therefore, the requirement for existing discernment equally regards both elements of the juridical will.

2. Content

Usually, doctrine analyzes the matter of discernment in connection with the element – consent, as it is considered to be one of consent's conditions.

It has been shown that this condition arises from the requirement for conscious trait of consent[5].

But what is actually the significance of this requirement? The forming mechanism of juridical will revealed that the human psychic reflects the awareness of needs and of menas of satisfying those needs. The juridical act is, above all, an intellectual operation, because the will to contract presumes the awearenes of the elements of the forseen operation, that is "weighed" by each party before conclusion[6]. It is, therefore, a premeditated juridical operation, as the parties priorly analyze all the advantages and disadvantages devolving from it. The subject of law must have the faculty to discern, because they have to deliberate, to assess the advantages and disadvantages presented by wishes and the means to achieve them.

This is the only way determinant reason (cause) can arise, which will lead to making a decision and, finally, to exteriorising the latter. And, for that to happen it is necessary that each party has the necessary intellectual faculties to "understand" and, then, to "want".

In other words, consent must be given by a person which is aware of the juridical consequences rising

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[1] G. Boroi, C. Anghelescu, Course of Civil Law. General Part, 2nd Edition, Bucharest, Hamangiu Publishing House, 2012, page 109.

[2] G. Boroi, C. Anghelescu, op. cit., page 131; E. Chelaru, General Theory of Civil Law, Bucharest, C.H. Beck Publishing House, 2014, page 110; T. Prescure, R. Matefi, Civil Law. General Part. Persons, Bucharest, Hamangiu Publishing House, 2012, page 147.

[3] G. Boroi, C. Anghelescu, op. cit., page 172; E. Chelaru, op.cit, page 140; T. Prescure, R. Matefi, op.cit, page 167.

[4] G. Boroi, C. Anghelescu, op. cit., page 138.

[5] G. Boroi, C. Anghelescu, op. cit., page 138

6 I. Dogaru, *The Juridical Valencies of Will*, Scientific and Encyclopedic Publishing House, Bucharest, 1996, page 70.

from the conclusion of the juridical act, which can imagine not only the rights they would gain by a juridical act, but also the obligations they would be bound by. And, this powe of foreseeing consequences translates to the existence of discernment.

If the faculty to discern does not exist, than the subject of the law cannot prefigure the determinant reason and, consequently, cannot express valid consent, as the said subject does not posess the intellectual faculties needed to "understand" and, then, to "want".

Therefore, it results that lack of discernment firstly affects the froming of determinant reason and only indirectly – by way and as a consequence of this situation – lack of discernment affects consent.

In conclusion, the condition that discernment exists is firstly a condition of cause and only after one of consent.

This reveals the interdependence consent-cause in view of the matter of discernment, as they both presume the existence of discernment, and in the hypothesis of its inexistence neither the cause exists, which triggers the invalidity of consent (which was not consciously expressed, as it misses determinant reason at the base).

Discernment equals to a person's possibility to foresee the consequences of ther actions. From a juridical poin of view and by regarding the juridical act, discernment represents the subject of law's aptitude to assess the juridical effects of their manifestation of will, to forsee its consequences.

The term "discernment" comes from Latin, respectively from *discerno, discernere*, which means to differ, to distinguish. And *discerno* comes from *cerno, cernere*, which means to observe. The etymology of the word thus shows its meaning. Discernment presumes firstly to observe and then to understand what you have oserved, respectively to foresee the consequences of your actions[7].

Or, looking in reverse, from the perspective of its inexistence, lack of discernment translates to the subject's disability to correctly foresee the effects of their actions. As shown, in view of the dispositions of art. 211 of Law no. 71/2011, lack of discernment means "the persons psychic incompetence to act critically and predictively regarding the socio-juridical consequences that may arise from exercising civil rights and obligations"[8].

The requirement for discernment to exist must not be mistaken for the condition of capacity[9], even if there is a close connection between them. Capacity represent a state of law (*de iure*), arising from law, and discernment is a state of fact (*de facto*)[10], being of psychological nature and having to be assessed from person to person, in view of their aptitude and psycho-intellectual power, even if the law has established some presumptions to their regard.

Discernment, theoretically, represents a premise for recognizing capacity to conclude juridical acts. The late "exclusively pertains to the legislator, which bases juridical capacity on the assumption that from a certain age we all have discernment for our actions"[11].

Thusly, individuals with full exercise capacity are presumed to posess the discernment needed for the conclusion of juridical acts. The one lacking exercise capacity (minor under 14 years of age and those placed under judicial injunction) is presumed not to have discernment, due to either early age, or mental health state. As for the minor between 14 and 18 years of age it is, generally, affirmed that their discernment is emerging, in order to emphasize ther intermediary situation. But this situation regards rather their capacity, than their discernment. In view of the matter hereunder, we must stress that the minor betewee 14 and 18 is presumed to have discernment because, as for the juridical acts they may conclude by themselves, according to rules governing capacity, the eventual lack of discernment must be proved by the person that invokes it[12].

In fact, when taking into account the issue of the existence of discernment we are only interested in acts concluded by persons with full exercise capacity and in acts conluded by persons with limited exercise capacity (minor between 14 and 18 years of age) by themselves, bot for which the rules of capacity did not request any approval.

The matter of acts concluded by those lacking exercise capacity or by those with limited exercise capacity, but for which prior approval was needed, will be solved according to capacity rules, without need for further checking the existence of discernment.

We have to mention that there are no special issues here regarding legal entities, because their representatives are always individuals with full exercise capacity.

We retain that, as a general rule, juridical capacity determines the assumption of existing discernment.

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[7] E.J. Prediger, Introduction to studying civil law, Bucharest, Hamangiu Publishing House, 2011, page 107.

[8] G. Boroi, C. Anghelescu, op. cit., page 138.

[9] French doctrine refered, when analyzing the aptitude of consenting, to two elemnts: on the one hand, *incapacities* – the issue of persons with an impossibility to express true consent, as per lack of juridical capacity, and, on the other hand, *spiritual insanity* – where we look at persons which have juridical capacity, but cannot assess the importance of their actions and, in consequence, cannot express valid consent. In both cases, the sanction is, on principle, relative nullity. See, for details, Terré, Fr.; Simler, Ph.; Lequette, Y., *Droit civil. Les obligations*, Dalloz, Précis Droit privé, 8th Edition, 2002, pages 98-105.

[10] G. Boroi, C. Anghelescu, op. cit., page 139.

[11] I. Reghini, S. Diaconescu, P. Vasilescu, Introduction to civil law, Bucharest, Hamangiu Publishing House, 2013, page 487.

[12] To the same end, jurisprudence decided: "the capacity to contract, and also the valid consent of the party undertaking obligation are, as per provisions of art. 948 Civ.C. and of Decree no. 31/1954, validity conditions of the juridical act, the lack of either one being sanctioned by nullity. Even if they had not been declared incapable, according to law, the existence of valid consent cannot be retained, if upon conclusion of the act, for reasons of sickness, the party was lacking discernment."; see I.C.C.J., s. civ., dec. no. 51/15.01.2003, în C.J. no. 4/2004, page 75.

However, "the simultaneity of juridical and natural capacity"[13] does not exist in all cases.

Besides the cases in which the law presumes the person to be lacking discernment (*legal incapacities*), there are cases when persons having discernment by law (upon which, as preveiously shown, an assumption of existing discernment operates) are, however, temporarily lacking discernment (namely cases of *natural incapacity*). To that matter, drunkenness, hypnosis, sleep-walking, rage (*ab irato*) have been mentioned[14].

I must emphasize that, in the case of drunkenness, however, if it is voluntary, the cocontractor could claim compensation for damages caused by dissolution of contract for lack of discernment, naturally only if they have not participated to the occurrence of that state (in which case we might also have undue influence) or if they have not tried to take advantage of the other party's state (immoral cause or injury), situations in which their own guilt would prevent them from taking action. However, we consider that the nullity of the act could not be rejected because the law, when establishing consequence for lack of discernment, does not distinguish between the causes of that state.

To these, aforementioned, natural incapacities, we must assimilate the case of those mentally alienated or disabled before being placed under judicial injunction, surely in the hypothesis they are adults. Thusly, prior to the placement under injunction, they would be considered as having full exercise capacity and, therefore, presumed to have discernment. Yet, undoubtedly, the respective illness naturally affects discernment and, hence, eventual juridical acts concluded by them could be dissolved for failure to fulfill this condition regarding consent. In such cases it is possible for lucidity periods to appear. Should the act be conclude during a period of lucidity, the cause for relative nullity hereunder does no longer exist[15]. The mutual is not valid, to the point that a juridical act concluded by someone placed under injunction is sanctioned by relative nullity even if, upon conclusion, the person into matter would have had discernment (art. 172 Civ.C.), except, of course, for acts which the person under injunction could conclude by themselves (an aspect which further underscores the difference between discernment and capacity)[16].

This situation is also taken into account by the New Civil Code. As per art. 1205 align. 2, Civ.C., "the contract concluded by a person that is ulteriorly placed under injunction may be annulled if, upon conclusion of the act, the causes for placement under injunction existed and were fairly known".

This disposition will generate controversy when applied in practice, as the reason it was adopted, given the way it was formulated, is not clear. A grammarly interpretation of the text could lead to the conclusion that nullity *could* be sanctioned only if two conditions are cumulatively fulfilled: the person ulteriorly placed under injunction to have been lacking discernment upon conclusion of the act, while the causes for injunction already existed and, also, were fairly known. But this second condition appears to be excessive and har to accept. In this interpretation, the second condition is far from the reason for which it has been provided that lack of discernment triggers voidness of the juridical act, thus contradicting the expressly provided requirement (in the previous article – no. 1204), according to which consent must be knowingly expressed. There is no base for deciding to apply a sanction depending on an ulterior placement under injunction of the party lacking discernment (anyway, the cause for nullity is simultaneous to the conclusion of the juridical act, and it cannot be assessed in view of ulterior circumstances). Moreso, we cannot accept the fact that there are more conditions for annulment of the act for lack of discernment by the one ulteriorly placed under injunction, than by the one which has not been placed under injunction, even more so if the measure of placing under injunction is meant to protect the respective person[17].

The reason for which lack of discernment triggers the annulment of the contract is exactly that, in such case, the consent cannot be knowingly expressed. And, in the hypothesis hereunder, whether upon conclusion of the act, due to causes which ulteriorly lead to placement under injunction, the person lacked discernment, the requirement for the consent to be knowingly expressed is not fulfilled. And that does not depend on whether the respective causes were known or not. Knowledge of the causes which determined lack of discernment has no relevance to the validity of consent. Notwithstanding the fact that lack of discernment or its causes were known ("fairly") or not, consent was not validly expressed. The knowledge of the causes for placement under injunction could raise the issue of immoral purpose, but has no relevance to lack of discernment.

A second possible interpretation of the text hereunder would lead to the conclusion that the legislator only wanted to state the possibility of annulment of the act in the hypothesis in which, upon its conclusion, the causes that ulteriorly lead to injunction existed and were known, without representing conditions for ruling nullity. However this interpretation has two main flaws. Thusly, it does not take into account the way the text was written, failing to observe the reference to knowledge of the causes for injuction. Moreover, in this interpretation, the legal disposition has no effect. The possibility for declaring nullity given the circumstances (implying however an

[13] I. Reghini, S. Diaconescu, P. Vasilescu, op.cit., page 487.
[14] G. Boroi, C. Anghelescu, op. cit., page 139; I. Reghini, S. Diaconescu, P. Vasilescu, op.cit., page 488.
[15] See Ch. Larroumet, *Droit civil. Les obligations. Le contrat*, 2003, page 286.
[16] E. Chelaru, op. cit., page 116.
[17] G. Boroi, C. Anghelescu, op. cit., page 140.

assessment of the extent to which, upon conclusion of the act, discernment had been affected) exists and there is no need for a norm to expressly provide it. Namely, in this interpretation, the legal disposition would be useless, which contradicts a traditional interpretation rule (taken from the matter of the juridical act) – *actus interpretandus est potius ut valeat quam ut pereat*.

For the same reasons we can neither agree with the opinion according to which the disposition only seeks to emphasize that, in the hypothesis thereunder, annulment can not be declared for lack of exercise capacity, but only for lack of discernment[18].

Finally, in one last interpretation it could be deemed that the text institutes an assumption of lack of discernment for the hypothesis in which, upon conclusion of contract, the causes ulteriorly leading to injunction existed and were known. Naturally we can assume that the reasons which determined the measure of placement under injunction, especially lack of discernment, existed upon conclusion of the act[19]. This interpretation has the advantage of finding, for the reference to the ulterior injunction and to the knowledge of its causes, a justification which would not contradict the validity requirements for consent. It would also give use to the disposition hereunder, by acknowledging its effect of establishing the assumption of lack of discernment[20].

As for the phrase "fairly known", it presumes the notoriety of existing causes which ulteriorly lead to placement under injunction. We must observe that there is no provision of a requirement for the cocontractor to have knowledge of those causes (case in which it would trigger the consequences of immoral cause or of injury). The condition of notoriety is meant to insure avoiding difficulties in establishing the moment when the causes which ulteriorly lead to injunction appeared.

Lack of discernment upon conclusion of a juridical act triggers the sanction of relative nullity of the respective act, as provided by both art. 1.205 Civ.C., with direct reference to lack of discernment, and art. 1.238 Civ.C., viewing lack of cause[21].

3. Conclusions

As we have seen, the existence of discernment constitutes a validity requirement for consent and a premise for the existence of cause, discernment being, hence, essential for the forming of juridical will. At the same time, discernment represents a premise for capacity, but is not to be confounded with the latter.

Therefore the necessity for the analysis brought forward by the present study, with the purpose of clarifying the requirement under matter, especially by a correct understanding of the legal dispositions referring to it.

Naturally, this analysis does not exhaustively cover the subject and it could be completed by, for example, an exam on jurisprudence in the matter, which would reveal new elements, at least regarding the difficulties of proving lack of discernment.

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[18] G. Boroi, C. Anghelescu, op. cit., page 140.

[19] E. Chelaru, op.cit. page 116.

[20] E.J. Prediger, op.cit., page 108; Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, The New Civil Code: comment by articles, Bucharest, C.H. Beck Publishing House, 2012, page 1264.

[21] See G. Boroi,C. Anghelescu *op. cit.*, page 173. For practice, see, e.g.: C.A. Braşov, s. civ., dec. no. 374/R/1995, in C.P.J. 1994-1998, page 51 (*lack of discernment upon drawing testament*); C.A. Ploieşti, s. civ., dec. no. 477/1998, in B.J., semester I 1998, page 181 (*lack of discernment upon conclusion of a sell-buy contract with a care clause*); C.A. Bucharest, s. a III-a civ., dec. no. 2079/1999, in C.P.J.C. 1999, page 80 (*lack of discernement upon conclusion of a sell-buy contract*) and dec. no. 3247/1999, in C.P.J.C. 1999, page 64 (*lack of discernment upon conclusion of an exchange contract*); C.A. Iaşi, s. civ., dec. no. 193 of November 3rd 2000, in M. Gaiţă, M.-M. Pivniceru, *Jurisprudence of the Iasi Appellate Court in Civil Matter of Year 2000*, Lumina Lex Publishing House, Bucharest, 2001, pages 47-48; C.A. Ploieşti, s. civ., dec. no. 282 of February 1st 1999, in *Ploieşti Appellate Court, Jurisprudence Bulletin, Judicial Practice Summary, semester I, 1999*, Lumina Lex Publishing House, Bucharest, 2000, pages 212-215; C.A. Ploieşti, s. civ., dec. no. 3454 of October 22nd 1999, in I.-N. Fava, M.-L. Belu-Magdo, E. Negulescu, *Jurisprudence Bulletin, Ploiesti Appellate Court Judicial Practice Summary, semester II, 1999*, Lumina Lex Publishing House, Bucharest, 2001, pages 139-142.

CLASSIFIED DOCUMENTS IN CIVIL LAWSUITS

Enikő DAMASCHIN*

Abstract

The purpose of this study is to approach classified documents from a very specific perspective: that of using them as evidence during a civil lawsuit. In this sense, we provide the definition of classified documents, give details about the way in which classification operations are performed, as well as the conditions that have to be met so that these documents could become declassified in case parties wanted to have access to the documents submitted to the case file. Moreover, we deal with the issue of submitting classified documents to court, with the way in which these documents could be accessed, considering the right to a fair trial.

Keywords: *classified documents, civil lawsuit, the right to have access to evidence, the right to have access to court*

1. Introduction*

With Book II, Chapter II, Section 2, Subsection 3 of the Romanian Civil Procedure Code (RCPC)[1], the legislator regulated the legal status of documents in terms of their use as evidence in civil proceedings. We recall in this connection that, according to the provisions listed in art. 250 RCPC, the burden of proof as far as a legal document or fact is concerned lies with the documents, witnesses, presumptions, testimony of one of the parties, given on its own initiative or obtained either by interrogation or expertise, the material objects, the investigation made or any other means provided for by law.

A document is defined by the provisions of art. 265 RCPC as any piece of writing or other record that contains information about a legal document or fact, regardless of its physical support or the preservation and storage means.

In a civil lawsuit, parties may use both authentic documents and documents under private signature, as well as electronic documents, for each of these categories being necessary to comply with the terms expressly provided for by the legislator. The documents can be electronically processed, and, in this situation, when the details of a legal document are electronically processed, the evidentiary instrument of this document is the document that reproduces these details, provided that it is comprehensible and incorporates sufficiently serious guarantees so that its contents, as well as the identity of the person who has produced it, could prove to be of good faith[2].

Regarding the proposal and management of documentary evidence, based on the provisions of art. 249 RCPC, according to which the party who makes a claim during the civil lawsuit must prove it, except for the cases stipulated by law, parties are required to submit all the documents they intend to use in order to resolve the dispute taken to court once they file the petition form, the statement of defense or the counterclaim, as appropriate, under penalty of preclusion.

Nevertheless, there are situations where parties, to the extent they are not state authorities or public institutions, are not in possession of the documents that are necessary to resolve the disputes. In this case, the provisions of art. 298 RCPC are to be followed, whereby, at the request of a party or ex officio, the court shall order that the given documents are to be made available by the public authorities or institutions holding them. The public authority or institution holding the documents has the right to refuse submitting the document when national defense, public security or diplomatic relations are at stake.

In other words, the public authority or institution holding the document could, for instance, refuse to send the document when it is classified, this right of refusal not being unconditional. Under these circumstances, we have to ask ourselves whether the right to a fair trial, provided for by art. 6 RCPC, as well as the principle of equality of arms, regulated by art. 8 RCPC, are observed in civil lawsuits.

In order to understand the legal status of this category of documents, we need to define this type of document. Additionally, by briefly analyzing how the information becomes classified or not, a more comprehensive perspective on this topic will be provided.

According to art. 15 of Law no. 182 of 2002 on the Protection of Classified Information[3], classified information is information, data, documents of interest to national security[4], which, due to the levels of

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[1] Law no. 134 of July 1, 2010 regarding the Civil Procedure Code, republished in the Official Gazette of Romania no. 247 of April 10, 2015.

[2] Boroi Gabriel, Stancu Mirela – *Drept procesual civil* (Civil Procedural Law), Hamangiu Publishing House, 2015, p.438.

[3] Law no. 182 of 2002 on the protection of classified information, as amended, was published in the Official Gazette of Romania no. 248 of April 12, 2002.

[4] According to art. 1 of Law no. 51/1991 on the national security of Romania, republished in the Official Gazette of Romania no. 190 of March 18, 2014, Romania's national security means the state of legality, social, economic and political stability and balance, necessary for the

importance and consequences that would occur as a result of unauthorized disclosure or dissemination, shall be protected[5].

The categories of classification to which classified information may belong are state secrets and restricted secrets. The information classified as state secret comprises that information concerning national security, which, if disclosed, could compromise national security and defense, whereas the information classified as restricted secret comprises information which, if disclosed, is likely to cause harm to a legal entity of public or private law. Also, within the class of information classified as state secret information, information can be divided into special classification levels, according to the damage that might occur through disclosure: NATO top secret information, NATO secret information and NATO confidential information.

An important aspect is the fact that, in principle, the two classes of classified information are governed by different regulations: the legal status of the class of information classified as state secret is provided for by Government Decision no. 585 of 2002[6], whereas the restricted secret information is protected by the provisions of Government Decision no. 781 of 2002[7]. We used the phrase 'in principle' to refer to the legal regime to be applied to the two classes of classification because, within certain limits, the provisions of Government Decision no. 585/2002 are also to be observed in order to protect restricted classified information[8].

We would like to point out that classified information should not be confused with trade secrets, the reason for restricting access to classified information pertaining to the protection of information related to national security and defense and not to the protection of certain secrets in relevant industrial areas, which has to do with the freedom of trade and industry, as it is enshrined in the provisions of art. 135 para. (2) a) of the Constitution of Romania[9].

In this context, it might prove useful to specify that trade secret[10] is defined as information which, wholly or partly, is not generally known or easily accessible to people dealing usually with this kind of information and which acquires commercial value because of the fact that it is secret, for which the legitimate holder took reasonable steps under the circumstances, to be kept under secrecy; trade secret protection operates as long as the previously mentioned conditions are cumulatively met[11].

Romanian national state to exist and develop as a sovereign, unitary, independent, indivisible state, to maintain the rule of law, and necessary for the Romanian citizens to unrestrainedly exercise their rights, freedoms and fundamental duties, according to democratic principles and norms enshrined in the Constitution of Romania.

[5] According to art. 17 of Law no. 182/2002, "The category of state secret information comprises information representing or relating to: a) the national defense system and its basic elements, military operations, manufacturing technologies, armament and combat characteristics used exclusively within the national defense system elements; b) plans and military devices, personnel and missions of the forces engaged; c) the state cipher and other encrypting elements established by the competent public authorities and the activities related to their implementation and use; d) the organization of the protection and defense systems for the objectives, sectors, as well as the special and military computer networks, including their security mechanisms; e) data, schemes and programs relating to communication systems, as well as the special and military computer networks, including their security mechanisms; f) the intelligence activity carried out by public authorities established by law for national defense and security; g) means, methods, techniques and equipment, as well as the specific information sources used by public authorities that carry out intelligence activities; h) maps, topographical plans, thermograms and air flight records performed at scales larger than 1: 20,000, which exhibit the elements of content or the objectives classified as state secrets. i) studies, geological surveys and gravimetric analysis with density higher than one point per square kilometer, which assess national reserves of radioactive, disperse, precious and rare metals and ores, as well as data and information related to the material reserves that are the competence of the National Administration of State Reserves; j) systems and plans to supply electricity, heat, water and other utilities necessary for the operation of the objectives classified as state secrets; k) scientific activities, technological and economic activities and investments related to national security or national defense or which have special importance for the economic, technical and scientific interests of Romania; l) scientific research in nuclear technologies, besides the fundamental ones, as well as the programs for the protection and security of the nuclear materials and installations; m) issuing, printing banknotes and minting coins, the mockups of the monetary issues of National Bank of Romania and security features of banknotes and coins for detecting counterfeits, not for advertising, as well as printing securities such as government securities, treasury and government bonds; n) external relations and activities of the Romanian state, which by law are not meant for publicity, as well as intelligence belonging to other States or international organizations, to which, through treaties or international agreements, the Romanian government has committed itself to protect.".

[6] Government Decision no. 585 of June 13, 2002 approving National Standards for Protection of Classified Information in Romania, was published in the Official Gazette of Romania no. 485 of July 5, 2002.

[7] Government Decision no. 781/2002 for the Protection of Restricted Information was published in the Official Gazette of Romania no. 575 of August 5, 2002.

[8] According to art. 1 of Government Decision no. 781/2002 "The national standards for the protection of classified information in Romania, approved by Government Decision no. 585/2002 shall apply accordingly to the restricted classified information regarding:

a) classification, declassification and minimum protection measures; b) the general rules of evidence, preparation, storage, processing, copying, handling, transport, transfer and destruction; c) the obligations and responsibilities of the heads of public authorities and institutions, business entities, as well as other legal entities; d) the access of foreign citizens, of Romanian citizens who have another citizenship and of stateless persons to classified information and to places where activities unfold, objects are exposed and activities are performed related to this type of information; e) control over safeguards.".

[9] The Constitutionof Romania of November 21, 1991, republished, was published in the Official Gazette of Romania no. 767 of October 31, 2003.

[10] To analyze the concept of "trade secret", see Răzvan Dincă, *Protecția secretului comercial în dreptul privat* (Trade Secret Protection in Private Law), Volume 10, Universul Juridic Publishing House, 2009.

[11] See Law no. 11/1991 regarding unfair competition, published in the Official Gazette of Romania, no. 24 of January 30, 1991, as amended and supplemented.

2. Classification and declassification of documents[12]

When labeling a piece of information as classified, the originator must take into account a number of objective and subjective criteria resulting from the way the legislator intended to regulate this area. In this regard, all authorities / institutions that draft or work with classified information are obliged to draw up guidelines for classification on which proper and uniform classification could be carried out.

Besides the previously mentioned guidelines, public authorities and institutions are obliged to draw up their own lists comprising the categories of state secret information in their fields, lists that are approved and updated by Government decision. Moreover, the units holding restricted secret information are required to draw up lists comprising these categories of information, lists which shall contain information relating to that unit's activity and which, while not constituting state secrets, within the meaning of the law, should be only known by the persons who need it to perform their official duties.

In this respect, for instance, when drafting a document, the originator is obliged to consult the guidelines and the lists of state secret information, or the list of restricted secret information, respectively, in order to assign the appropriate class and level of secrecy to the document, as these are the tools which basically provide objective criteria for the originator to classify or not the information included in that document.

Nevertheless, the originator might draw up a document containing data and information from different classes of classification, or data and information from the same class of secrecy but with different classification levels, or data and information taken from both classified and unclassified documents. Usually, if the document reproduces information belonging to different classes of secrecy, the resulting document will bear the highest level of secrecy. But, at the same time, without violating any legal provision in force, in this situation, classification may also be performed considering the content criterion, which is subjective. Thus, if the information is not reproduced exactly, but it is processed or partially reproduced, the resulting information may or may not be classified, according to its actual content. The originator is the one who assesses the features to be assigned to the document, as the legislator allows him/her to assign the appropriate level of secrecy according to the content of that document.

Consequently, in practice the following situations may arise:

a) the originator[13] consults the classification guidelines and the lists of classified information, he/she finds that the information contained in the drafted document falls within one of the categories included in the list, he/she considers that it is mandatory to protect information due to its content and he/she assigns the document a class and a level of secrecy;
b) the originator consults the guidelines and the lists of classified information, he/she finds that the information contained in the drafted document falls within one of the categories included in the lists, however, he/she considers that, by referring to the content of the document, there is no need to protect it and no level of secrecy is assigned to that document;
c) the originator consults the guidelines and the lists of classified information, he/she finds that the information contained in the drafted document doesn't fall within any of the categories mentioned in the lists of classified information, but in relation to its content, it is mandatory to protect information, and thus that document is submitted for classification.

Another aspect should be outlined here: if the document has several annexes, they will be classified or not, depending on their content, but as long as the document will be treated as a whole, annexes cannot be separated in terms of their content and the document will benefit from protection measures relating to the annex / document bearing the highest level of secrecy. It is also necessary to mention in this context that each originator is required to establish the periods of classification, depending on the importance of information and the consequences that might arise in case of unauthorized disclosure or dissemination.

As far as declassifying information is concerned, according to provisions in art. 20 of Government Decision no. 585/2002, this operation is authorized when the classification period has expired, disclosure shall not endanger national security, defense, public order or the interests of public or private persons holding the information or the classified character of the respective information and when that information

[12] For more details see *Chapter II - Classification and declassification of information. Minimum safeguards specific for secrecy classes and levels*, in Government Decision no. 585/2002.

[13] According to art. 19 of Law no. 182/2002, "The individuals occupying one of the following offices are empowered to assign documents one of the classification levels, during their drafting: a) for NATO top secret information: 1. the President of Romania; 2. the President of the Senate and the President of the Chamber of Deputies; 3. the members of the Supreme Council of National Defense; 4. the Prime Minister; 5. Government members and the Secretary General of the Government; 6. the Governor of the National Bank of Romania; 7. directors of the national intelligence services; 8. the Director of the Protection and Guard Service; 9. the Director of the Special Telecommunications Service; 10. the Secretary General of the Senate and the Secretary General of the Chamber of Deputies; 11. the President of the National Institute of Statistics; 12. the Director of the National Administration of State Reserves; 13. other authorities empowered by the President or the Prime Minister; b) for NATO secret information – those empowered referred to in subparagraph a), as well as officials with the rank of secretary of state, according to their material competences; c) NATO confidential - those empowered referred to in subparagraphs a) and b), as well as senior officials with the rank of subsecretary of state, secretary general or director general, according to their material competences."

was classified by a person who was not empowered by law.

Declassification can be done by the originators, who must obtain the prior approval of institutions that coordinate and control the safeguards for the protection of classified information, according to their material competences. Thus, it is inferred that the originator has the option to declassify information whenever he/she considers that disclosure or dissemination would not cause damage to national security, national defense, public order or the interests of public or private persons holding the information.

3. Using classified documents in civil lawsuits

As shown in the first section, the parties have the duty to submit all the documents they intend to use in order to resolve the dispute, and, in case the documents are held by public authorities or institutions, the court may order the submission of documents in court, if it considers this piece of evidence to be admissible and useful.

Insofar as the document concerns national defense, the authority may refuse to submit the document. In this context, one word of caution is necessary: essentially, based on the analysis of how the legislator defined classified information, making express reference to national security, it follows that the documents relating to national defense are usually labeled as classified. Under these circumstances, by systematically analyzing legal reference texts, we find that by means of the final thesis statement in paragraph (2) of art. 298 CPC reference is made to art. 252 CPC, according to which the substantive provisions contained in classified documents can be proven and consulted only as provided for by law.

Given these arguments, we consider that only the label 'classified' assigned to a document may not constitute a reason *per se* for refusing to submit the respective document to court, while courts have not only the right of access to classified information but also powers to control the overstatement or understatement of the secrecy level and the duration for which they were classified. Additionally, one has to underline the fact that, in order to achieve this purpose, the phrase "*those related to national defense and security*", contained in art. 5 para. (3) of Law no. 554/2004[14], was declared unconstitutional, contrary to the provisions of art. 126 para. (6) of the Constitution of Romania, as on the basis of this phrase the administrative acts related to national defense and security[15] could circumvent the judicial review of the contentious administrative court.

Thus, we consider that the provisions of art. 298 in relation to art. 252 CPC are derogatory with respect to the need-to-know principle, whose fulfillment is checked only by the originator, who is held liable for unauthorized disclosure or dissemination. Therefore, public institutions or authorities holding the document may not refuse to submit the classified document at the request of the court only by invoking its classified nature. On the other hand, we consider that the submission of such a document may be refused to the extent that such refusal is duly justified (for instance, refusal to submit to the administrative court documents that formed the basis for issuing an adverse opinion for some individuals to enter the national territory, motivated not only by their classified nature, but also by using reference documents by the authorities with jurisdiction in criminal matters).

As for the way courts deal with classified information, this activity is regulated by the provisions of the decision of the Superior Council of Magistracy no. 140 of February 6, 2014 approving the Regulation on the access of judges, prosecutors and assistant magistrates of the High Court of Cassation and Justice to information classified as state secrets and restricted secrets[16]. At the same time, we would like to emphasize the fact that this act was issued due to changes in the provisions of art. 7, para. (4) of Law no. 182/2002, in terms of providing access to classified information for all judges, provided they have been appointed and taken the oath. Prior to this legislative change, only certain judges had access to classified information, an aspect that has aroused lively controversies especially in terms of ensuring the random distribution of cases.

According to art. 11 of the decision of the Superior Council of Magistracy no. 140/2014, classified documents shall be kept in separate volumes, which are not publicly available. Classified documents may be made available to court staff or, where appropriate, to prosecutors, parties, their defenders, experts, interpreters, according to the procedures stipulated by Law no. 182/2002 and Government Decision no. 585/2002, Government Decision no. 781/2002, respectively, as appropriate, and only if they have security clearance for access to classified information or access authorization corresponding to the class or the secrecy level of each of the given

[14] According to art. 5 para. (3) of Law no. 554/2004 "administrative acts issued to enforce the state of war, the state of siege or of emergency, as well as those related to national defense and security or those issued to restore law and order, to eliminate the consequences of natural disasters, epidemics and epizooties, can be contested only for abuse of power." Law no. 554 of December 2, 2004, on the administrative contentious, with amendments and supplements, was published in the Official Gazette of Romania no. 1154 of December 7, 2004.

[15] In this respect, see the Constitutional Court Decision no. 302 of March 7, 2011 regarding the exception of unconstitutionality of the provisions in art. 7 para. (4), art. 17 (f), art. 20 and art. 28 para. (1) of Law no. 182/2002 on the protection of classified information, as well as art. 5 para. (3) of Law no. 554/2004 on administrative contentious, published in the Official Gazette of Romania no. 316, of May 9, 2011.

[16] Available at http://www.csm1909.ro/csm/linkuri/07_02_2014__65245_ro.PDF accessed 17/02/2017. Constitutional Court Decision no. 1120 of October 16, 2008 regarding the exception of unconstitutionality of art. 2 para. (2) art. 7 para. (1), Art. 25 para. (1) and Art. 34 lit. j) of the Law no. 182/2002 on the protection of classified information and art. 3 and art. 13 of Law no. 51/1991 on the national security of Romania, published in the Official Gazette no. 798 of November 27, 2008.

documents and provided they give arguments for the need-to-know principle.

Analyzing the provisions mentioned, we have demonstrated that they cannot be fully enforced and that they are ineffective in terms of parties' access to classified documents in the file, being inconsistent with the higher level rules of law included in the Government Decision no. 585/2002. Thus, one could notice that the authorization of access to classified information is defined as a document issued by the competent institutions, the head of the legal person holding such information, which confirms that***, by performing professional duties***, the holder can have access to state secret information of a certain level of secrecy, complying with the need-to-know principle; additionally, the security certificate is defined as a document issued to the person ***with direct responsibilities in the protection of classified information***, to the security officer or to the employee belonging to the security structure, who proves verification and accreditation to hold, to access and to work with classified information of a certain level of secrecy. Or, obviously, one party in a lawsuit cannot obtain authorization to access classified information / certificate security, as these authorization documents are to be issued only when they are necessary to carry out job duties.

In such circumstances, we consider that, since the resolution of a dispute involves examining classified documents, to ensure the right to a fair trial, first it is necessary to verify the conditions under which reference documents might be declassified. In this regard, the court assigned to resolve the dispute should notify the originator to consider the opportunity of declassifying reference documents, as such a procedure is possible in terms of art. 20 and art. 21 of the Government Decision no. 585/2002.

Moreover, the issuing authority is able to make and communicate declassified partial extracts, from the original document, as such a measure is expressly provided for by art. 298 CPC. In case the documents may not be declassifed, the dispute will be resolved appropriately, as these documents are kept in separate volumes, access being provided only to those who hold proper authorization and who will justify the need to know the reference documents.

It is appropriate to mention in this context that, over time, the parties have invoked the constitutional challenge of art of the provisions on access to classified information, arguing that the contested legal texts infringe the right to a fair trial under one, impartial and equal justice for all. Nevertheless, the Romanian Constitutional Court was constant as far as its case law is concerned and dismissed the constitutional challenge of art as unfounded, stating that it is natural that Law no. 182/2002 contain specific rules on certain persons' access to such information, that is persons who are parties in a lawsuit, as well as their representatives, on condition that the security clearance certificate be obtained, for which it is necessary that the requirements and the procedure, provided for by the same law, be complied with beforehand. Since the legal provisions under criticism do not have the effect of effectively and absolutely blocking access to certain information, but, on the contrary, they make it conditional upon taking certain procedural steps, stages justified by the importance of such information, one cannot advocate the infrigement of the right to a fair trial or of the principle that justice shall be one, impartial, and equal for all. On the other hand, the Constitution of Romanian itself provides for, according to art. 53 para. (1), the possibility to restrict the exercise of certain rights - including guarantees related to a fair trial - for reasons of safeguarding national security[17].

3. Conclusions

In civil lawsuits documents occupy an important place in terms of evidence and ensuring the parties' access to the case file is a key issue when respecting the right to a fair trial and exercising procedural rights equally without discrimination. It is to be noted, however, that there are situations where access to certain documents cannot be provided, or at least cannot be provided to all persons involved in the settlement of the dispute, as some of them do not have the effective opportunity to obtain the authorization documents required for consulting the documents.

We appreciate, however, that, in such a situation, the possibility of declassifying the documents to ensure access for all parties to all parts of the file should be thoroughly analyzed for each particular case. But in the event that such an operation is not possible, the dispute shall be settled by reference to all the documents submitted, even if not all the parties have access to them. We do not consider, however, that the existence of an ongoing lawsuit might constitute a pertinent reason to declassify a document as, usually, in a civil lawsuit two or more private interests are in opposition, because documents are assigned a classification level to protect certain general interests as it is widely accepted that individual rights must be exercised consistent with collective rights.

Finally, the restrictions related to the access to information have always been accepted, even in the practice of the European Court of Human Rights, on condition that they be provided for by law, have a legitimate aim and be necessary in a democratic society.

[17] Constitutional Court Decision no. 1120 of October 16, 2008 regarding the constitutional challenge of art for provisions in art. 2 para. (2), art. 7 para. (1), art. 25 para. (1) and art. 34 lit. j) of the Law no. 182/2002 on the protection of classified information, as well as art. 3 and art. 13 of Law no. 51/1991 on the national security of Romania, published in the Official Gazette of Romania no. 798 of November 27, 2008.

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- Law no. 51/1991 on the national security of Romania, republished in the Official Gazette of Romania no. 190 of March 18, 2014;
- Government Decision no. 585 of June 13, 2002 approving National Standards on the protection of classified information in Romania was published in the Official Gazette of Romania no. 485 of July 5, 2002;
- Government Decision no. 781/2002 for the protection of restricted information was published in the Official Gazette of Romania no. 575 of August 5, 2002;
- Law no. 11/1991 regarding unfair competition, published in the Official Gazette of Romania no. 24 of January 30, 1991, as amended and supplemented;
- Constitutional Court Decision no. 302 of 1 March 2011 regarding the constitutional challenge of art of the provisions in art. 7 para. (4), art. 17 (f), art. 20 and art. 28 para. (1) of Law no. 182/2002 on the protection of classified information and art. 5 para. (3) of the Law no. 554/2004 on contentious administrative published in the Official Gazette of Romania no. 316 of May 9, 2011;
- Constitutional Court Decision no. 1120 of October 16, 2008 regarding the constitutional challenge of art of the provisions in of art. 2 para. (2), art. 7 para. (1), art. 25 para. (1) and art. 34 (j) of the Law no. 182/2002 on the protection of classified information and art. 3 and art. 13 of Law no. 51/1991 on the national security of Romania, published in the Official Gazette of Romania no. 798 of November 27, 2008;
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PROFESSIONAL LIABILITY. PARTICULARITIES OF CIVIL LIABILITY REGARDING THE LIBERAL PROFESSIONS

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Abstract

With the evolution and modernization of the liberal professions, both practitioners and clients are also aware of their rights and obligations, the risks involved in exercising professions that depend on the accuracy of information, the stability of decisions, and the observance of deadlines. The present study looks at the appearance of the particularities of the civil liability in the liberal professions existing in Romania in relation to the legal obligation to conclude an insurance policy for professional liability, as well as the situations and conditions in which it produces its effects.

Keywords: *liberal profession, liability, insurance, particularities, obligation*

1. Introduction

The term liberal profession is found in many normative acts. According to Law no. 200/2004 on the recognition of diplomas and professional qualifications for regulated professions in Romania[1], regulated professional activity represents the activity for which the access or exercise in Romania is directly or indirectly conditioned by the possession of a document attesting the level of professional training.

Occupational regulated professional activities are considered to be professional activities if the use of such a title is reserved only to holders of documents attesting to the level of professional training. The notion of liberal profession is also found in the Fiscal Code, being defined as the occupation exercised on its own behalf by natural persons, according to the special normative acts that regulate the organization and the exercise of the respective profession. Exercising an independent activity involves doing it on its own and pursuing a lucrative purpose. However, even if exercised on its own account, the liberal profession depends on a professional body and is distinctly regulated by a normative act. Members of the liberal professions are constituted as distinct professional bodies based on their own statute, adopted under the law and by virtue of which they have the right to practice and to be accountable for the professional act they perform.

Professional liability occurs as a result of the activity of protecting and achieving a public interest, as well as of a private interest, in exchange for a payment called honor. Two of the most representative legal professions are those of a notary public and a bailiff. These are specific to the profession of lawyer in that the act of the public notary and of the bailiff is an act of public authority.

2. Content

2.1. The Notary's Responsibility

The conditions for exercising the profession of notary are provided by Law no. 36/1995 of the notaries public and of the notarial activity and in the Regulation for the implementation of Law no. 36/1995.

Notarial activity ensures legal and natural persons to establish non-litigious civil or commercial legal relationships, as well as the exercise of rights and the protection of interests, in accordance with the law[2]. The legislator regulated various types of legal liability of the notary public, each of which interfered with the gravity of the deviation from the legal norms. This will raise the question of the disciplinary, civil or criminal liability of the notary public according to the violated norm[3].

The public notary shall be liable to disciplinary action if it misappropriates its duties as to the legality of the legal relations it finds, the exercise of rights and the protection of the interests of legal persons requesting the conclusion of notarial acts. Disciplinary liability will also arise when the public notary carries out acts that affect the honor and prestige of the notary profession, facts that will impose a sanction proportional to the seriousness of the offense committed. The civil liability of the notary public will intervene in cases where, through his activity, the notary would cause damage to a natural or legal person because he violated some professional obligations by causing guilty liability in the form of bad faith, established by a final court decision. The most severe form of legal liability to which the public notary may be subjected is criminal liability.

From the point of view of the civil liability of the notary, this can be both contractual and tortuous.

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[1] Art. 2 of the Law no. 200/2004 on the recognition of diplomas and professional qualifications in Romania, published in M.Of. No. 500 of 3 June 2004.

[2] Art. 1 of the Law no. 36/1995 of the notaries public and the notarial activity.

[3] Ionut Alexandru Toader, Legal Responsibility of the Public Notary in National and European Context - Doctoral Thesis, Bucharest, 2016.

Regarding contractual civil liability, it intervenes under the conditions of art. 78 par. (2) of Law no. 36/1995, respectively, if a contract is concluded for a determined period between the latter and a natural or legal person, regarding the consultations given in the notarial legal field.

According to art. 72 of the Law no. 36/1995, the civic liability of the public notary may be engaged under civil law, for violation of his professional obligations, when he caused guilty, in the form of bad faith, an injury determined by a final court decision. Thus, the special law of public notaries has to be interpreted in correlation with the provisions of the Civil Code, since the special rule derogates from the general rule, but this is not capable of opposing the two normative acts.

Article 1258 of the Civil Code regulates a special form of liability of the notary who may be obliged to repair the damage in case of invalidity of the contract concluded in the authentic form[4].

In the event of the annulment or finding of the nullity of the contract concluded in the authentic form for a cause of nullity, the existence of which results from the contract itself, the injured party may require the public notary to pay compensation for the damages suffered, under the conditions of the tort liability for his own deed[5].

Article 1258 establishes a form of special responsibility for the personal act of a notary public, who is charged with the existence of a cause of nullity resulting from the content of the contract itself. The text of the law takes into account the situation of finding the nullity of a contract concluded in the authentic form and presupposes verification of the following conditions[6]:

- the cause of nullity results from the text of the contract itself. No liability can be assumed by the notary irrespective of the cause of nullity, but only for a cause of nullity in close connection with the notarial act of authentication of acts.
- there is damage;
- the law does not specify whether authentication is an ad validitatem requirement for the contract requirement or only an option of the contracting parties, so that the ubi lex non distinguit nec nos distinguere debemus rule will apply[7].

Moreover, in order for the patrimonial responsibility of the notary to be attracted, it is necessary to have a final decision stating the nullity of the legal act authenticated by the notary public[8].

Taking into account the principles of civil tort liability, the phrase "the cause of nullity of which the existence derives from the text of the contract itself" must be understood as a nullity imputable to the notary in the sense that, although he knew or ought to know that by concluding the contract Violates rules that may invalidate the contract, did not refuse to process the authentication procedure. Per a contrario, the notary can not be held liable if a contract is unenforceable for error, dollar, violence or injury, because it is impossible to censure such causes of nullity if he does not know them[9].

The special responsibility regulated by art. 1258 Civil Code is not a joint or subsidiary liability. The aggrieved party has the right to choose between to excoriate the Contractor or notary public. In the circumstances where the notary public benefits from civil liability insurance, the interested party will address with indemnity to the insurer, within the limits of the insured amount, being able to act on the contractor for possible injury differences not covered by the insurance policy[10].

Regarding the insurance, the public notary is obliged, prior to the commencement of the activity, under the sanction of non-issuance of the operating license, to conclude the insurance contract with the Public Notary Insurance House. During the exercise of the position, the notary is obliged to pay annually the price of the insurance policy established by the insurance contract. Failure to comply with this obligation results in the withdrawal of the operating license.

Specifically to this profession, as in the case of the bailiff, is the fact that the legislator imposed the establishment of an insurance house of the notary public through which the civil liability insurance for its members was to be carried out. Therefore, the Insurance House aims at ensuring the civil liability of the notary public for damages caused by notarial deeds and acts, except for the damages caused by intentional acts. The insured quality of the Notary Public Insurance Company is acquired before the public notary begins to carry out its activity, according to the law, by concluding the insurance contract and will become effective at the beginning of the activity[11]. The civil liability insurance of notaries in service is compulsory, the rights and obligations of each party being determined by the insurance contract and by Law no. 36/1995. According to art. 15 of the Statute of the Romanian Notary Public Insurance Company, the insured risk represents the damage caused by the public notaries, by fault, by notarial acts and legal acts. The civil liability insurance of the notary public guarantees the payment of the damage within the limit of the insured amount established by the contract concluded with the Insurance House.

[4] Gabriel Adrian Nasui, Medical malpractice. Malpractice of Liberal Professions, Ed. Universul Juridic, Bucharest 2016, p. 310.
[5] Art. 1258 Civil Code.
[6] Gabriel Adrian Nasui, Medical malpractice. Malpractice of Liberal Professions, Ed. Universul Juridic, Bucharest 2016, pp. 311.
[7] Cristina Zamsa, New Civil Code. Comment on articles, C.H. Beck, Bucuresti 2012, pp. 1317-1318.
[8] Gabriela Raducan in the New Civil Code. Comments, doctrine and jurisprudence, vol. II, Hamangiu, Bucharest 2012, pp. 561-562.
[9] Gabriela Raducan in the New Civil Code. Comments, doctrine and jurisprudence, vol. II, Hamangiu, Bucharest 2012, pp. 561-562.
[10] Titus Prescure, Roxana Matefi, Civil Law. General. People, Hamangiu , Bucharest 2012, p. 216.
[11] Adina Motica, Oana Elena Buzincu, Veronica Stan, Admission in notarial - grid tests and theoretical synthesis, Hamangiu, Bucharest 2016, p.34.

The insurance is valid from the beginning of the activity of the notary public till the termination of his / her quality, being operative both for the period when the notary is in the exercise of the function, and after this period, provided that the insured event occurred during the exercise of the position.

Failure to comply with the term for the subscription of the subscribed insurance premiums without the approval of the Insurance House in the course of the year results in the failure to pay compensation. The insurance contract is an enforceable title for the amount due for the insurance premium and the related penalties. Depending on the professional risk assessment sheet, the notary will determine the annual amount of the insurance premium, the insured amount, as well as the type of the insurance policy.

Insurance cover:

- damages caused by the public notary, by fault, by his own deeds or by his employees, in the exercise of his professional duties;
- damages caused by the public notary as a result of the loss, destruction or deterioration of the original documents;
- damage caused to the values entrusted to the warehouse, except for cases where its disappearance, destruction or loss is the result of a fortuitous case or force majeure.

The insurer does not pay damages for damages caused by the notary through his own deeds or employees when the event occurred:

- a case of force majeure;
- from the exclusive fault of the person harmed;
- from the exclusive guilt of a third person.

The insurer will pay the damages to the injured party, insofar as he has not been compensated by the insured.

The Insurance House may conclude reinsurance contracts with insurance companies, the conditions and premiums being determined by the reinsurance contract.

By concluding, liability is incumbent on all damages caused by the public notary, by fault, by his own deeds or by his employees, in the exercise of his professional duties. Therefore, the text establishes responsibility for the notary's own deed, but also a liability for the notary's employees. In both cases, the liability of the insurer is only incidental if the detrimental act has occurred in the "exercise of his professional duties". Civil liability operates in all cases where the notary public or his employees have acted "by fault".

2.2. Liability of the bailiff

The legal liability of bailiffs in Romania is regulated by Law no. 188/2000 on Judicial Bailiffs, the Regulation for the Application of this Law, the Statute of the National Union of Judicial Executives and the Judicial Exercise and the Code of Ethics of the Bailiff. These legal provisions regulate only two types of liability, namely: civil liability and disciplinary liability.

The normative acts indicated do not regulate plenum liability of bailiffs, but this is fully applicable in situations where a bailiff commits a criminal offense[12]. However, the three types of liability co-exist, not excluding each other, but their application is neither mandatory nor concomitant. There are situations in which a bailiff for the same deed can answer civil, criminal and disciplinary. As with other professions, the civil liability of the bailiff may be engaged under civil law, for causing damage by violating his professional obligations[13].

As regards professional insurance for civil liability of bailiffs, the legislator chose a solution similar to that of notaries public, ie an insurance house operating in a mutual system. Thus, according to art. 35 paragraph (1) of the Law no. 188/2000 within the National Union of Judicial Executives operates an insurance house for ensuring the civil liability of bailiffs with legal personality.

If the bailiff works in conjunction with other bailiffs, the liability is not solid, because regardless of the form of the activity, the personal attributions and the responsibility for the drawn up acts belong exclusively to the bailiff who has drafted them.

The conditions in which the civil liability of the bailiff can be undertaken are provided by art. 1357-1371 and art. 1381-1395 Civil Code.

Thus, it must be proved that the bailiff caused damage to one of the persons concerned in forced execution by violating a subjective right as a result of an unlawful act in the exercise of his profession. The damage can be both patrimonial and moral. The reparation of the damage occurs in its entirety, being compensated and for future damage if its production is unquestionable. Injury can only be the result of an illicit act, which means that by an action or inaction the rules of objective law are violated. Regarding the obligation of the bailiff in forced execution, we consider that this is a duty of diligence, not a result obligation. This also results unequivocally from the provisions of art. 627 par. (1) The Code of Civil Procedure, which stipulates that the executor is obliged to play an active role throughout the execution of the execution, stating, by all means permitted by law, for the full and speedy fulfillment of the obligation stipulated in the enforceable title, in compliance with the provisions of the law, the rights of parties and other interested parties. Therefore, the obligation of the bailiff is to carry out all the necessary steps to carry out forced execution.

The engagement of the civil liability of the bailiff presupposes not only the existence of an illicit deed and injury but also a causal relationship between the two. In order to answer civilly, it is necessary that

[12] Ioan Garbulet, The Acts of the Bailiff, Universul Juridic, Bucharest 2014, p. 97.
[13] Art. 45 par. (1) of Law no. 188/2000.

the wrongful act be attributable to the bailiff, so that he is guilty of commiting it.

Ensuring professional liability of bailiffs is mandatory, according to the law. The rights and obligations of the parties are established by statute and by contract. As in the case of notaries, and in relation to the liability of the bailiffs, the existence of an insurance house functioning in a mutual system is regulated. The Insurance Executor's Court is a body with legal personality, which includes all final, or trainees' bailiffs who work on the territory of Romania. The purpose of this structure is the compulsory insurance of the civil liability of the bailiff, for the damages caused to third parties by their own deeds or by their employees.

According to art. 24[14] of the Statute of the Insurance Company of the Judiciary Executors the insurance covers:

- damages caused by the bailiff by his own actions or by his employees, due to negligence, mistake or imprudence in the exercise of his professional duties;
- damages caused by the bailiff for the values entrusted to the depository, except for the cases where their disappearance, destruction or loss is the result of a fortuitous case or force majeure case;
- damages caused by the bailiff as a result of the loss, destruction or deterioration of the original documents given by the clients for execution, limited to the cost of their recovery.

Insurance does not cover[15]:

- damages caused by operations which are forbidden to the bailiff by the legal provisions or statutory and statutory provisions of the profession;
- the insured event that was intentionally produced by the insured person, his or her beneficiary or the beneficiary;
- damages due to mistaken drafting, exclusively due to the fault of the beneficiary;
- the part of the damage exceeding the maximum compensation limit, produced in the same year and the same insured event, regardless of the number of beneficiaries;
- prejudice to the insurer's exercise of other activities, including those permitted by law as compatible with the profession of bailiff.

The insured is obliged to notify the insurer of the insurance risk within 30 days of becoming aware of the existence of a claim for compensation. At the same time, he will inform the insurer of any claim or action brought by the lawyer to obtain damages and, in the meantime, will pass on documents, information, and litigation on time. If these obligations are not met, the insurer has the right to refuse to pay the indemnity, if for this reason he could not determine the cause of the insured event and the extent of the damage.

The rights of the indemnified persons will be exercised against those responsible for causing the damage. The insurer may be sued by the injured party within the limits of the obligations incumbent on him or may intervene in his own name in civil actions against the insured.

Compensation is established on the basis of a final court order, whereby the insured / insurer was bound, at the request of the injured party.

The insurer pays the indemnity to the injured party, insofar as he has not been compensated by the insured, indemnity that can not be tracked by the insured's creditors. Compensation is paid to the insured, if he proves that he has compensated the injured. The insurer has the right to offset the premiums due to him by the end of the calendar year, with any compensation due to the beneficiary or the insured. The indemnity established in the insurer's liability in relation to all the insured events occurring in the calendar year of insurance is made according to the Insurance Contract, regardless of the number of events, produced and notified to the insurer.

The maximum limit of indemnity for the calendar year of insurance refers to the insurer's liability for all amounts payable to a beneficiary or number of beneficiaries in respect of all insured events as a result of the insured's professional misconduct from that year of insurance. If the damage caused is greater, the insurer is not responsible for covering the difference. In this case, the bailiff remains solely responsible to the injured person. If the fault occurs through several successive acts, the fault is deemed to have occurred at the time of the first act or guilty omission

3. Conclusions

Characteristic of notaries and bailiffs is the existence of a mutual insurance system, each professional body having its own insurance house. The mutual insurance system can be complemented by the classical civil liability insurance system. Thus, for a greater coverage of the insured risk, over the limit of the mutual system, an additional insurance policy can be concluded with an insurance company.Creating a system for defamation of the person injured by the poor performance of the professional duties by the notary or the bailiff is extremely favorable as it provides a quick and effective way of compensation.

[14] See http://www.executori.ro/Organizare/docs/STATUTUL%20CASEI%20DE%20ASIGURARI%20A%20EXECUTORILOR.pdf.
[15] Art. 25 of the Statute of the Court of Assurance for Judicial Executives.

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MEDICAL MALPRACTICE. THE MALPRACTICE INSURANCE

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Abstract

Increasingly, complaints about medical malpractice ocure extreme situations such as the death of the person or the occurrence of irreparable injuries. Professional misconduct in the exercise of the medical or medical-pharmaceutical act generating harm to the patient implies the civil liability of medical personnel and the provider of medical, sanitary and pharmaceutical products and services. Law no. 95/2006 on the health reform stipulates the obligation of the medical staff to conclude a malpractice insurance for the cases of professional civil liability for the damages created by the medical act, the indemnities being the responsibility of the insurer, within the limits of the liability established by the insurance policy.

Keywords: *medical, malpraxis, insurance, liability, sanction*

1. Introduction

From the etymological point of view, the word malpraxis defines an inappropriate practice, being an internationalized, self-governing word, used only in the medical field, and currently spreading to other professions such as lawyer, notary public, Bailiff, etc. Also included in the explanatory dictionary of the Romanian language, it defines malpractice as an "improper or negligent treatment applied by a doctor to a patient, which causes him harm of any nature in relation to the degree of impairment of physical and mental capacity." In the Romanian legal system, any person has the duty to observe the rules of conduct which the law or custom of the place requires, and not to interfere with his actions or inactions, the rights or legitimate interests of others. The one who, having discernment violates this duty, is liable for all the damages caused, being obliged to repair them fully. At the same time, the person who contracts obligations is held to execute them, otherwise being responsible for the damage caused to the other party, being obliged to repair it. Specific malpractice is even the existence of rules of conduct imposed by the profession and the professional body, which establish competences and attributions in the field, rules that are violated by the professional, attracting his responsibility.

Professional misconduct in the exercise of the medical or medical-pharmaceutical act generates harm to the patient, involving the responsibility of the doctor or the medical staff. Like civil liability, the malpractice also seeks to repair the damage caused by committing an illicit act in a pre-existing legal relationship between a professional and a patient. Thus, medical malpractice is interested in determining who is to respond to the action or inaction, establishing the extent of the damage created and the limits to which the responsible person can answer.

Title XVI of Law no. 95/2006 on Health Reform establishes the extent of the civil liability of medical personnel, as well as the procedure for determining the cases of professional liability. At the same time, the same normative act imposes the duty of those who grant medical assistance, to conclude a malpractice insurance for the cases of professional liability for damages caused by the medical act.

2. Medical practice

The legal notion of medical malpractice is defined by art. 653 par. (1) letter b) of the Law no. 95/2006 on the health reform as being professional misconduct in the exercise of the medical or medicopharmaceutical act generating harm to the patient, involving the civil liability of medical personnel and the supplier of medical, sanitary and pharmaceutical products and services. Within the same normative act, medical staff is the doctor, dentist, pharmacist, nurse and midwife who provides medical services. Starting from this definition, we note that engaging civil liability in malpractice-specific conditions occurs when the individual violates a rule of professional conduct. At the same time, one of the conditions of malpractice is that there is a legal relationship of the professional nature (doctor-patient) between the victim of the injury and the victim[1].

However, it is well known that the basis of civil liability is either the law or the parties' contract. Regarding the subject of this article, according to the legal provisions (art.653 corroborated with art.660 et seq. From Law no 95/2006), we may consider that the basis of the doctor's responsibility for failure or poor fulfillment of the professional obligations has its source both in Law, but also in the medical agreement (patient informed consent).

However, the informed patient's consent implies that, prior to being subjected to any method of prevention, diagnosis and treatment with potential for

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[1] Dan Cimpoieru, *The malpractice*, Ed. C.H.Beck, Bucharest 2013 p. 27.

patient risk, the physician has the duty to explain in reasonable terms the patient's ability to understand, will be subjected.In turn, the patient gives his written consent for the medical procedures.

In fact, written consent is only a guarantee that the patient has agreed to perform a particular medical procedure, without totally or partially exonerating him from a responsible physician in case of a professional error[2].

Thus, we can not consider the patient's informed consent as a genuine contract, as the doctor's obligations are not established. The main consequence of this circumstance is that, in the case of malpractice, we can not speak of a contractual civil liability, but exclusively of civil tort liability, the doctor's obligations stemming from the law.

Medical civil liability is always a criminal liability because life, health, physical or mental integrity can not be the subject of a convention, and if such legal acts were concluded, they should be considered null and void under Art. 1229 Civil Code, according to which, "only goods that are in the civil circuit may be the subject of contractual provision"[3].

As a form of tort law, malpractice, in most cases, is found in the form of civil liability for its own deed, as a form of tortuous civil liability. Even though the law also governs other forms of tort / delict liability, liability for other person's deeds and damage caused by things, these are atypical for malpractice.

2.1. Conditions of Liability for Own Deed

The provisions of art. 1357 paragraph (1) of the Civil Code state that "the one who causes another to suffer an offense by an offense committed with guilt is obliged to fix it." Therefore, the general conditions regarding tort liability in the sense that there must be an unlawful deed, injury, causality and guilt must be met. Liability for own deed is the principal area of liability based on the fault of the perpetrator, the fault not presumed, but must be proven by the victim.

As far as the professional error (illicit deed) is concerned, it has not been given a legal definition, but the legislator[4] has exemplified the forms of this error. Medical staff is civilian responsible for:

- professional error;
- insufficient medical knowledge in the exercise of the profession;
- preservation of legal regulations on confidentiality, informed consent and the obligation to provide medical assistance;
- depending limits of competence, except in the case of emergency where no medical personnel with the necessary competence is available.

Nonetheless, the lawyer also provided for the medical staff not to be liable for damages and damages in the exercise of the profession, namely when these damages:

a) is due to working conditions, insufficient equipment with diagnostic and treatment equipment, nosocomial infections, adverse effects, complications and generally accepted risks of investigation and treatment methods, hidden vices of sanitary materials, medical equipment and devices, sanitary equipment used;
b) acting in good faith in emergency situations, respecting the competence granted [5]

In the provision of health care and / or health care, medical staff is required to apply therapeutic standards established by nationally approved practice guides or, failing that, standards recognized by the medical community of that specialty, which What could enable the circumstance of the illicit medical offense.

Injury, as an essential element of medical civil liability, consists in the negative result suffered by the patient as a user of medical services as a result of the illicit act committed by the physical or legal person providing medical services[6].

According to art. 1385 Civil Code, the damage shall be fully rectified, unless otherwise provided by law. Compensation will also be granted for future damage if its production is unquestionable. Compensation must include the loss suffered by the injured person, the gain he would have been able to make and which he was deprived of under normal conditions, and the expenses he has incurred for the avoidance or limitation of the damage. If the illicit act also determined the loss of the chance to gain an advantage, the reparation will be proportional to the probability of obtaining the advantage, taking into account the circumstances and the victim's concrete situation.

In the case of injury to a person's bodily integrity or health, the compensation must include, as the case may be, the gain from the work that the injured person was deprived of or prevented from acquiring through the loss or reduction of his / her work capacity. In addition, the indemnity must cover the costs of medical care and, if applicable, the expenses related to the increased life needs of the injured person, as well as any other material damage[7].

If the person who suffered harm to bodily integrity or health is a minor, the established disparity will be due from the date when the minor would normally have completed his / her professional training. . Until that date, if the minor had a win at the time of

[2] Dan Cimpoieru, *The malpractice*, Ed. C.H.Beck, Bucharest 2013 p. 86.
[3] Roxana Maria Calin, *Malpraxis - Liability of medical staff and healthcare provider. Judicial Practice - 2nd Edition*, Ed. Hamangiu, Bucharest, 2016., p. 87.
[4] Art. 653 par. (2) of Law no. 95/2006 on health reform with subsequent amendments and completions.
[5] Art. 654 par. (2) of Law no. 95/2006 on health reform with subsequent amendments and completions.
[6] Roxana Maria Calin, *Malpraxis - Liability of medical staff and healthcare provider. Judicial Practice - 2nd Edition*, Ed. Hamangiu, Bucharest, 2016,p. 91.
[7] Art. 1387 Civil code.

the injury, the compensation would be determined on the basis of his lost earnings, and if he did not have a win, he shall be determined according to the provisions of art. 1388 Civil Code, which applies accordingly[8].

The damage may be of a patrimonial (economic) or non-patrimonial (moral) nature. Even if the damage is not susceptible to a pecuniary assessment, the compensation to be awarded for this damage will have a patrimonial character.

As regards the moral prejudice, as its difficult assessment, the courts, when granting moral damages, do not operate with predetermined evaluation criteria, but proceed to an appreciation subjective of the particular circumstances of the case, namely the physical and psychological sufferings suffered by the victim[9], as well as the adverse consequences that the event under consideration had on the particular life, taking into account the evidence to be administered.[10] Thus, the judge is placed in the situation of estimating such damages, on the basis of estimated criteria that can highlight the limits of appreciation of the amount of the indemnities.

It is necessary that there is a causal relationship between the illicit act and the damage, namely the damage caused as a consequence of the illicit deed. The causality report includes both the facts that are the necessary and direct cause, as well as the facts that have made the causal action possible, or have ensured or aggravated its harmful effects. In order to establish the causal relationship between the illicit medical act and the damage, it is necessary to establish, on a scientific basis, all the correlations between the facts and the circumstances[11].

Article 1358 The Civil Code differentiates the particular situations of appraisal of guilt. Thus, in assessing the guilt, account will be taken of the circumstances in which the damage occurred, which is foreign to the person of the perpetrator, and, if so, of the fact that the damage was created by a professional in the operation of an enterprise.

Since medical liability, as a civil liability, is based on the classic guilt (fault), professional misconduct could be defined as a form of guilt where the physician did not foresee the outcome of his deeds, although he could have foreseen it , Or predicted the results of his actions, but he considered it to be easy that they would not appear.

Medical professional misconduct consists of non-observance of the rules regarding the exercise of the medical profession by failing to adhere to or deviations from the usual rules recommended and recognized in the practice of this profession, resulting from negligence, lack of attention or non-observance of specific methods and procedures.

Any form of professional misconduct can be identified by reference to the following:

- *culpa in adendo* – adherence to professional misconduct, imprudence, incomprehension, non-indifference to the requirements of the profession or the risks to which a person is exposed, the inappropriate use of working conditions, or an ease in medical activity that calls for special attention and caution;
- *culpa in eligendo* – consists in the wrong choice of technical procedures, in a delegation to an inappropriate person of obligations or in the delegation of their own obligations to others;
- *culpa in omitendo* – when the patient loses the chance of healing or survival due to the failure to carry out necessary gestures;
- *culpa in vigilando* – which resides in the breach of a duty of confraternity on a request for the request and the obligation to answer it, the failure to ask for help, the failure to inform the patient about the fate of the patient.[12]

When establishing the guilt, the objective criterion of average diligence will be taken into account. If the physician's obligation to treat the patient is a means of diligence, caution, the doctor - without guaranteeing the outcome (healing), assumes the obligation to have the necessary conduct and to apply the most suitable medical remedies for the purpose of patient's recovery[13]. The result has a random nature, being influenced by the specific reactivity of the patient, the particularities of the disease, false or incomplete information obtained from the patient, or the limited technical and scientific resources available at the time of treatment[14].

2.2. Legal Liability of Medical Service, Sanitary Materials, Appliances, Medical Devices and Medicines Providers.

Along with the civil liability of medical personnel for the professional misconduct in the exercise of medical or pharmaceutical medicine, Law no. 95/2006 also regulates the civil liability of the providers of

[8] Art. 1389 Civil code.

[9] In the case of the trial, the applicant suffered psychological trauma as a result of the fetus' death, but also because she had to look for answers for 5 years, as all those involved constantly refused to offer it. The court held that, in the context of the circumstances of the case and taking into account the actual suffering of the applicant, the amount of 200,000 lei claimed for moral damages is a fair satisfaction – *Jud.Sect.1 Bucuresti, sent.civ. nr. 11541/ 26.06.2013.*

[10] Roxana Maria Calin, *Malpraxis - Liability of medical staff and healthcare provider. Judicial Practice - 2nd Edition,* Ed. Hamangiu, Bucharest, 2016, p. 97.

[11] Regarding the causal link between the illicit act and the injury, the court noted that the doctors' inaction triggered, favored and did not in any way prevent the constitution of the causal chain that resulted in the fetal death of the fetus and the danger of the mother. The guilt of the doctors constantly in the form of omission, manifested in some inactions by not performing some necessary actions, namely not knowing the correct diagnosis and not taking the necessary treatment measure - *Jud.Sect.1 Bucuresti, sent.civ. nr. 11541/ 26.06.2013*.

[12] Dan Cimpoieru, *The malpractice*, Ed. C.H.Beck, Bucharest 2013 p. 90.

[13] Gabriel Adrian Nasui, *Medical malpractice*, Universul Juridic, Bucharest 2016, p. 103.

[14] Gabriel Adrian Nasui, *Medical malpractice*, Universul Juridic, Bucharest 2016, p. 103.

medical services, sanitary materials, appliances, medical devices and medicaments for damages to the patient.

Thus, healthcare providers are responsible for their own deed, for the deed of another person, but also for the damage caused by things.

Regarding the responsibility for their own deed, the public or private sanitary units as providers of medical services are liable civilly according to the law for the damages caused by the prevention, diagnosis or treatment activity, if they are the consequence of:[15]

a) nosocomial infections, unless it is proven to be an external cause that could not be controlled by the institution;
b) known defects of abusively used devices and medical devices without being repaired;
c) the use of sanitary materials, medical devices, medicinal and sanitary substances, after the expiry of the warranty period or the term of their validity, as the case may be;
d) acceptance of medical equipment and devices, sanitary materials, medicinal and sanitary substances from suppliers, without the insurance provided by the law, as well as the subcontracting of medical or non-medical services from providers without civil liability insurance in the medical field.

Public or private healthcare providers providing healthcare services are civilly liable for damages caused, directly or indirectly, to patients by failure to comply with the internal regulations of the sanitary unit.

Besides the responsibility for their own deed, the providers of medical services - public or private sanitary units - are also responsible for the deed of another, respectively for the deed of medical personnel.

Art. 655 par. (2) of Law no. 95/2006 stipulates that the medical units are liable under civil law for the damages caused by the hired medical personnel, in solidarity with him.

Therefore, we are in the presence of the commissioner's responsibility for the deed regulated by art. 1373 Civil Code.

With regard to liability for damage caused by things, public or private healthcare providers, and medical device and medical device manufacturers and healthcare manufacturers are responsible under civil law for harm to patients in the prevention, diagnosis and Treatment, generated directly or indirectly by hidden defects of medical equipment and devices, medicinal substances and sanitary materials during the warranty / period of validity, in accordance with the legislation in force.

2.3. The procedure to be followed in order to establish malpractice cases

2.3.1. Establishing cases of malpractice has two procedures, an extrajudicial and a judicial procedure. As regards the out-of-court procedure, as regulated by the Law on Health Reform, the Methodological Norms of Law no. 95/2006 and the Regulation on the organization and functioning of the monitoring committee and the professional competence for the cases of malpractice, approved by Order no. 1343/2006. This is a voluntary procedure, not compulsory.

Thus, the procedure for establishing cases of malpractice does not prevent free access to justice under common law. The optional nature of this procedure is manifested not only by the possibility of the person interested in choosing between the two ways - the extrajudicial and the judicial procedure - but also by his right to leave the special procedure for the determination of the cases of professional civil liability and to address of the court[16].

The minimum mandatory elements that a referral to the Commission must contain in order to be subject to verification are:

- the first and last name of the person making the referral;
- the quality of the person making the referral;
- the name and surname of the person who considers himself the victim of a malpractice case, if different from the person making the referral;
- the name and surname of the perpetrator of the act of malpractice perceived, committed in the performance of a prevention, diagnosis and treatment activity;
- the date of the act of malpractice;
- the description of the deed and its circumstances;
- the damage caused to the victim;

In the proceedings before the Commission, the interested person will participate, that is, the person or, as the case may be, his legal representative who considers himself the victim of a malpractice committed in the course of a prevention, diagnosis and treatment activity or the deceased's successor As a result of an act of malpractice imputable to a prevention, diagnosis and treatment activity.

Besides the injured person, they have the status of parties to the extrajudicial procedure and the insured person (the person who committed the malpractice act - the medical staff) and the insurer (the insurance company with which the person accused of malpractice has concluded the civil liability insurance contract). Also, there may be medical experts who can be consulted by the Commission in cases of medical malpractice.

Within 3 months of referral, the Commission must take a decision on the case, a decision that will be communicated to all concerned, including the insurer.

If the insurer or any of the parties disagrees with the Commission's decision, it may appeal to the competent court within 15 days from the date of the communication.

[15] Art. 655 of the Law no. 95/2006 on healthcare reform with subsequent amendments and completions.
[16] Dan Cimpoieru, *The malpractice*, Ed. C.H.Beck, Bucharest 2013 p.118.

2.3.2. The entitled person may at any time leave the administrative jurisdictional procedure before the Commission and may address the court. In all these cases, the court acts as a court of full jurisdiction, invested with the resolution of an action in tort. At the same time, the court also acts as a judicial review body when verifying, in terms of its soundness and legality, the Commission's decisions.

The competent court to resolve malpractice litigation is, according to art. 687 of the Law no. 95/2006, the court in whose territorial jurisdiction took place the alleged malpractice.

By indicating the court an exclusive competence, both material and territorial, is established.

In the case of a tort action for malpractice, addressed directly to the court, it will not be possible to resolve the case in the absence of a forensic expertise.

Insofar as criminal acts and deontological norms have been violated by the same act in its materiality, legal liability accumulates, both criminal responsibility and tort liability.

Malpractice acts within the medical activity of prevention, diagnosis and treatment are prescribed within 3 years from the occurrence of the injury.

3. The malpractice insurance

In all situations, professionals are required by law or by their own body regulations to end malpractice insurance.

Regarding the compulsory insurance of the initiated medical personnel, this was regulated by the law on insurance and reinsurance in Romania but was later introduced in Law no. 95/2006 on health reform.

The malpractice insurance is in fact insurance for civil tort liability, which means that, in addition, civil law regelations will be applied regarding the liability for the offense and the other legal norms with the incidence in the matter[17].

Ensuring malpractice has an important role in the work of professionals. On the one hand, he assures the professional against the risk of civil liability and, on the other hand, confers on the victim the certainty that his prejudice will be covered to a greater extent even though the author of the damage would be insolvent.

Moreover, ending insurance is also a sine qua non condition for the doctor who is to be employed, being obliged to submit a copy to the employing unit[18].

Even if the doctor has the obligation to present insurance when concluding the contract of employment, insurance must be maintained throughout medical practice. Moreover, the failure to conclude the medical malpractice insurance or to ensure the legal limit is a disciplinary offense. The jurisprudence also established that[19] since the Romanian law expressly regulates the provision of malpractice to healthcare personnel as a form of insurance against it, individually concluded, distinct from any form of insurance concluded by the medical institution, it is obvious that the insurance contract concluded between the medical institution and the insurer does not include insurance for malpractice.

At the same time, with regard to professional liability insurance, the legislator[20] provided for the possibility of coexistence of more valid insurance, in which case the indemnities due will be borne in proportion to the amount insured by each insurer.

Regarding the damages, the legal provisions establish that the insurer pays damages for the insured persons who are liable, under the law, to third parties who are found to have been subjected to a medical malpractice act, as well as to the costs of the injured party Through the medical act.

Art.669 par. (1) of Law no. 95/2006 provides that damages are to be paid in respect of amounts which the insured is obliged to pay by way of compensation and legal costs to the person or persons injured by the application of inadequate medical assistance, which may have the effect of including personal injury or death.

Compensation to be granted when healthcare has not been granted, although the status of the person or persons who have applied for or for whom healthcare was required implied this intervention.

The medical malpractice insurance does not cover the damages that the doctor, pharmacist, nurse or midwife who provides healthcare services will incur in the medical act.

For such damages, medical staff will have to cover the risk of accidents and occupational diseases as any other employee[21].

An important aspect of interest in the provision of medical liability is the place where the risks and damages specific to this form of insurance are incurred.

Involved activity and health care is given in hospital units, but there are cases when given outside these units, does the question arise whether the doctor's responsibility can be drawn in such situations? The answer is affirmative. The responsibility of the medical staff and, implicitly, the liability of the insurer, regardless of the place where the assistance or medical services were provided, may be attracted.

The Law on Health Reform, by the provisions of Art. 668, provides for indemnity to pay regardless of where the care was given. In conclusion, the medical malpractice insurance operates only if the inadequate assistance has been voluntarily granted outside the specially designated areas[22].

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[17] Vasile Nemes, *Medical malpractice insurance* in Romanian Journal of Business Law no. 2/2009, p. 2.
[18] Art. 667 para. (2) of Law no. 95/2006.
[19] Decision no. 2658 of September 24, 2014, rendered in appeal by the Civil Division of the Supreme Court of Justice.
[20] Art. 671 of Law no. 95/2006
[21] Vasile Nemes, *Medical malpractice insurance* in Romanian Journal of Business Law no. 2/2009, p.9.
[22] Vasile Nemes, *Medical malpractice insurance* in Romanian Journal of Business Law no. 2/2009, p.9.

Relevant to medical liability insurance is the quality of the persons to whom the indemnities will be secured.

Thus, the insurer pays the indemnities directly to the injured party, insofar as he was not compensated by the insured. If the insured proves that he has compensated the injured party, the indemnity shall be paid to the insured. In case of death, the indemnities are granted to the successors of the patient who have requested them. As far as the patient's rights successors are concerned, they have to do so in this regard. Moreover, the insurer will not pay compensation ex officio, but only at the express request of the patient's successors.

The settlement and award of damages usually takes place amicably, when the insured's liability is clearly established.

The certainty of the insured's liability may result from a court decision or may be set by the Monitoring and Professional Competence Commission for malpractice cases.

4. Conclusions

The responsibility of the holders of liberal professions is an instrument at the fingertips of rights holders, against those who violate professional obligations and deontological principles. Thus, mistakes committed during the exercise of the profession attract the civil assassination of the culprit. The need to engage medical and medical staff in general is warranted by guaranteeing the right to health. Certainly, the civil liability of medical staff does not remove criminal responsibility, and they can coexist.

As a form of civil tort liability, the responsibility of the medical staff to be drawn must meet the legal requirements in the matter, so there must be an illicit deed, an injury, a causal link and guilt.

Having the legal obligation to close malpractice insurance for professional civil liability for injuries caused by the medical act, malpractice insurance plays an important role in the work of the professionals, the lack of which can distort the activity of the professional who, for fear of being sued for the potential harm that would cause its patients, would be extremely reluctant to take any risk.

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A NEW APPROACH IN CROSS BORDER CASES - REGULATION (EU) NO 2015/848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 20 MAY 2015 ON INSOLVENCY PROCEEDINGS (RECAST)?

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Abstract

Following numerous attempts to recast Regulation (EC) No 1346/2000 on insolvency proceedings, the appearance of EU Regulation 2015/848 (recast) aims to solve the problems encountered in practice regarding rules establishing international jurisdiction in opening the main proceedings but preventing also fraudulent forum shopping , new ways to coordinate of insolvency proceedings relating to the same debtor or to several companies belonging to the same group, new design for secondary proceedings and also a more accessible way for lodging claims and obtaining information about cross border proceedings .At last, is also important to understand the need of the extension of the scope of this Regulation to proceedings which promote the rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs.

Keywords: *Recast Regulation, COMI, secondary proceedings, groups of companies, publicity of proceedings*

Introduction

The phenomenon of international insolvency which determines internal legislator's approaches combined with the European legislator's logic or model norms developed by international bodies such as UNCITRAL, faces many regulatory problems because, beyond the accuracy of scientific research tools and methods and the fairness of the results of this research both at a national and a global level, especially regarding the free movement of persons, goods and services, it will always be impossible to predict entirely the attitude of the human factor and the way they understand to play the role they can find themselves in an insolvency proceeding or in related contexts, because, why shouldn't we admit that, the good faith, the speculation, the attempt to obtain, regardless of the means of a more favorable position, the constructive attitude of rescuing the joint contractor who is in a state of financial difficulty, are behaviors of meaning, even if sometimes condemnable from the perspective of positive law.

Council Regulation (EC) no. 1346/2000 of May 29, 2000[1] on insolvency proceedings(referred to in this paper as **Regulation**) succeeded in establishing a legislative framework for cross-border insolvency procedures being necessary, at an European level and in order to ensure a proper functioning of the internal market, at the level of the European Union, to introduce an instrument leading to an effective approach to the measures to be applied to the patrimony of an insolvent debtor whose activity has a cross-border effect.

This article proposes a centralized listing of problems which arose during the implementation of Council Regulation (EC) no. 1346/2000 and also highlighting solutions identified and introduced through the new version of the Regulation on Insolvency Recast Regulation 2015/848 (the "**Recast Regulation**[2]"), pointing out the advantages of these new provisions.

After 10 years of application of the European Insolvency Act (the Regulation is applicable as of 31 May 2002), the Commission has analyzed its practical effects and considered it necessary to amend for the reasons that will be detailed below. However, before analyzing these considerations, it must be mentioned that, besides technical corrections, the proposals came amid a deep economic crisis which led to a change of attitude at the level of the European Union. towards firms in difficulty and debtor's good faith[3].

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[1] Official Journal L 160 , 30/06/2000 P. 1.

[2] Published by the European Parliament and Council on 20 May 2015, came into force on 26 June 2015 and applies to relevant insolvency proceedings from 26 June 2017, Official Journal L 141 on 5 June 2015.

[3] The European Commission has included in its Work Program for 2012 the revision of the Insolvency Regulation in line with the review clause foreseen in Article 46 of the Regulation, the revision being in line with the Europe 2020 Strategy with the Small Business Act, with the Annual Growth Survey 2012 and the Single Market Act II, but it is important to remember, as is apparent from the very working document of the Commission Staff that accompanied the proposal for a revision of the Regulation - available at http://eur-lex.europa.eu / Legal / content / en / ALL / ies = CELEX: 52012SC0417, the fact that in the period 2009-2011, on average, approximately 200,000 bankruptcies were recorded annually at the European Union level. In this context, all communications from European bodies have always referred to a second chance for an honest entrepreneur - see 'A Second Chance for Entrepreneurs: Preventing Bankruptcy, Simplifying Bankruptcy and Supporting Business Re-launch,' ' Report of the Expert Group, European Commission, DG Enterprise and Industry, January 2011, Communication from the

The following categories of issues have been identified, and their enumeration is to be followed in the present approach by the amendments introduced in the Recast Regulation.

1. Lack of provisions regarding pre-insolvency procedures and debt discharge procedures for individual debtors.

Updating national laws on insolvency involved, in many Member States, including in the field of regulation the pre insolvency procedures, but these procedures are not included in the Annex A of the Regulation. If such methods are not covered by the Regulation, their effects will not be recognized at a European level. Thus, there will be no suspension of individual enforcement actions against the company, the procedures that do not involve the appointment of a liquidator but in which the debtor remains in possession of its assets, are not recognized at the level of the European Union, foreign creditors would not be willing to engage in restructuring negotiations, all of which lead in the vast majority of cases to the impossibility of reorganizing the debtor and implicitly to the impossibility of saving jobs.

In addition, regarding the insolvency of individuals, it was found that the non-inclusion of insolvency proceedings of individuals within the scope of Regulation blocks the possibility to obtain a discharge of debt, the debtor still remaining liable to foreign creditors, so that the honest entrepreneur cannot get second chances, which is in contradiction with the EU policies in the field of entrepreneurship.

In this context it was necessary to amend the scope of the Regulation, which stipulated in the 1st article 1st paragraph that it was applicable to collective proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.

Through the Recast Regulation, the 1st article was amended to include procedures that do not involve a liquidator but in which the debtor's assets and activities are subject to control or supervision by a court[4]. Furthermore, the procedures in which the debtor remains in possession of his assets and manages his / her business without being appointed a liquidator enjoys recognition at EU level. Additionally, there are procedures that allow the debtor to reach an agreement with its creditors in a pre-insolvency stage.

Another important element stated in the 7th recital of the Recast Regulation is the one inducing the method of interpretation of the Regulation in cases of regulatory gaps between it and Regulation (EU) no. 1215/2012 of the European Parliament and of the Council[5] insofar as bankruptcy, insolvency or other legal proceedings, amicable settlements, concordances or similar procedures and actions relating to such procedures are being excluded from the scope of this last Regulation. As stated in the final sentence of the 7th recital, 'the mere fact that a national procedure is not listed in the Annex A to this Regulation should not lead to its entry into the scope of Regulation (EU) No. 1215/2012 ".

2. Center of main interests and difficulties in determining jurisdiction to open insolvency proceedings. Identifying the most favorable legal forum ("forum shopping")

The Regulation does not explicitly required the court opening insolvency proceedings to examine international jurisdiction, and there is a risk that several main proceedings may be opened in parallel.

COMI really provides treating the case in a jurisdiction with which the debtor has a genuine link rather than in a jurisdiction chosen by the founders, COMI's approach being consistent with international developments, being chosen by UNCITRAL also as a standard review in its Model Law on cross-border insolvency. In order to determine the COMI, however, it is necessary to circumstantiate it, both for the legal entity and for the individuals(exercising or not an independent business or professional activity) and to clarify the ways in which the presumption regarding the identity between COMI and the registered office(principal place of business/habitual residence) can be rebutted.

As for the forum shopping, it should be noted that not all relocations are abusive and they can be considered a legitimate way of exercising the right to free settlement, all the more so as the differences in the regime between the national laws on insolvency are unquestionable. Establishing the fraudulent intention in delocalization is, indeed, a problem because there is a fine line between the flexibility of a national regime that would allow reorganization and call for a more favorable regime to the detriment of creditors who can

Commission to the European Parliament, the Council and the European Economic and Social Committee 'A New European Approach to Business Failure and Insolvency' - http:Eur-lex.europa.eu/legal content/RO/TXT/HTML/?uri=CELEX:52012DC0742&from=RO.

[4] This Regulation shall apply to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation:

(a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed;

(b) the assets and affairs of a debtor are subject to control or supervision by a court; or

(c) a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b)

Where the proceedings referred to in this paragraph may be commenced in situations where there is only a likelihood of insolvency, their purpose shall be to avoid the debtor's insolvency or the cessation of the debtor's business activities.

[5] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (JO L 351, 20.12.2012, p. 1)

no longer execute their claims. In addition, all foreign creditors should be able to challenge the decision to open the proceedings as the court or the insolvency practitioner appointed should inform the known creditors who have their domicile or habitual residence in another Member State of the opening of the main proceedings.

According to the 13th recital of the Regulation, the "center of main interests" must correspond to the place where the debtor ordinarily carries out his interests and may therefore be verified by third parties, 3rd article (1) pointing that "In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary."

The experience of the Eurofood or Interedil[6] cases has led to the introduction of additional elements to help determine the COMI so that the content of the Recast Regulation both in the recitals and in the articles on the core of the main interests has been clarified in a fairly large proportion. Therefore, according to the 30th recital, as for a company, the presumption of the identity of the COMI within its registered office may be reversed if the central administration of the company is located in another Member State than that in which the registered office is located and if a comprehensive assessment of all the factors settles, in a verifiable manner by third parties, that the real management and supervisory center of the company and the center for the management of its interests are located in that other Member State. In the case of an individual not exercising an independent business or professional activity, it should be possible to overturn this presumption if the major part of the debtor's assets is outside the Member State where the debtor is habitually resident, or where it can be established that the main reason for the move was the opening of an insolvency proceeding before the new court and if such an opening would significantly affect the interests of the creditors whose business with the debtor took place before the move, indicating that the latter two hypotheses are provided as an example. The amendments also referred to the 3rd article, regarding the international competence, which states in the drafting of the Recast Regulation that "the center of the main interests is the place where the debtor usually manages his interests and which is verifiable by third parties", maintaining the presumption of the place where the registered office is located. In addition, in the same article determinations are added to the COMI for individuals exercising independent or professional activities (the principal place of business in the absence of evidence to prove the opposite), respectively for the individual (the place where the person has his/her ordinary residence in the absence of evidence to prove the opposite).

On the other hand, through the 4th article (Examination as to jurisdiction) and 5th article (Judicial review of the decision to open main insolvency proceedings) has been regulated the ex officio examination by the court of the jurisdiction pursuant to Article 3, and also the possibility that the debtor or any creditor may appeal in court the decision to open the main insolvency procedure for reasons of international jurisdiction.

Regarding the prevention of fraudulent use of the search for a more favorable lex fori , two temporal limitations have been brought forward, as we have seen in recital 31st of the Recast Regulation but also in the 3rd article, paragraph 1 thereof. Thus, the presumption that the center of main interests is the place where the registered office is located, the principal place of business or the habitual residence should not apply if, in the case of a company, legal entity or, respectively, individuals carrying on an economic or professional activity independently, the debtor has moved its registered office or principal place of business to another Member State within three months prior to the request for opening of the insolvency proceedings or, in the case of an individual who is not self-employed nor carries on a professional activity, if the debtor has moved his habitual residence to another Member State within six months prior to the request to open the insolvency proceedings(the debtor may present additional evidence in support of the idea that the new COMI is the real one) .

3. The matter of defining secondary insolvency procedures and coordinating them with the main procedure.

According to the 3rd article of the Regulation, when a main insolvency proceeding is opened, any subsequent insolvency proceeding initiated later on is a secondary winding-up procedure. This regulatory mode led to shortcomings in the restructuring of companies that have branches in several Member States. Although the secondary procedures were designed to protect the interests of local creditors, they often broke away from their purpose, sometimes being opened for the simple reason that the debtor had a seat on the territory of that state, without at least appreciating the opportunity to start such a procedure in a context in which a continuation of the debtor's activity would have been more profitable, including for local creditors, than a winding-up of assets located on the territory of that state. Also, it was necessary to increase the role of the liquidator in the secondary procedure and to maintain a continuous contact with the court and the liquidator in the main proceedings, as well as to establish a duty of cooperation between the courts of the two procedures.

From the perspective of the Recast Regulation, we will analyze only the two situations in which the court seized with the request to open secondary insolvency proceedings may refuse or postpone the

[6] Eurofood IFSC Ltd.C-341/04, Interedil Srl, in liquidation v Fallimento Interedil Srl and Intesa Gestione Crediti SpA C-396/09, http://curia.europa.eu.

opening of the secondary proceedings at the request of the insolvency practitioner in the main proceedings. Thus, with the approval of the local creditors, the insolvency practitioner has the possibility to give them an undertaking that they will be treated as if a secondary insolvency proceedings had been opened (recital 42nd and art 36th). The assets would be considered as part of a subcategory of the insolvency estate in the main insolvency proceedings, following that, at the distribution, the insolvency practitioner in the main proceedings will comply with the priority rights that would have been borne by the creditors if a secondary insolvency procedure had been opened on the territory of that State. In this case, the court may refuse to open these secondary proceedings if it considers that the undertaking protects the interests of local creditors.

In a second situation (recital 45th and article 38th), the court is given the possibility to temporarily suspend the opening of a secondary insolvency proceedings when a temporary stay of the individual enforcement proceedings in the main insolvency proceedings had been granted in order to maintain the effectiveness of this suspension from the main proceedings. The period of suspension may be set for a maximum of 3 months, provided that adequate measures are in place in order to protect the local creditors.

It is also necessary to say, in regard of the new treatment of secondary proceedings, that the requirement that the secondary procedure be a winding-up procedure has been removed from the text of the Recast Regulation so in this context , the possibility given to the court, notified with a request to start a secondary proceedings , to open, at the request of the practitioner in insolvency of the main proceedings, a type of insolvency procedure listed in the Annex A other than the originally requested, will ensure a higher level of protection of the interest of local creditors and better consistency between the main and the secondary proceedings (art. 38th).

Additional provisions have been added in order to regulate the cooperation and communication between insolvency practitioners designated in the main and secondary insolvency proceedings (art. 41st), including the cooperation in the form of agreements or protocols. It has been legislated also according to art. 42nd, the cooperation and communication between courts, in several forms such as the coordination regarding the appointment of insolvency practitioners, the coordination of the administration and supervision of the debtor's assets and activity, the coordination of the court hearings and, last but not least, the cooperation and communication between the insolvency practitioners and the courts (art. 43rd). In the new regulation, we can only hope that the additional costs generated by the cooperation, language barriers and national procedural rules that prevent information disclosure will no longer be such an important source of difficulties in cooperation.

4.The insolvency of a group of companies

The proposal to amend the Regulation creates a specific legal framework for the insolvency of companies belonging to a group, while maintaining the approach underpinning the Regulation currently in force, according to which each company is treated separately. It introduces the obligation to coordinate insolvency proceedings concerning various companies of the same group by imposing an obligation on the liquidators and the courts involved to cooperate, similar to the duty of cooperation established in regard of the main and secondary proceedings. Liquidators should, in particular, exchange information and cooperate in drawing up a rescue or reorganization plan if appropriate. The opportunity to cooperate through protocols is referred explicitly to confirm the practical importance of these instruments and further promote their use. The courts should also cooperate by exchanging information, coordinating, as appropriate, appointing liquidators which must cooperate with each other and approving the protocols submitted by the liquidators. In addition, each liquidator will have a procedural status with respect to the other member companies of the same group with the right to participate in the creditors' meetings.

According to Recital 53rd of the Recast Regulation, the introduction of rules on insolvency procedures for groups of companies should not restrict the possibility for a court to open insolvency proceedings in one jurisdiction for several companies belonging to the same group if the court detects that the center of the main interests of these companies is in a single Member State. In order to maximize the results of the cooperation and communication in the procedures concerning those companies making up a group, according to 61st art., group coordination procedure may be requested before any Court having jurisdiction in insolvency proceedings of a member of the group by an insolvency practitioner appointed in open insolvency proceedings in relation to a member of the group.

According to the 66th article, where at least two-thirds of all insolvency practitioners appointed in insolvency of the companies in the group agree that the court of another Member State which has jurisdiction is the appropriate court for the opening of the group coordination procedure, that court has exclusive jurisdiction. Such a procedure shall be initiated if its opening is appropriate to facilitate the effective administration of insolvency proceedings concerning the members of the group and if no creditor of any member of the group whose participation in the procedure is expected is not likely to be disadvantaged by including that member in such a procedure.

5.Information for creditors and lodgement of claims

Although the Regulation includes an entire chapter aimed to informing creditors and registering requests for admission of claims (Chapter IV, Provision of information for creditors and lodgement of their claims) the set of rules relating to the right to register requests for admission of claims, the obligation to inform creditors, the content and the form of the request for the transmission of claims do not solve concrete problems linked, on one hand, to the differences between the national legal systems regarding the way in which insolvency proceedings are opened in the territory of a Member State and, on the other hand, to the lack of timely information on the opening of the procedure, the absence of which may lead to the loss of the possibility of recovery of the claim by registering it after the expiry of the time limits provided by the national law. Additionally, the costs of translation of documents or legal representation before a court in a Member State for filing an application for admission of claim are still an issue.

The reconsideration of this chapter in the Recast Regulation brings clarifications on the form of the notification of opening the procedure that will be sent to the creditor(it shall bear the heading 'Notice of insolvency proceedings' in all the official languages of the institutions of the Union), respectively on the standard claims form , indicates the information to be included in their content and makes the explanations regarding the costs. First of all, the standard forms will be available in all of the official languages of the European Union, thus reducing translation costs. Secondly, foreign creditors shall be offered at least 30 days from the date of publication in the insolvency register of the State where the notice of opening of the insolvency proceedings was opened, to file applications for admission of claims, regardless of the shorter time limits applicable under national law. Also, creditors will be informed if the claim is challenged and will be able to provide additional evidence on the existence and amount of the claim.

The Recast Regulation sets up, within the content of the 24th art., for a better information of creditors and for the prevention of the opening of parallel insolvency proceedings, the obligation of the Member States to publish a minimum set of information regarding the date of the opening of proceedings, the reference number of the case, the type of proceedings (main or secondary), the type of debtor, the important elements of the case in question (the deadline for filing the request for admission of claims, the deadline for lodging the appeal after the pronouncement of the decision of opening), the closing date of the procedure.

The information will be stored in publicly accessible electronic registers, following that through the European e-Justice portal shall be proceeded to the interconnection of such registers. It is also worth noting that according to article 27th paragraph. 1, the set of mandatory information will be available free of charge. With regard to the publicity on the opening of proceedings, according to the 28th article, paragraph 1, the insolvent practitioner may request that the notification of the decision to open the insolvency proceedings and, if appropriate, the decision by which the insolvency practitioner has been appointed, be published in any other Member State where the debtor has an establishment, in accordance with the publication procedures applicable in that Member State. In this context, honoring of a obligation for the benefit of the debtor has been regulated by reference to the time of providing the publicity stated in the 28th article. According to the 31st article where an obligation has been honoured for the benefit of a debtor(and not of the IP) who is subject to insolvency proceedings opened in another Member State, the person honouring the obligation shall be deemed to have discharged it if he was unaware of the opening of the proceedings (this person shall be presumed, in the absence of proof to the contrary, to have been unaware of the opening of insolvency proceedings if executed such liability before the publication provided for in the 28th article).

Conclusions

This article aims not to be critical of the changes made by the Recast Regulation, its intentions are to represent the first part of a series of comments on these changes. The authors considered it appropriate in this introduction to stop on the provisions that were the most important points in the list of shortcomings noted by the practice in applying the Regulation, specifying the current texts and also those which become applicable by the coming into force of the Recast Regulation.

However, we cannot conclude without leaning on the presented texts, raising a few questions or formulating some conclusions imposed by the very meaning of these provisions.

First of all, it should be said that the scope of the Recast Regulation imposes certain restrictive conditions even if it tries to resolve the failure to include particular insolvency prevention procedures on the list of those falling under cross border rulings. Thus, according to the 1st paragraph of the 1st article of the Recast Regulation, the procedures must be collective (according to the 2nd article 1st paragraph, procedures involving all creditors of the debtor or a significant part thereof, provided that in the latter case the proceedings do not affect the claims of creditors not involved in those procedures), public (such as confidential preventive procedures as for the ad hoc mandate of Romanian Law will not fall under the scope of the rule), based on the insolvency law. Only in the framework of these collective, public, based on the insolvency law procedures and only for the purpose stated in the European act, namely salvage, debt adjustment, reorganization or liquidation, are valid the assumptions setting out in points a, b, c of the 1st paragraph of this article.

In the presented hypothesis we can ask ourselves how to reconcile the content of the" collective procedure" definition that can only concern a significant part of the debtor's creditors with the temporary stay of an individual execution procedure granted, for example, according to the text of letter c) of the 1st paragraph of the 1st article, by the effect of the law, in the conditions under which the final sentence of the 2nd article (1) states that procedures must not affect (what will the interpretation of the term „affect" be in practice?) the rights of creditors who are not involved in the collective proceedings.

In order to avoid a possible tendency to expand the scope, in the context of the same 1st article, it should be added that the 16th Recital of the Recast Regulation clarifies that procedures based on the general law of the companies which is not exclusively elaborated for insolvency matters, should not be considered to be based on insolvency law.

Regarding the way of establishing COMI according to the provisions of the 3rd article of the Recast Regulation, the center of the main interests is the place where the debtor usually manages his interests and is verifiable by thirds. The Regulation indicates in its 3rd article 1st paragraph the administration of the interests and not the place of the proper location of the headquarters as the main determinant. However, the assumptions made regarding COMI raise issues particularly within the situation of individuals who are self-employed or carrying on professional activities or in the situation of any other individual because it is presumed that the center of the main interests is the main place of activity or the place where the usual residence is located.

If in the case of a legal entity the COMI is presumed to be the place where the registered office is located, till proven contrary, which is relatively accessible to the third party verification, in the other two cases, the verification is burdensome, especially since there are no criteria available at the level of the members states for this sort of identification.

In addition, the assumption that the center of main interests is the principal place of business, respectively the habitual residence, applies only if no movement occurs to another Member State in the 3 months respectively 6 months preceding the request for the opening of the procedure. However, in the case of a move will the main criterion be applied, namely the place where the debtor usually manages his interests and is verifiable by third parties? Correspondingly, the 28th Recital of the Recast Regulation induces the idea that, when determining whether the center of interest of the debtor is verifiable by third parties, creditor's perception of the place where the debtor manages his interests is of greater importance, in the case of the relocation of the center of main interests, being necessary to inform creditors at the most appropriate time of the new place where the debtor will carry on his activities.

Regarding the individual who does not carry on an independent professional or commercial activity, according to the 30th recital, overturning the presumption of COMI is done and exemplified as follows: " In the case of an individual not exercising an independent business or professional activity, it should be possible to rebut this presumption, for example where the major part of the debtor's assets is located outside the Member State of the debtor's habitual residence ", in which case we move away from the "management of interests" as the main determinant.

One last thing that we would like to mention is the one related to the secondary insolvency proceedings, namely that related to the so-called "secondary synthetic proceedings" whose mechanism is implemented by the 36th article of the Recast Regulation. While beneficial, the unilateral undertaking that the insolvency practitioner appointed makes in the main proceedings will raise a number of questions. Although it has the nature of a unilateral act, this commitment must be approved by the local creditors. Also from this perspective how much time is needed for its approval and how will the designated practitioner carry out the identification of assets and the communication with "the known" local creditors.

Moreover, according to the 36th article 1st paragraph, the undertaking specifies the "factual premises" on which it is based, notably on the value of the assets in the Member State referred, without any further indication as to their value, the only reference regarding not the value but the time of setting the assets is stated in the 36th article 2nd paragraph, which at its final sentence states that the relevant moment for the establishment of the assets is the moment of the undertaking. In addition, the question arises as to know how the known local creditors will be treated in comparison with the creditors in the main proceedings considering the provisions of the 36th article 1st paragraph, which take into account the fact that when distributing those assets or the income originated from their sale, there are to be respected the rights of distribution and priority under national law of which the local creditors would have benefitted from if there had been initiated a secondary insolvency proceedings in that Member State.

The amendments brought by the new Regulation are more than welcome after those years when the lack of provisions had been solved by interpretations of the practice and of the courts. Without considering that the problems stop when its implementation starts, we appreciate that at least at the level of an immediate regulation the European act represents a new path, more adapted to the market's requirements of our days.

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MANDATORY TAKEOVER BIDS ON ROMANIAN CAPITAL MARKET

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Abstract

The Romanian Capital Market Law (Law no 297/2004) lays down rules regarding public offers (to buy or sell) of securities admitted to trading on a regulated market. Such offers are not unknown in the general framework of companies' regulations, i.e. Company Law no 31/1990. Actually a public limited liability company (joint stock company) can use a public subscriptions (offering shares for sale) to raise the registered capital for incorporation of the company or to increase the company's share capital already established. But all such operations are voluntary decisions. The founders or the shareholders of the company are those who decide to launch a public subscriptions.

Capital Market Law comes with something new and at least peculiar at first sight: mandatory takeover bid, meaning a mandatory public offer made by an offeror to the holders of the securities of a company (offeree) to acquire all or some of those securities.

Can someone be forced to buy securities on the regulated market? The Capital Market Law responds affirmatively, but only if such takeover bid follows or has as its objective the acquisition of control of the offeree company in accordance with national law. The takeover bid remains under supervision and authorization of the national authority of the Capital Market (FSA – Financial Supervisory Authority).

Keywords: *capital market, investments, public offers, mandatory takeover bid, securities.*

1. Introduction.

A joint stock company can use a public subscriptions (offering shares for sale) to raise the registered capital for incorporation of the company or to increase the company's share capital already established. Offering shares in a public manner is a common commercial issue that usually requires the authorisation of the national Securities and Exchange Commission. Such commercial operations are always voluntary decisions of the company or shareholders' decisions. They decide to launch a public subscription in their conditions: quantity and price. A mandatary bid is not an option in common commercial framework.

Capital market environment has its own goals and principles. One of these principles states the shareholders' rights and investors' protection. Therefore it is necessary to protect the interests of holders of the securities of companies when those companies are the subject of changes of control - and their securities are admitted to trading on a regulated market.

European legislator chose to lay down certain rules relevant when control of listed companies has been acquired or has been changed. Such rules[1] target the protection of the holders of securities, in particular those with minority holdings.

In the main the European directive recommends obligation for the person who has acquired control in a company to launch an offer to all the holders of that company's securities for all of their holdings[2]. Much more: the offer should be fulfilled at an equitable price.

2. Premises and principles.

In certain conditions a shareholder of a company (offeror) should be required to make a bid addressed to all the holders of those securities for all their holdings at the equitable price. Such provisions denote an intervention in the free commercial market. Not only must launch the bid but the offeror must fulfil in full any cash consideration. He has to be prepared to buy all company's securities still outside of his holdings. Such "mandatory buy" is uncommon even for capital market and infringes the principle of freedom of trade.

We must observe de higher consideration paid for all holdings on capital market. All holders of the securities of an offeree company must be afforded equivalent treatment. As a result, if a person acquires control of a company, all the other holders of securities must be protected at the same level[3].

An offeror seeking to buy a controlling interest in a target company (offeree) from a (controlling) stockholder or different stockholders will usually pay a higher price, a premium over the market price of the target shares. Therefore control premium is an amount that a buyer is prepared to pay (over the current market price of a listed company) in order to acquire a controlling stake in that company.

European approach on capital market requires an acquiror who purchases a controlling block of shares to offer to buy the remaining shares from the minority

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[1] Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.

[2] Ibidem, Art. 5.

[3] Art. 1, Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.

stockholders. Such vision calls for equivalent treatment for all shareholders, which effectively requires the control premium to be shared among all stockholders, irrespective the fact they provide or not shares for building up the controlling position[4].

The relevant conclusion in EU law system is that capital market needs increased protection for investors and in case of clash of principles as abovementioned the investors' protection should prevail.

3. Mandatory bids on Romanian Capital Market.

As expected, Romanian legislator followed European vision in takeover bids matter. The European Directive pointed that Member States should take the necessary steps to protect the holders of securities when control of their companies has been changed or acquired. Such protection is enforced by obliging the person who has acquired control of a company traded on a regulated market to launch an offer for all securities issued by offeree company held by other shareholders[5].

A natural or legal person who, as a result of its purchases or of the persons acting in concert with such person, holds securities giving more than 33% of the voting rights in a company traded on a regulated market shall launch a public offer addressed to all holders of those securities for all their holdings at the earliest opportunity but no later than two months from reaching such holding position[6].

Such offer shall comply with requirements laid down for any takeover bid. Therefore the offeror is required to draw up and make public a purchase offer document comprising the information necessary to enable the holders of the offeree company's securities to reach a documented decision on the offer.

The minimum contents of information[7] which shall be included in the public purchase offer document is prescribed through FSA's regulations[8].

Before the offer document is made public the offeror shall communicate it to the supervisory authority which shall decide on the approval of the public purchase offer document within ten days from the registration of the request[9].

4. Equitable price.

The equal treatment of all shareholders in a takeover process and a real minority shareholders' protection are enforced by the European legislator by guaranteeing an equitable price for mandatory takeover bids. Such price is regarded to be the highest price paid for the same securities by the offeror (or by persons acting in concert with him) over a period of not less than six months and not more than twelve months before the bid (shall be determined by Member States)[10].

Supervisory authority may adjust upwards or downwards the price approved in a takeover bid in certain circumstances such as:

1. the highest price was set by agreement between the purchaser and a seller,
2. the market prices of the securities have been manipulated,
3. market prices have been affected by exceptional occurrences[11].

In such cases certain criteria shall applied to determine equitable price, such as: the average market value over a particular period, the break-up value of the company or other objective valuation used in financial analysis[12].

These European principles regarding equitable price are implemented by the Romanian legislator in Romanian Capital Law.

The twelve months rule: The price of the mandatory takeover bid shall be at least equal to the highest price paid by the offeror (including the persons acting in concert with the offeror) over the twelve months period prior to the submission of the mandatory bid offer document to Financial Supervisory Authority[13].

Increased accuracy for bid submitted in legal term: FSA, ex officio or further to a notification could determine, on grounded reasons, that the purchases of shares may have been manipulated or offeror (including the persons acting in concert with him) did not acquire shares of the offeree company over the twelve months period prior to the submission of the offer document to FSA.

In this case the price offered within the takeover bid shall be at least equal to the highest of the three values determined by an appraiser appointed by the offeror:

1. the weighted average trading price on regulated market related to the last twelve months prior to the

[4] American model is different: e.g. Delaware Company Law, which is representative for American state law, does not impose such a requirement.
[5] Art. 5 para (1), Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.
[6] Law no. 297/2004, Art. 203 para (1).
[7] Regulation no. 1/2006 on issuers of and operations with securities, in force as of 6 April 2006, Annexe no. 23 to the regulation, Minimum contents of the public purchase offering document.
[8] FSA, Financial Supervisory Authority is the Romanian authority with full capacity on Romanian Capital Market.
[9] Law no. 297/2004, Art. 194.
[10] Art. 5 para (4), Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.
[11] Idem.
[12] Art. 5 para (4), Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.
[13] Law no. 297/2004, Art. 204 para (1).

submission of the purchase offer document to FSA;
2. the value of the company's net assets divided by the number of total shares, according to the latest audited financial statements;
3. the value of the shares determined by an evaluator according to international evaluation standards[14].

Increased accuracy for bid submitted after legal term has elapsed: The hypothesis is the same: FSA, ex officio or further to a notification could determine, on grounded reasons, that the purchases of shares may have been manipulated or offeror (including the persons acting in concert with him) did not acquire shares of the offeree company over the twelve months period prior to the submission – *after de legal term of two months has elapsed* - of the offer document to FSA.

In this case the price offered within the mandatory takeover bid shall be at least equal to the highest price determined by an appraiser appointed by the offeror:
1. the weighted average trading price on regulated market related to the last twelve months prior to the submission of the offer document to FSA;
2. the weighted average trading price related to the last twelve months prior to the date when the controlling position (33% of the voting rights) was reached;
3. the highest price paid by the offeror (including the persons acting in concert with him) in the last twelve months prior to the date when the controlling position (33% of the voting rights) was reached; iv) the value of the company's net assets divided by the number of total shares (according to the latest audited financial statements prior to the submission date of the offer document to FSA); v) the value of the company's net assets divided by the number of total shares (according to the latest audited financial statements prior to the date when the controlling position was reached;
4. the value of the shares determined by an evaluator according to international evaluation standards15.

These provisions reveal the endeavor of the Romanian legislator to lay down accurate methods to enforce an equitable price.

5. Romanian law exclusions.

Mandatory takeover bids regulations provide equivalent treatment for all holders of the securities of an offeree company. Such regulations are well intentioned and appealing but can be overwhelmed by exclusions.

Romanian Capital Market Law decided large scale exceptions from mandatory takeover bid rules.

Exempt transaction. The mandatory takeover bid shall not apply if the control over the issuer was acquired as a result of an exempt transaction. Under Romanian law exempted transactions include: i) control was acquired within the privatisation process; ii) control of the company was obtained by purchase of shares from the Ministry of Public Finance or from other entities legally authorised, within the budget claims collection procedure; iii) control obtained following the transfer of shares between the parent company and its branches or among the branches of the same parent company; iv) control resulting from a voluntary takeover bid addressed to all holders of the securities and for all their holdings[16].

Unintentionally control. The mandatory takeover bids have a distinct regime in some cases defined by the Capital Market Law as unintentionally acquiring of control in a traded company: i) the reduction of the capital through the redemption by the company of its own shares, followed by their annulment; ii) as a result of the exercise of the pre-emptive right, subscription or conversion of the initially allotted rights, and conversion of preferred shares into common shares; ii) merger, division or succession.

In abovementioned cases the person reaching the ceiling (33% of the voting rights) shall have alternative obligations: to make a public purchase offer, subject to the conditions and at the price provided for mandatory bid or to sell a number of shares, in order to drop below the control position acquired without intention[17].

Legal remedies. If the person who, as a result of his purchases (or of the persons acting in concert with him) holds more than 33% of the voting rights in a company traded on a regulated market fails to launch a public offer addressed to all holders of securities no later than two months from reaching such holding position, the voting rights related to the securities exceeding the ceiling (33%) are suspended and the person (or the persons acting in concert with him) may no longer purchase shares of the same issuer[18].

In the case of exempted transaction such ban does not apply.

Unintentionally control engages an alternative obligation that shall be fulfilled within three months from acquiring such position: to launch a mandatory takeover bid at an equitable price or to sell shares up under the ceiling (33% of the voting rights).

6. Sell-out and squeeze-out.

Mandatory takeover bids can have two special consequences:

[14] Ibidem, art. 204 para (3).
[15] Law no. 297/2004, Art. 204 para (4).
[16] Law no. 297/2004, Art. 205 para (1) and (2).
[17] Law no. 297/2004, Art. 205 para (5).
[18] Ibidem, Art. 203 para (1).

1. a minority shareholder shall have the right to request the offeror to purchase his shares at a fair price and
2. the offeror shall have the right to request the shareholders who did not subscribe within the offer to sell him such shares, at a fair price.

Sell-out procedure[19]. This procedure is a "legitimate" one. After the closing of the mandatory takeover bid, in some circumstances, the remaining shareholders receive the right to sell their holdings to the offeror in the same conditions. The procedure can be understood as a legal extension of the period of the offer. The circumstances are laid down by Romanian Capital Market Law referring to the closing of the bid: i) if the offeror holds shares representing at least 95% of the total number of shares of the share capital granting voting rights; ii) if the offeror purchased, within the public purchase offer addressed to all shareholders and for all their holdings, shares representing at least 90% of the total number of shares referred to in the offer. In these situations a minority shareholder shall have the right to request the offeror to purchase his shares at a fair price[20].

Squeeze-out procedure[21]. This procedure is more spectacular. In the same revealed conditions ((i) if the offeror holds shares representing at least 95% of the total number of shares of the share capital granting voting rights; ii) if the offeror purchased, within the public purchase offer addressed to all shareholders and for all their holdings, shares representing at least 90% of the total number of shares referred to in the offer) the offeror shall have the right to request the shareholders who did not subscribe within the offer, to sell him such shares, at a fair price. It looks like a "forced" purchase, without shareholder's consent[22].

The issuing company shall withdraw from trading on the regulated market as a result of the completion of the procedure for exercising the squeeze-out right[23].

7. Conclusions.

Romanian Capital Market Law is an example of how declaration of principles may be compromised by the exceptions stated in it. Romanian companies whose shares were admitted to trading on a regulated market are overwhelmingly privatised companies. Initially such companies have been involved in a mass privatisation process resulting in free allocation of share to population and admitting to trading floor.

Subsequently these listed companies have been privatised through the privatisation agreement concluded between the State as controlling shareholder and strategic investors. As exempted transactions such situations were excluded from the mandatory takeover bid rules.

This course of events put the Romanian Capital Law in contradiction with European principles regarding takeover bids. The law fails to ensure an equivalent treatment for any securities holders and a sound level of minority protection.

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[19] Art. 16 Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.

[20] Law no. 297/2004, Art. 206 para (3) and (4).

[21] Art. 15, Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.

[22] This situation was challenged in front of Romanian Constitutional Court for alleged property right infringement. The Court stated the legislator's capacity to establish limits for the exercise of rights for certain purposes and rejects the motion. (Decision no. 515 of 29 May 2007 on unconstitutionality motion of Art. 206 Law no. 297/2004 regarding Capital Market, published in Official Gazette no 431 of 28.06.2007).

[23] Law no. 297/2004, Art. 206.

THEORETICAL AND PRACTICAL ISSUES REGARDING THE MATRIMONIAL REGIMES

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Abstract

Following the entry into force of Law No. 287/2009 on the Civil Code, as republished, and of Law No. 71/2011 for the implementation of Law No. 287/2009 on the Civil Code, as further amended, that repealed the Family Code (Law No. 4/1953, as republished and further amended), the spouses may choose another matrimonial regime than the legal community regime, respectively the separation of assets regime and the conventional community regime through a matrimonial agreement. The study examines theoretical issues of the matrimonial regimes that raise some debates in the doctrine. The research also consists in the analysis of some new institutions such as clauses of a matrimonial agreement and the provisions of the primary obligatory regime both from theoretical and practical perspectives. Considering the 5 year period after the entry into force of the legal provisions that regulate the matrimonial regimes, the authors intend to carry out an analysis of the relevant case law of the courts of law in the matter of the pecuniary relationships between spouses.

Keywords: *matrimonial regimes, legal community matrimonial regime, conventional community matrimonial regime, separation of spouses' assets regime, matrimonial agreement*

1. Introduction

This paper intends to clarify a few issues related to the matrimonial regimes that raise some debates in the doctrine.

Given that Law No. 287/2009 on the Civil Code, as republished and further amended (hereinafter referred to as the "Civil Code")[1], regulates the conventional matrimonial regimes, the matrimonial agreement and the primary obligatory regime as a novelty after the repealed Family Code - Law No. 4/1953, as republished and further amended (hereinafter referred to as the "Family Code"), a thorough analysis of some debatable provisions is important not only for the authors of family law, but also for the legal practitioners.

In this respect, our intention is to examine some main theoretical issues of the matrimonial regimes, of the matrimonial agreement and of the primary obligatory regime and the main authors' opinions of family law already expressed in doctrine.

This paper will provide an analysis of the relevant doctrine, of the main legal provisions and of the jurisprudence in order to outline some options to be considered both by the authors of family law and by the legal practitioners.

2. Content

2.1. General considerations on the matrimonial regimes

Article 312 paragraph (1) of Civil Code provides that "the future spouses may choose as the matrimonial regime: the legal community regime, the separation of assets regime or the conventional community regime." Therefore, the Civil Code regulates the principle of freedom of choosing the matrimonial regime. Should the future spouses intend to choose another matrimonial regime than the legal community one, they must conclude a matrimonial agreement in this respect.

Notwithstanding the matrimonial regime chosen by the spouses, in accordance with article 312 paragraph (2) of Civil Code, they must comply with all the regulations that are common to all the matrimonial regimes.

These basic rules represent the so called "the primary obligatory regime"[2]. This primary obligatory regime is regulated by articles 312-338 of Civil Code and refers to the effects of the matrimonial regime, its opposability, the conventional or the judicial mandate by and between spouses, the disposition acts that endanger seriously the family's interests, the spouses' pecuniary independence, the spouses' right to

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[1] Published in Official Gazette of Romania No. 505 of July 15, 2011.

[2] See D. Lupașcu, C.M. Crăciunescu, *Family Law*, 2nd edition, Universul Juridic Publishing House, Bucharest, 2012, page 126; C. Mareș, *Family Law*, 2nd edition, C.H. Beck Publishing House, Bucharest, 2015, page 73; M. Avram, *Civil law. Family*, Hamangiu Publishing House, Bucharest, 2013, page 201; G.C. Frențiu, *Comment (to article 312)*, in *New Civil Code. Comments, doctrine and jurisprudence, The 1st volume. Articles 1-952. About civil law. Individuals and legal entities. Family. Assets*, Hamangiu Publishing House, Bucharest, 2012, page 420; C.M. Nicolescu, *Comment (to article 312)*, in *New Civil Code. Comment by articles*, C.H. Beck Publishing House, Bucharest, 2012, page 321; P. Vasilescu, *Matrimonial regimes*, 2nd edition, Universul Juridic Publishing House, Bucharest, 2009, page 37.

information, the termination, the exchange and the liquidation of matrimonial regime, the family's dwelling and the marriage expenses.

This primary obligatory regime is considered primary for two main arguments[3]:

1. it applies prior to any other legal or conventional provision and
2. it is common for all the matrimonial regimes, given that it is their base.

This primary regime is obligatory given that applies compulsorily to all spouses as simple effect of the marriage and that no one may derogate from its provisions through a matrimonial agreement[4].

Although the primary obligatory regime is common to all the matrimonial regimes, it represents their base, as other authors of family law[5], we do not consider that it is a matrimonial regime[6]. In accordance with article 312 paragraphs (1) and (2) of Civil Code above cited, the spouses may choose only between the three matrimonial regimes, respectively the legal community regime, the separation of assets regime or the conventional community regime. The basic rules that are called the primary obligatory regime by the authors' of family law only apply besides the provisions of the chosen matrimonial regime. We consider that if the legislator had regulated a fourth matrimonial regime, it would have been expressly provided as it is the case of the three matrimonial regimes.

It is important to underline that according to article 27 of Law No. 71/2011 for the implementation of Law No. 287/2009 on the Civil Code, as further amended, irrespective of the conclusion date of marriage, the provisions of the Civil Code apply to the spouses, from its entry into force, in connection with their personal and pecuniary relations.

There has also been expressed that a regime of participating to acquisitions by the spouses may be chosen based on the separation of assets regime, considering the provisions of paragraph (2) of article 360 regulated by Law No. 71/2011[7] for the implementation of Law No. 287/2009 on the Civil Code, as further amended[8].

Although the spouses may include in their matrimonial agreement a clause in relation with the receivable of participation to the acquisitions of assets, we[9] do not consider that such clause may be a separate new matrimonial regime regulated by the Civil Code, but it is a variety of the separation of assets regime.

This matrimonial regime was regulated in the first draft of the project of the Civil Code, in 2000, but after this moment the authors of the Civil Code renounced this matrimonial regime, given that it was considered highly complicated.

Therefore, we consider that article 360 paragraph (2) of Civil Code does not provide a fourth matrimonial regime, but only a clause for its liquidation that may be or not included in the matrimonial agreement based on which the spouses choose the separation of assets regime.

Moreover, we consider that there is an inexact provision regulated by paragraph (2) of article 360 of Civil Code which provides that "by matrimonial agreement, the parties may stipulate clauses related to the liquidation of this regime (separation of assets regime) depending on the assets acquired by each of the spouses during the marriage (…)". From our point of view this inexactness refers to the regulated period, respectively during marriage. Instead of this time limit, the above mentioned legal provision should have been drafted in order to refer to the assets acquired during the separation of assets regime and not during the marriage, because the spouses may change the matrimonial regime during their marriage whenever they may want, according to the applicable legal provisions.

In case of the legal community regime, on the contrary to article 360 paragraph (2) of Civil Code, article 339 of Civil Code provides that the assets acquired during the legal community regime by any spouse are common assets acquired jointly by them, not as co-owners, from their acquisition date. Tehrefore, in this case the Romanian legislator regulated the correct period with exactitude, specifically during the application period of the legal community regime.

According to the final thesis of paragraph (2) of article 360 of Civil Code should the parties have not agreed on the contrary, the receivable of participation represents half of the difference net value between the two groups of assets acquired by each spouse and will be owed by the spouse whose net value of the acquired assets is bigger than the other spouse's net value of the acquired assets. Therefore, the receivable of participation is half of the difference net value between the two groups of assets acquired by each spouse only in case the spouses have not agreed a lower value of the receivable of participation.

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[3] C. Mareș, op. cit., page 73.

[4] C.M. Crăciunescu, *The spouses' disposition right over the assets that belong to them, in different matrimonial regimes*, Universul Juridic Publishing House, Bucharest, 2010, page 17-22; P. Vasilescu, op. cit., page 34.

[5] See G.C. Frențiu, *Comment (to article 312)*, in op. cit., page 420; E. Florian, *Matrimonial regimes*, C.H. Beck Publishing House, Bucharest, 2015, page 28; N.C. Aniței, *Matrimonial regimes in accordance with the new Civil Code*, Hamangiu Publishing House, Bucharest, 2012, page 43.

[6] See M. Avram, op. cit., page 202, for the point of view that the primary obligatory regime is a matrimonial regime, but incomplete, fragmentary, and the other matrimonial regimes are called secondary matrimonial regimes. According to this author the primary obligatory regime may be qualified as a matrimonial regime considering that it consists in the juridical norms applicable to the pecuniary relationships between spouses as well as to the relationships between the spouses and third parties, which is the essence of a matrimonial regime by definition.

[7] Published in Official Gazette of Romania No. 409 of June 10, 2011.

[8] M. Avram, op. cit., page 340; C.M. Crăciunescu, *Family in the new Civil Code. Amendments adopted by Law No. 71/2011 for the implementation of Law No. 287/2009 on the Civil Code*, in Pandectele săptămânale No. 17/2011, page 7; D. Lupașcu, C.M. Crăciunescu, op. cit., page 171.

[9] C. Mareș, op. cit., page 126; G.C. Frențiu, *Comment (to article 360)*, in op. cit., page 496.

2.2. Matrimonial agreement

The matrimonial agreement is a public authenticated juridical act based on which the future spouses, respectively the spouses, in accordance with the principle of choosing the matrimonial regime, by mutual consent, agree on the matrimonial regime that will apply, or change the matrimonial regime during their marriage.

Under the sanction of the absolute nullity, the matrimonial agreement must be concluded as an authenticated act, with both spouses' consent expressed either personally or by a proxy based on an authenticated special power of attorney and with predetermined content[10].

Therefore, unlike a marriage that can be concluded only personally by the spouses, the matrimonial agreement can be concluded by a proxy.

The power of attorney for the conclusion of a matrimonial agreement must be:

a) authenticated by a public notary
b) special
c) with a predetermined content, which means that it must provide in detail the clauses of the matrimonial agreement that will be signed by the proxy.

It is a contract with a specific juridical cause (*affectio conjugalis*). In this respect, the pecuniary relationships between the spouses are to support the marriage and cannot exceed the purpose of the marriage itself – the creation of a family.

Article 313 paragraph (1) of Civil Code provides that between spouses the matrimonial regime takes effect only from the conclusion date of the marriage. Paragraph (2) of the same article provides that the matrimonial regime can be opposed to third parties from the date when the legal publicity formalities are fulfilled, except the case when they knew about this matrimonial regime by other means. And paragraph (3) of this article provides that should the publicity formalities not be fulfilled, the spouses are considered married under the legal community regime, in relation with the good faith third parties.

These legal provisions protect only the good faith third parties, given that towards the bad faith third parties, respectively those who knew about the applicable matrimonial regime either from the spouses or from another source, the matrimonial agreement will apply, even if the legal publicity formalities had not been fulfilled.

In relation with the publicity formalities, article 334 of Civil Code provides that a matrimonial agreement is publicized as follows: (i) by the mention made by the public clerck on the marriage act, after its conclusion[11]; (ii) by registration within the National Notarial Registry of the Matrimonial Regimes; (iii) by registration within the land registry, the trade registry, or any other public registry provided by law, depending on the nature of the assets. In case there is an asset that based on its nature determines the obligation of registration of the matrimonial agreement with the special public registries above mentioned, failing to fulfil the obligation of registration within this special registry cannot be covered by the registration of the matrimonial agreement only within the National Notarial Registry of the Matrimonial Regimes.

In accordance with the provisions of article 330 paragraphs (2) and (3) of Civil Code the conclusion date of a matrimonial agreement may be before the conclusion of marriage or during the marriage, but it enters into force only during the marriage.

The future spouses may conclude a matrimonial agreement either before concluding the marriage, or at the moment when they conclude their marriage. Irrespective of the moment when the future spouses decide to conclude a matrimonial agreement, it will enter into force only if they conclude the marriage. In case the future spouses do not conclude the marriage, the concluded matrimonial agreement will not enter into force.

Notwithstanding the above, even if the marriage is not concluded and the matrimonial agreement does not enter into force, the juridical acts provided by such matrimonial agreement that are not linked with the matrimonial regime and that the future spouses haven't connected them with the conclusion of their marriage will take effect, such as a recognition of filiation either by the mother, or by the father.

During marriage, the spouses may conclude a matrimonial agreement in order to change the applicable matrimonial regime, only after a period of one year as of the conclusion date of the marriage[12]. The matrimonial agreement concluded by the spouses, therefore during the marriage, enters into force on the date provided therein by the spouses or, in case no date was provided, on its conclusion date[13].

Although the future spouses or the spouses have the right to conclude a matrimonial agreement, when they agree on this issue, they do not have the right to create their own matrimonial regime. They have only the right to choose between the matrimonial regimes expressly provided by the Civil Code.

According to article 332 paragraph (1) of Civil Code, a matrimonial agreement may not derogate from the legal provisions that regulate the matrimonial regime except otherwise provided by law, under the sanction of absolute nullity. Also, the matrimonial agreement may not derogate from the legal provisions that regulate the primary obligatory regime under the sanction of absolute nullity. Moreover, a matrimonial agreement may not affect the equality between spouses, the parental authority and the legal inheritance provisions. Given that we consider the matrimonial

[10] Article 330 paragraph (1) of Civil Code.
[11] Article 291 of Civil Code.
[12] Article 369 of Civil Code.
[13] Article 330 paragraph (3) of Civil Code.

agreement to be a contract, as any contract, it may not derogate from the legal obligatory provisions and from the good manners.

Article 312 paragraph (2) of Civil Code irrespective of the matrimonial regime chosen by the spouses or the future spouses, the matrimonial agreement may not derogate from the provisions of Section 1. Common provisions of Chapter VI. The spouses' pecuniary rights and obligations of Title II. The marriage of Book 2. About family.

Therefore, the spouses do not have the right to copy a matrimonial regime regulated by the legislation of another country, but not regulated by the Civil Code or the right to create a matrimonial regime combining the provisions of the matrimonial regimes regulated by the Civil Code.

Article 338 of Civil Code provides that in case the matrimonial agreement is null and void or is declared null, the legal community regime applies between the spouses, without affecting the rights of the good faith third parties.

The legal community regime will be also applicable, should the spouses not conclude a matrimonial agreement.

It is impossible to have a marriage without a matrimonial regime, or to have a matrimonial regime without a marriage.

Referring to the capacity for concluding a matrimonial agreement, although it is a contract, the rule *habilis ad nuptias, habilis ad pacta nuptialia* is applicable, which means that the capacity to conclude a marriage applies. Therefore, the individuals who are 18, as well as the children who are 16 with his parents' consent and with the authorization of the court may conclude a matrimonial agreement.

Article 337 paragraph (1) of Civil Code provides that the individual who is not 18, but he has the matrimonial age, may conclude a matrimonial agreement. The individual who is not 18 must have the matrimonial age when he concludes the matrimonial agreement, not when he concludes the marriage.

The individual who is 16 may conclude the matrimonial agreement only with his parents' consent and with the authorization of the court.

It is forbidden to a child who is 14 or 15 to conclude a matrimonial agreement, although according to civil law he has restricted capacity, given that he does not have the matrimonial age.

An individual who is 16 with anticipated capacity recognized by the competent court based on article 40 of Civil Code and an individual who is between 16 and 18 years old who marries and therefore gets full capacity based on his marriage can conclude a matrimonial agreement without their parents' consent and without any authorization of the competent court. They are considered as an individual who is 18 and who can conclude any act without any prior authorization.

Should these legal provisions related to the matrimonial age, to the parents' consent and to the authorization of the court be infringed, the matrimonial agreement may be null and void or may be declared null. Thus, on the one hand, under the sanction of absolute nullity the matrimonial agreement cannot be concluded by the individual who is not 16 years old. On the other hand, under the sanction of relative nullity the matrimonial agreement cannot be concluded by the individual who is 16 years old without his parents' consent or the authorization of the court. As we have already mentioned, should the matrimonial agreement be null and void or declared null, the legal community regime applies.

2.3. Family dwelling

A new institution regulated by the Civil Code within the primary obligatory regime is the family dwelling. Article 321 paragraph (1) of Civil Code provides that the family dwelling is the spouses' common dwelling or, in case such dwelling does not exist, the spouse's dwelling where the children live.

For opposability purposes, any spouse may request the registration of a house as the family dwelling within the land book, even if he is not the owner of that house[14].

The special legal regime of the family dwelling consists in the limits of one spouse's right of disposition of the family dwelling by his own, without the other spouse's express consent, through juridical acts.

According to article 322 paragraph (1) of Civil Code without the other spouse's written consent, none of the spouses, even if he is an exclusive owner, can dispose of his rights over the family dwelling and can conclude acts based on which he could affect its use.

In accordance with these legal provisions, given that they do not distinguish, it is not important the nature of the spouses' right over the family dwelling. Therefore, they may have a real right or any other kind of right over the family dwelling, even a right of use based on a lease/rent agreement or even a non-remunerated lease agreement.

Should the family dwelling be owned by a spouse, there is no relevance whether the spouse who intends to dispose of it is its exclusive owner or if the family dwelling is a common asset, depending on the applicable matrimonial regime[15].

Referring to the other spouse's consent, we must consider two situations: (i) when only one spouse is the family dwelling's owner (he has an exclusive ownership right) and (ii) when both spouses are the family dwelling's owners.

In the first case, should the spouse owner intend to conclude any act of disposition of the family dwelling, he will need the other spouse's written consent, but this consent will not be a consent to the conclusion of that act of disposition as a co-owner, but

[14] Article 321 paragraph (2) of Civil Code.

[15] See also B.D. Moloman, L.-C. Ureche, The new Civil Code. 2nd Book. About family. Articles 258-534. Commentaries, explanations and jurisprudence, Universul Juridic Publishing House, Bucharest, 2016, page 203.

a consent that he does not oppose the conclusion of such act of disposition. Thus, the other spouse's consent does not affect the owner spouse's exclusive ownership right over the family dwelling.

The spouse's consent who is not an owner of the family dwelling is an act of irrevocable authorization from its signature moment[16].

As a remedy, in case one spouse refuses to express his consent for the conclusion of an act of disposition of the family dwelling, without a legitimate reason, the other spouse may claim in court and request the authorization of the court in order to conclude such act[17].

The rule of the spouses' express consent applicable to all the acts of disposition of the family dwelling does not mean that the immovable asset becomes imperceptible, the family dwelling could be subject of the forced execution even for receivables contracted only by one spouse, without the other spouse's consent.

In the second case, should the spouse owner intend to conclude any act of disposition of the family dwelling, he will need the other spouse's written consent in his quality as co-owner. Therefore, in this situation both spouses will conclude the act of disposition either personally or by a proxy in their quality of owners.

In relation to the form of the spouses' consent article 322 paragraph (1) of Civil Code provides only that it must be written.

We should also consider the above mentioned two situations also referring to the form of the spouses' consent[18].

Thus, when only one spouse is the family dwelling's owner (he has an exclusive ownership right), given that the other spouse, who is not an owner of the family dwelling, does not become a party of the disposition act, we consider that his consent may be expressed through a private act that is not authenticated by a public notary[19]. Notwithstanding the above, for safety reasons, we consider that also in this situation the spouse who is not an owner of the family dwelling should express his consent in authenticated form. In this respect, we consider the verifications of the public notary in order to authenticate the act based on which this spouse express his consent, specifically his identification and ascertaining his consent. If the spouse owner presented to the notary who authenticates the act of disposition a private act signed by the other spouse, its authenticity couldn't be verified. Therefore, the spouse owner who intends to conclude an act of disposition of the family dwelling may present to the notary a private act providing the other spouse's consent that could be signed by anyone.

On the contrary, when both spouses are the family dwelling's owners, their consent must be expressed in authenticated form. This is applicable when one spouse cannot be present personally in front of the public notary in order to sign in his name and on his behalf the act of disposition. In this case, both spouses express their consent in their quality of co-owners. They become parties of the act of disposition. This rule derives from the provisions of article 1244 of Civil Code which provide that the agreements that transfer real rights that are to be registered within the relevant land book must be concluded in authenticated form, under the sanction of absolute nullity.

Failure to comply with the provisions of article 322 paragraph (1) of Civil Code will result either in the sanction of nullity[20] or in the damages[21]. For the applicable remedy, the law provides it depending on the fact whether the asset was duly registered as the family dwelling within the relevant land book.

According to article 322 paragraph (4) of Civil Code the spouse, who has not expressed his consent to the conclusion of the act of disposition or based on which the use of the family dwelling is affected, may claim its annulment in a period of one year from the moment when he acknowledges that it was concluded, but no later than one year from the moment when the matrimonial regime terminates.

In relation with the limit period of one year from the moment when the spouse, who does not consent to the conclusion of the act of disposition, may claim its annulment, we consider that it could be calculated from the registration date of the ownership right of the new owner within the relevant land book.

On the contrary, paragraph (5) of article 322 of Civil Code provides that if the asset was not registered as the family dwelling within the relevant land book, the spouse, who has not expressed his consent to the conclusion of the act of disposition or based on which the use of the family dwelling is affected, may not claim its annulment, but only he may claim damages from the other spouse, except the case when the third party knew that the asset is the family dwelling from another source.

Therefore, the exception regulated by the final thesis of paragraph (5) of article 322 of Civil Code applies in case of a bad faith third party who knew from any other source that the asset is the family dwelling. In such case, although the asset was not registered as family dwelling within the relevant land book, the spouse who has not expressed his consent to the conclusion of the act of disposition or based on which the use of the family dwelling is affected may claim the annulment of that act.

[16] See M. Avram, op. cit., page 206.
[17] Article 322 paragraph (3) Civil Code.
[18] C. Mareș, op. cit., page 78.
[19] See M. Avram, op. cit., page 207; C. Mareș, op. cit., page 78.
[20] Article 322 paragraph (4) of Civil Code.
[21] Article 322 paragraph (5) of Civil Code.

Referring to case law, a decision rendered by the Court of Appeal of Timișoara[22] in a second appeal registered against a resolution rendered in appeal by the Arad Tribunal[23] is relevant in relation with the registration of the family dwelling within the land book of an immovable asset. According to this decision the registration within the relevant land book of the immovable asset as the family dwelling, owned exclusively by one spouse, is allowed by the applicable legal provisions, irrespective that the immovable asset is a spouse's own or common asset, or that over this asset was priorly registered a conservatory seizure by the Directorate for Investigating Organized Crime and Terrorism (hereinafter referred to as "DIOCT"). The registration within the relevant land book of the immovable asset as the family dwelling has no effect over the conservatory seizure of DIOCT priorly registered over it. Moreover, such registration does not mean that the immovable asset becomes imperceptible. Therefore, should it be the case, even if an immovable asset is registered as the family dwelling within the relevant land book, it can be subject of forced execution as a consequence of the conservatory seizure of DIOCT.

Related to the movable assets that decorate the family dwelling, article 322 paragraph (6) of Civil Code provides that the same legal provisions applicable when the family dwelling was not registered with the relevant land book apply. Therefore, the spouse who did not consent to the conclusion of the act in writring may claim either to bring back the movable assets that were removed from the family dwelling, if these assets were not sold and the third party's patrimony is not affected, or damages[24].

It is important to underline that according to article 30 of Law No. 71/2011 for the implementation of Law No. 287/2009 on the Civil Code, as further amended, the provisions of article 322 of Civil Code are applicable also for the marriage into force on the entrance date into force of the Civil Code[25], if the acts of disposition of the family dweling or of the movable assets that decorate the family dwelling or their removal fom the dwelling were concluded after this date.

2.4. The preciput clause

The preciput clause may be provided by any matrimonial agreement concluded by and between the spouses or the future spouses[26]. Therefore, such clause is applicable either in the separation of assets regime or in the conventional community regime. Also during the separation of assets regime, the spouses may acquire common assets that will be owned by them in co-ownership.

Moreover, we consider that the preciput clause may be applicable even in case of a legal community regime, given that the spouses may conclude a matrimonial agreement that could provide only such clause.

Article 333 paragraph (1) of Civil Code provides that according to the matrimonial agreement the surviving spouse may take over one or more common assets acquired either jointly or as co-owners, without any payment and before the division of the inheritance. Such clause may be provided either on both spouses' benefit, or on one spouse's benefit.

Following these legal provisions, given that the preciput clause is a clause of the matrimonial agreement, it can not exist unless the spouses conclude such agreement. Moreover, a matrimonial agreement does not require necessarily a preciput clause, but it can be its single provision.

The beneficiaries of a preciput clause can only be the spouses in case they conclude a matrimonial agreement or they conclude a new matrimonial agreement after a period of one year from the conclusion date of the marriage and they agree that the matrimonial agreement provides such clause.

In case of future spouses who conclude a matrimonial agreement before the conclusion of the marriage, given that the matrimonial agreement enters into force only after the marriage is concluded, we may conclude that the beneficiaries of a preciput clause can not be the future spouses.

The object of this clause may be one or more common assets acquired either jointly or as co-owners, movable or immovable. Therefore, the spouses' own assets cannot be object of the preciput clause. Such assets will be included in the inheritance group of assets.

The preciput clause can not be object of the donations report, but only to reduction as provided by article 1096 paragraphs (1) and (2) of Civil Code[27].

Thus, the reduction will be done according to article 1096 of Civil Code, specifically before the donations, together and proportionally with the wills.

Although the Romanian legislator had the French Civil Code as inspiration source, respectively article 1516 that provides "Le préciput n'est point regardé comme une donation, soit quant au fond, soit quant à la forme, mais comme une convention de marriage et entre associés"[28], the juridical nature of the preciput clause has not been provided by article 333 of the Civil Code.

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[22] Court of Appeal of Timișoara, 1st Civil Section, decision no. 1538 of November 13, 2013, *Săptămâna Juridică* 21 (2014), page 6.

[23] Arad Tribunal, Civil Section, decision no. 256 of 2013.

[24] D. Lupașcu, C.M. Crăciunescu, op. cit., page 129.

[25] October 1, 2011.

[26] C.M. Nicolescu, *The preciput clause in the regulation of the new Civil Code. Comparative approach*, Romanina Revue of Private Law no. 6/2011, page 139-141; E. Florian, op. cit., page 79-80.

[27] Article 333 paragraph (2) of Civil Code.

[28] "The preciput is not seen as a donation neither in relation with the background conditions, nor in relation with the conditions of forme, but as a matrimonial agreement and between associates".

Considering these legal provisions, in the doctrine there are a lot of analyses in relation to the juridical nature of the preciput clause.

Together with other authors[29] we consider that the preciput clause is a matrimonial advantage, a special regulation in relation with the provisions regarding the reduction of the excessive non-remunerated acts.

We do not agree that the preciput clause may be considered a non-remunerated act[30], given that according to article 984 paragraph (2) of Civil Code the non-remunerated acts can be done only through a donation or a will.

According to a recent opinion[31] besides the legal inheritance and the testamentary inheritance, law regulates a forme of contractual inheritance under the name of preciput clause defined as the act based on which a person dispose of all or part of his assets, for the time when he will no longer be alive, in favour of another person who accepts it. The preciput clause is considered by this author as a donation of future assets.

The preciput clause does not affect the common creditors' right to execut the assets that are object of this clause, even before the community terminates[32].

Therefore, the assets that are object of the preciput clause do not become imperceptible, they could be executed by the spouses' common creditors before the community of assets terminates.

The preciput clause will no longer have any effect

a) when the community of assets terminates during the spouses' life,
b) when the beneficiary spouse dies before the spouse who gratified him,
c) when the spouses die at the same time or (iv) when the assets object of this clause had been sold by the common creditors' request[33].

Besides these situations expressly provided by the legal provisions of article 333 paragraph (4) of Civil Code, there are two additional situations when the preciput clause will no longer have any effect, specifically

a) if the matrimonial agreement that provides this clause is null and void or declared null and
b) if the matrimonial agreement will no longer have any effect given that the marriage was not concluded by the parties of the matrimonial agreement.

The execution of the preciput clause may be done in kind or, if it is not possible, by equivalent, in money[34].

Referring to the period of time for its execution, the law does not provide any special term in this respect. Therefore, the general prescription period of three years will apply from the spouses' death date, in case the preciput clause is mutual, on both spouses' benefit, or from the gratifying spouse's death date, when the preciput clause is unilateral, on one spouse's benefit.

Considering these legal provisions that regulate the preciput clause we consider that the surviving spouse has an important advantage regarding the use of some common assets before the division of the inheritance, specifically in case of a house taken over based on the preciput clause, the surviving spouse will no longer be interested in claiming the right of habitation that could be applicable, given that this right has specific conditions that could affect his right over that house if they are not fulfilled.

2.5. The expenses of the marriage

Article 325 paragraph (1) of Civil Code provides that the spouses must mutually support each other materially.

They must contribute to the expenses of their marriage depending on each other's means, should the matrimonial agreement not provide otherwise[35].

No agreement may provide that the expenses of the marriage are to be supported only by one spouse, any agreement contrary to this provision is to be considered unwritten[36]. Therefore, any agreement based on which the spouses would agree that the expenses of the marriage are to be supported by one of them has no legal effect.

Considering that the provisions related to the expenses of the marriage are regulated by the primary obligatory regime, we may conclude that they apply irrespective of the applicable matrimonial regime. Thus, notwithstanding the matrimonial regime chosen by the spouses, in accordance with article 312 paragraph (2) of Civil Code, they must comply with all the regulations of the primary obligatory regime that are common to all the matrimonial regimes.

Therefore, the spouses may agree within the matrimonial agreement the amount of each contribution, that may consists in money, in kind (e.g. by using the house as the family dwelling that is exclusively owned by one spouse) or in industry (e.g. one spouse's work in the house or for bringing up the children or one spouse's help for the other regarding his professional activity)[37]. As we have already mentioned above, it is forbidden for the spouses to agree that the expenses of the marriage

[29] D. Lupașcu, C.M. Crăciunescu, op. cit., page 150; D. Lupașcu, C.M. Crăciunescu, *The regulation of the preciput clause in the new Civil Code as it was amended by Law no. 71/2011*, in Pandectele române no. 8/2011, page 21; G.C. Frențiu, *Comment (to article 333)*, op. cit., page 457.

[30] D. Chirică, *Treaty of civil law. Inheritance and non-remunerated acts*, C.H. Beck Publishing House, Bucharest, 2014, page 363; B.D. Moloman, L.-C. Ureche, op. cit., page 228; I. Popa, *The preciput clause*, *Romanina Revue of Private Law* no. 6/2011, page 174.

[31] D. Chirică, op. cit., page 3-4.

[32] Article 333 paragraph (3) of Civil Code.

[33] Article 333 paragraph (4) of Civil Code.

[34] Article 333 paragraph (5) of Civil Code.

[35] Article 325 paragraph (2) of Civil Code.

[36] Article 325 paragraph (3) of Civil Code.

[37] C.M. Nicolescu, *Comment (to article 325)*, in *New Civil Code. Comment by articles*, C.H. Beck Publishing House, Bucharest, 2012, page 346.

will be supported by only one of them, but they are allowed to agree the amount of their contribution and how they contribute.

Moreover, it is important to underline that the legal provisions that regulate each of the three matrimonial regimes expressly provide that the usual expenses of the marriage and those for bringing up the children must be supported by both spouses.

Referring to the legal community regime, the spouses are jointly liable for the obligations undertaken by any of them for the usual expenses of the marriage[38]. It is important to underline that according to article 35 of Law No. 71/2011 for the implementation of Law No. 287/2009 on the Civil Code, as further amended, these provisions are applicable also for the marriage into force on the entrance date into force of the Civil Code, if the debt has been born after this date.

In case of the separation of assets regime, although the rule is that none of the spouses may be liable for the obligations undertaken by the other spouse[39], article 364 paragraph (2) of Civil Code provides that the spouses are jointly liable for the obligations undertaken by any of them for the usual expenses of the marriage and for those related to bringing up the children.

In the conventional community regime, although the spouses may limit their community to the assets and debts expressly mentioned in the matrimonial agreement, irrespective of the moment when they were acquired or they were born, either before or during the marriage, they can not exclude from their community the obligations undertaken by any of them for the usual expenses of the marriage[40].

According to article 326 of Civil Code any spouse's work in the house and for bringing up the children represents a contribution to the expenses of the marriage.

As the doctrine[41] and the jurisprudence[42] provided during the application period of the Family Code, that is also relevant in relation to the present regulation of the Civil Code, in case one spouse refuses to contribute to the marriage expenses, the other may claim against him in court and request to be forced to contribute to the marriage expenses. Also according to the current legal provisions above mentioned, a spouse may claim to force the other spouse to contribute to the marriage expenses.

In accordance with the case law[43] given that the woman's work in the house is considered a contribution to the family's income and considering that the defendant did not have any contribution to it in the last 7 years, the court decided that both spouses contributed equally to the acquisition of the common assets, even if there were some discrepancies between their incomes.

3. Conclusions

The common institutions of the matrimonial regimes are: (i) the primary obligatory regime and (ii) the matrimonial agreement.

The primary obligatory regime regulates special rules of protecting not only the family, but also each spouse's interest.

Although the Civil Code provides the principle of freedom of choosing the matrimonial regime, the spouses do not have full freedom to create a matrimonial regime combining the provisions of the matrimonial regimes regulated by the Civil Code or to copy a matrimonial regime regulated by the legislation of another country, but not regulated by the Civil Code, in order to apply it to their marriage.

Therefore, the spouses may only choose one of the three matrimonial regimes as they are provided by the Civil Code.

The family dwelling regulated for the first time by the Romanian legislation is a special case of protecting both the family and each spouse, given that without the other spouse's written consent, none of the spouses, even if he is an exclusive owner, can dispose of his rights over the family dwelling and can conclude acts based on which he could affect its use.

Referring to the preciput clause, we consider it helpful for the surviving spouse, in case it was provided by the matrimonial agreement, given that besides the common asset or assets that could be taken over by him before the division of the inheritance, he has an important advantage regarding the house taken over, specifically the surviving spouse will no longer be interested in the right of habitation, in order to avoid the specific conditions applicable in case of this right that could affect in some circumstances his right over that house, that does not happen in case of applying the preciput clause.

The Civil Code provides expressly that the expenses of the marriage are to be supported jointly by both spouses. It is forbidden for the spouses to agree that the expenses of the marriage will be supported by only one of them, but they are allowed to agree the amount of their contribution and how they contribute. The legal provisions that regulate each of the three matrimonial regimes expressly provide that the usual expenses of the marriage and those for bringing up the children must be supported by both spouses. Therefore, irrespective of the matrimonial regime and of the spouses' agreement in relation to the amount of their contribution and how they contribute, they could never avoid the joint contribution to the usual expenses of their marriage.

[38] Article 351 letter (c) of Civil Code.
[39] Article 364 paragraph (1) of Civil Code.
[40] Article 367 letter c) of Civil Code.
[41] I.P. Filipescu, A.I. Filipescu, *Treaty of family law*, Eighth Edition, Universul Juridic Publishing House, Bucharest, 2006, page 66.
[42] High Court, civil decision no. 34/1975, published in *Romanian Revue of Law* 9 (1975): 70.
[43] Călărași Local Court, civil resolution no. 3092/2014, published on www.portal.just.ro, in B.D. Moloman, L.-C. Ureche, op.cit., page 214.

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STUDY ON THE OBJECTIVE NOVATION OF AN OBLIGATION

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Abstract

In view of the fact that there is no consensus among the authors not only with regard to the precise nature, but also with regard to the unitary or dual character of the effects stemming from novation, we have decided to prepare a study on the novation of the legal obligation report which concerns the changing of the object or its cause.
In the legal literature relating to the regulation of novation in the former civil code, novation covered two forms, objective and subjective.
In the new civil code, the regulation of novation is based on the same primary categories of novation. Certain changes of this legal figure being expressly regulated in the Civil Code.
Subjective novation (Article 1609(2) and (3) of the Civil Code is that which is carried out by changing the creditor or debtor of the initial obligation. The change of the debtor takes place when a third person undertakes to a creditor to pay the debt and it can be operated without the initial debtor's consent which is released (Article 1609(2) Civil Code). The change of the creditor intervenes by substituting the initial creditor with a new creditor, operation as a result of which the debtor will be released from the creditor of the former obligation, being bound, as effect of novation, to the new creditor (Article 1609(2) Civil Code). Thus, a new legal obligation report is created between the parties.
In addition to the theories already consecrated, the study proposes to explore the objective novation of the obligation in the light of the following analysis directions:
• Novation as a way of settling the obligation versus the unsatisfactory fulfillment of the obligation;
• The structure and characters of objective novation;
• The legal nature of objective novation.

Keywords: *novation, obligations, objective novation, subjective novation, obligations transformation, animus novadi, aliquid novi, novum debitum.*

1. Introduction

Novation has gradually lost the centrality that characterized it in the past within our private law system, being replaced and suffering a regression that has benefited the other institutions. Novation has also been the target of intense criticism on the part of those who, *de iure condendo*, questioned even the desirability of a typical discipline, remembering a presumed, irreversible crisis of the institution; vice versa, there were also attempts of reassessment and revitalization, including by enlarging its scope of application to relations different from those of binding nature even through its transposition to different sectors by private law[1]. The fervor which characterizes, even at present, the debate around the nature, role and importance of the institution and of the implications from the point of view of law's general theory, up to its possible transposition into other sectors of the system, attests the always renewed interest of the doctrine for this institution's characters and morphology.

Consequently, in spite of novation resizing within the modern and contemporary legal systems, the theme remains one of the most frequented by the doctrine, due to its indubitable conceptual and practical relevance.

As it has been noticed, the need of a study on obligation novation is presented, in fact and first of all, strictly from a theoretical standpoint; and it is reflected in the direction of investigating up to which point *nova ad priorem obligationem* allow the persistence of the origin report identity. The study of novation constitutes, therefore, a logical-cognitive prerequisite for the phenomena of conventional amendment of obligation's subjects or content, not being able to discuss, consistently, the change of the binding relation, unless the obligation's novation is realized at the same time[2]. The intention of the parties to novate (animus novandi), consists of the parties' wish to transform the former obligation, which is the essential element of novation. In the absence of parties' desire to novate, even if the other conditions of novation exist, we cannot conclude that novation exists. The contracting parties's wish within the meaning of novation must be explicit. Whereas "novation shall not be presumed. The will to perform it must obviously result from the document" - Article 1130 Civil Code - from 1864.

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[1] Baias Fl.A., Chelaru E., Constantinovici R., Macovei I. (coord.), New Civil Code. Comments on articles, Ed. C.H.Beck, Bucharest, 2012, p. 289-292.
[2] Constantin Stătescu, Comeliu Bârsan – Civil Law – General Theory of Obligations, 9th edition, reviewed and completed, Hamangiu Publishers, 2008, p. 153.

2. Content

2.1. Novation as a way of settling the obligation versus the unsatisfactory fulfillment of the obligation:

In view of the aspects mentioned above the Supreme Court has established that the will to perform a novation must result in an unequivocal manner from the contract in which the parties were engaged through a legal binding relation to settle an existing obligation by replacing it with another new obligation. The absence of creditor's wish express manifestation to release the initial debtor, by signing a novation agreement, leads to the failure to comply with the conditions of validity for novation. In this situation, the legal document thus concluded cannot produce effects as a novation agreement, the initial debtor being bound to comply with the obligation undertaken[3].

In other words, in addition to the relevance give by its intrinsic value, a complex investigation of (objective) novation would allow the demarcation of its limits from the adjacent phenomenon of the contractual amendment of the contents of such obligation, the latter being allowed, inter alia, in Article 1182 NCC., where parties' power to "adjust" a matrimonial legal report existing between them is provided[4]. The practical relevance of this analysis is linked to the fact that, as long as they do not exceed the limits of the primitive obligation, the regulation and its associated guarantees remain intact.

In terms quite broad, it can be said that novation is included among the methods of extinguishing the obligation different from fulfillment, since it is reduced to an event which settles the binding report, even without the adequate *direct* satisfaction of the underlying creditor interest by direct achievement of the benefit provided by the obligation.

With regard to its compliance (or not) nature, the opinions in the doctrine are divided; there were also views that aimed to qualify novation in terms of claim settlement instrument, based on the required correlation - established via novation - between the effect of constitution and the effect of settlement, in relation to a mutual exchange.

It is therefore necessary to remember that, by novation, the good owed based on the primitive obligation will not be taken to its final value, but it will be used at its exchange value by exercising the power of "novation" which the holder of the right has on it; fact that, in itself, emphasizes the double plan of the interests involved, i.e. to receive the good which is the object of the initial benefit and the different interest of obtaining the new receivable right to be created through novation.

The primary interest is not intended to receive, under this plan, any "direct" satisfaction, because the right holder does not obtain the essential good which made its object; instead, he consciously waives the expectation to receive this good by "exchanging" it with the usefulness, considered equivalent, represented by the setting up of a new binding relation, i.e. a legal situation with instrumental character. The judgment with regard to the equivalence is left entirely on creditor's account, "except where, in a concrete manner, the existing economic difference is so high that it impedes and it does not allow, objectively, the identification of the novation instrument function, or event scheduled to constitute the expression of a contract concluded by error (Article NCC 1207), in the event of danger (Article 1216 NCC) or for a state of need (Article 1221 NCC)". The equivalence between the benefit due and the assignment of assets is only the result of a pure internal appreciation of the creditor which not only that may prove to be contrary to the reality, but it can also be excluded by a contrary, conscious opinion of the creditor. In these cases, we would be able to talk only about fiction of equivalence if the artificial arbitrary character of this trick was not obvious, at first sight, all the more so as the respective appreciation not only that may be ignored in a concrete manner but, in an abstract way, it is even irrelevant, given that the creditor, as debt holder, may freely dispose of it, up to causing immediate extinguishing with or without compensation[5].

Clarifying that satisfaction has only an "indirect" nature, the precise remark with regard to the instrumental nature of the lien created by novation makes us suspect also the "immediate" nature of satisfaction; however it is true that the immediate interest is designed to obtain an attribution different from that due (which shall be constituted by novation) from a new lien. However, being the case of an instrumental situation, the implicit interest is to obtain the final utility: so that creditor's satisfaction is delayed at that time and any different conclusion is presented as corrupted by excessive formal rigor.

Starting from these premises, it does not seem sufficient to assert that "the extinguishing by novation should be assigned a satisfaction nature (although of the other interest, still included within the obligation), representing the interest to obtain a different attribution than the benefit due".

By way of novation, the parties determine the settlement of the primary obligation by assuming a new debit soluto pro / without solvency guarantee.

The mechanism based on which novation acts on the primary interests structure being clarified, the qualification of novation in terms of means of settlement of satisfactory or unsatisfactory nature may be reduced to a matter rather semantic, depending on the amplitude which shall be deemed to be assigned to the attribute of "satisfactory" and hence to the concept

[3] ee C.S.J., Commercial Section, ruling no. 5394 dated October 10, 2001, in the Jurisprudence Bulleting, 1990-2003, p. 309; as well as I.C.C.J., Commercial Section, ruling no. 1213 dated March 28, 2006, in Law no.2/2007, p. 221-230.

[4] Art. 1182 - Law 287/2009 regarding the New Civil Code.

[5] Stătescu C., Bîrsan C., Civil Law – General Theory of Obligations, 9th edition, reviewed and completed, Hamangiu Publishers, 2008, p. 274-279.

of "satisfaction"; however, it is true that from the point of view of substance, novation does not bring the creditor a final usefulness (therefore, the satisfaction of the essential interest cannot be considered immediate), and, in particular, it does not comply directly with the interest to which the primary relation was subordinated[6].

In conclusion, taking into account the fact that any right (and any good which is its subject) has two usefulness profiles, a direct one, by its value of use, and an indirect one, by its exchange value, the creditor, by novating the primary obligation, makes use of this second usefulness profile, having as purpose a substitute interest for the one transmitted in the debit-credit primary relation.

The reason for which the doctrine does not include any consensus with regard to the satisfactory or unsatisfactory nature of novation, may be attributed to the fact that the concept of creditor interest has multiple meanings and that this unique concept is the basis of the distinction between the two categories of settlement cases.

Therefore, when account is taken of creditor's interest of obtaining the specific owed good, it must be compulsorily admitted that novation brings no satisfaction in respect of this interest and, from this point of view, it should be classified as a means of obligation settlement of unsatisfactory nature.

In theory, opposite conclusions might be drawn if it is presumed that the creditor has contracted the original obligation to protect not only the interest of obtaining a direct usefulness from the good which is the subject of the right, but also that of being able to take advantage of the indirect usefulness, from the exchange, which can be obtained to an equal extent, from this good, and that these interests have been placed by the creditor, from the very beginning, on the same level. However, thus structured, the obligation would be, from the very beginning, designed as an alternative and therefore the subsequent case would not be qualified as novation, but as the mere choice of the benefit to be achieved[7].

On the other hand, the typical replacement of creditor interest seems to be aiming at the attainment, by the creditor, of the object subject to obligation, that can express itself a final usefulness and that may respond immediately to a need within the meaning specified above.

Therefore, the conclusion seems necessarily oriented toward the unsatisfactory character of novation.

The procedure designed to lead to the attainment of final usefulness by the right holder, will certainly involve, in the case of novation, an additional transition, because between the right holder and the essential good not one, but two instrumental situations are positioned in sequence.

From this point of view, the power of disposition by novation is placed on the same level as the power of transfer disposition of the right, because both accomplish creditor's interest to obtain a new utility (i.e. the lien) instead of the original claim that goes out (novation) or is alienated (claim assignments).

Still from the point of view of satisfied interests, some authors considered inappropriate the joining between novation and other typologies of typical negotiations having an analogue function.

The negotiations diagrams which seem to be closest to novation are *datio in solutum* and the compensation on a voluntary basis. Indeed, by such contracts, the debtor assigns an *aliud* to the creditor, considered by the parties as the equivalent of the benefit due and able to achieve the *domestic* interest of the mandatory relation, to settle the obligation.

In a critical note it can be argued that, including in the cases mentioned by the benefit instead of achievement and voluntary compensation, the primary compulsory relation does not find its correspondent in an accurate fulfillment; the right which is its subject is not obtained *recta via*, but it is used for its exchange value.

Therefore, even in such cases, the primary right cannot bring its holder the final usefulness, which is not different from what happens in case of novation.

The only difference from novation consists, in the best case, of the fact that the substitute interest (and therefore, by definition, *external* to the initial contract, because it has not been taken into account, in advance, by the parties - except if they had intended to create the obligation as alternative) receives satisfaction (although still indirect, just as in the case of novation, but) immediately (via the different benefit provided instead of fulfillment or concomitant settlement by payment of a compensation which is not certain, liquid and payable, whose holder is the debtor); in the case of novation, it has already been proven that satisfaction is mediated by the establishment of a new binding relation.

We cannot share the assertion according to which the interest underlying *datio in solutum* and the compensation is identical from a legal point of view to the one found at the basis of the primary contract because the requirement of achieving a new negotiation itself attests, once more, duplicity of interests.

Finally, the diversity of novation from the point of view analyzed is presented clearly and unequivocally compared to the other two ways of settling an obligation, more precisely the direct fulfillment of the debtor and the fulfillment of the third party which, not incidentally, does not require an additional negotiation filter. The same conclusion may be drawn also with regard to the legal compensation (i.e. when the compensation is a certain, liquid and payable: indeed, in this case, the potential negotiation would have the nature of recognition of a compensation

[6] Dogaru I., Elements of law, University Course, Reprography of the University of Craiova, 1971, p. 145 and foll.
[7] Dogaru I., Drăghici P., Civil Law – General Theory of Obligations, All Beck Publishers, Bucharest, 2002, p. 156-172.

incurred at the moment of coexistence of the two reasons offset by debt, up to the competition of the lesser debt).

2.2. Structure and characteristics of objective novation

Given that the objective novation involves a succession between two subjective legal situations which refer to the same subjects, so that the first is used for its exchange value and in this way, is settled by the constitution of the new relation, it comes out that this event implies, necessarily, the existence of a relation in force, of a legal situations still *in itinere*, which is used for its exchange value and which is intended to be settled just as a result of this "exchange", carried out by novation. *Obligatio novanda* must not be settled in the meantime, inter alia, by debtor's direct fulfillment, but it will be an obligation not met or complied with only partially[8].

Also, it is considered necessary that all subjects of the relation that changes to take part to the corresponding agreement; however, the structure of the contract, the source of novation could be bilateral as well as unilateral and in accordance with the conditions of the legal relation which is settled, as well with the conventional power attributed, within a configuration contract[9] that is positioned prior to novation, to one of the parties to the primary relation.

On this point, the conclusions drawn by a part of the doctrine, which deny the admissibility of a unilateral novation created during the performance of a configuration contract previously stipulated between the parties, do not seem to be sufficient. It was argued in this issue that the difficulty in recognizing that, by a proper act of negotiation, the creditor or the debtor can constitute a novation event, unilaterally, is not based solely on the finding that, by this mode, the act of novation would pave the way for an unjustified interference in the debtor's or creditor's legal sphere. The difficulty lies in the structure of the novation event. In addition, a correct assessment of parties' will, allows to note that, if one of the parties was granted, at the time of obligation undertaking, a power of <<novation>>, an alternative obligation or an obligation with alternative right was intended (rather than predefining the configuration of a <<new>> obligation with a unilateral source) to be created (depending on the structure of interests identifiable in this case) between the same parties, recognizing to the creditor, or to the debtor, the power to transform through a unilateral declaration, the <<complex>> obligation into a simple obligation[10].

The alleged obstacle reasons which relate to novation limits of a structural nature would disappear if the assumptions under which novation must be necessarily qualified as a bilateral contract supported by a specific *animus* were rejected. But, in a critical note, it should be added that, in accordance with the theory shown above, we would not have a configuration contract, but an alternative or with alternative right obligation *ab origine* (or even *ex intervallo*, if performed by a contract subsequently intended to modify the content of the initial relation).

However, we do not take into account the fact that, in the alternative obligation, the debtor may be able to choose the benefit to perform, thus causing a concentration of the obligation from the alternative to the simple one, or may proceed directly to fulfillment, by the execution of one of the two benefits without passing through the negotiation conduct which has as purpose to stipulate a new obligation, not even unilaterally; the differences in terms of regulation seem obvious, for example, in matters of risk of extinction (this aspect is subject to a specific regulation in the alternative and with alternative right obligation, which does not extend to simple obligations), discharge of guarantees and accessories (which would not take place as a result of debtor's choice and of the concentration corresponding to the obligation), the invalidity of novation due to the inexistence of the primary obligation (which obviously would not be configurable in the same terms in the event of alternative or with alternative right obligation). Therefore, these are case which may be both prospected, but which are certainly different and independent of one another[11].

The legislation in the field of novation seems also to require a character of novelty for the obligation to be undertaken instead of the primary one.

However, the actual consistency of this requirement is strictly correlated with the exegesis of the rules which provide it: the latter, only easily understandable *prima facie*, have caused numerous controversies of interpretation in the doctrine and in the case law.

In particular, the first of these rules contained in Article 1609 NCC, mentions that the novelty must relate to the object or to the subjects of the obligation. On the other hand, it comes to confirm that the issue of a document or its renewal, the introduction or elimination of a deadline or any other ancillary

[8] By compliance understanding the „performance of benefit. The benefit designates what it is owed, namely the compulsory program; the compliance is the implementation of such program" and, vice versa, by noncompliance (understanding) the failure to implement such program.

[9] This phrase identifies those negotiations which, far from being exhausted in an actual or mandatory effect, are proposed as programming instruments of a form of actual capacity to contract, intended in a natural way to be carried out in time, through the succession of acts or behaviors whose causal relevance is predetermined by the *program agreement*. Precisely referring to these cases, therefore, *stare pactis*, in which the connection irrevocability is finally concretized, obtains independent consistency and becomes an effect meant to protect the common connection given but which, in our case, is not sufficient to exhaust the entire case from which the final effects will be arising. Irrevocability intervenes and acquires a special significance in the cases in which the contractual connection does not cover the entire complex case from which the effect should arise and is used for the qualification of this connection, specifically and particularly, when the connection itself is not solved immediately in the real or mandatory impact.

[10] Dogaru I., Drăghici P., Bases of civil law. Vol. III, General Theory of Obligations, C.H. Beck Publishers, Bucharest, 2009, p. 255 and foll.

[11] Pop L., Popa I.F., Vidu S.I., Elementary Treaty of Civil Law. Obligations, Universul Juridic Publishing House, Bucharest, 2012, p. 233-240.

modification of the obligation, do not produce novation. The changes also brought to the deadline up to which an obligation was to be executed, does not constitute novation, this change not having as a consequence the discharge of the former obligation concomitantly with the constitution of a new obligation – and it represented only an amendment to the initial contract terms, being essential to distinguish between a simple contractual amendment and the novation of the contractual obligations.

2.3. The legal nature of novation

We consider that it is useful to begin analyzing novation and its relationships with the event of obligation amendment, by exploring the classification of the institution in generalized terms.

In this respect, it is preliminarily noted that there is no consensus in the doctrine not even with regard to the legal nature of novation.

The view that is, perhaps, predominant at present, notices that a typical negotiation diagram is chosen, i.e. a genuine contract.

On the one hand, it is claimed that the novation event, even if it is separated into two actual distinct situations (discharge of the primary obligation and the constitution of "new" obligations), does not compromise the unitary essential structure of the act of novation and, therefore, does not legitimate the construction of novation in terms of case consisting of two independent conventions, one meant to determine the settlement of an obligation and the other having as purpose to constitute a "new" obligation, so that the two effects (independent, because each derive from a different and independent act) be connected to each other by a specific intention of the parties, translated in each of the two conventions, into a contractual assembly.

On the other hand, we find the unifying time of the "essential unitary structure" of the act of novation, which expresses, therefore, the common determination of the parties (showing a constant and invariable interest thereof) to discharge an obligation existing between them in order to create a "new" obligation "instead" of the previous obligation.

The first theoretical prerequisite on which this reconstruction relies is represented by the alleged irreducibility of the effects of which novation is composed (settlement and constitution) for one alone; these effects, yet, find an independent legal qualification in a contractual case with a bilateral structure and synallagmatic nature.

According to this opinion, therefore, novatia would be concretized in a contractual diagram whose typical character should be identified, in contraposition with the ability to find, within novation (bilateral) diagram, a waiver to the debt[12], in its irreducibility in the individual moments that compose it and they compete, together, to the outlining of the typical contractual effect, and therefore, in necessary correlation between the two opposed events.

The thesis which qualifies novation as a contract leaves, therefore, from the denial of the unitary nature of the effect and from the conviction that there is, in exchange, a duality of distinct effects, but not necessarily correlated depending on the exchange operation which, in a broad sense, represents the purpose of novation: the unifying moment would be accomplished on a contractual level, through the overall effectiveness of the contract, which is presented as unitary in a necessary way, and not more radically, on the actual level.

The settlement and constitution effects maintain distinct, although they represent, from this point of view, as many fragments which, with a perfect equivalence, draw up a uniform case, that of novation contract: if the settlement of the primary obligation and the creation of a "new" obligation are two contractual, independent and distinct effects, but connected by a mutual interdependence relation, which, within the global novation event, have the same value, then they are two contractual equivalent effects.

It is necessary, further, to pay attention to another thesis, according to which novation should be understood as an effect which can result from a multitude of fortuitous heterogeneous contractual cases: any contract, characterized by an independent and specific function and occurring between the subjects of the obligation (with or without the participation of a third party), may create, within its own system of effects, a "new" compulsory relation and the loss of the primary obligation validity. In the light of those exposed, the obligation novation could occur regardless of a specific will of the parties relating to the settlement of the existing obligation for the creation of a "new" obligation and it would exist in all cases in which the "new" obligation, as is desired by the parties *ex contractu*, would be objectively incompatible with the primary obligation original. After a critical reading of this wording, it was noted that the difficulties emerge taking into account that the two obligations, even if "incompatible" between them, may, however, coexist and also that even if it is assumed, in general terms, that the institution of a "new" binding relation, "incompatible" with the "survival"" of the old one, implies - despite the lack of a punctual and unequivocal will of the parties - from a technical point of view, the discharge of the primary obligation, the situation in which the "new" "incompatible" obligation would appear ant it would reveal, within the global event, as *fact* (which produces the discharge effect), thus

[12] The will of disposal of the debt, which can be seen within novation, could not even be qualified as an onerous waiver (to the debt). In fact, whenever the act of disposal does not have a purely abdicative nature, but proposes, based on the onerous nature of the act (which, therefore, falls within a wider structural context), to determine the construction of a binding relation, we will not be able to have any waiver (although onerous) in a technical direction.

outlining a irreducible dynamic for the novation of obligation (even) understood as *effectus iuris*[13].

The doctrinal elaborations presented until now, with all their diversity, place, therefore, predominantly on the path of *reductio ad unitatem* of the novation phenomenon. This is done by qualifying novation, alternatively, as contract or as effect, without taking into account the possibility that a same institution be able to receive a double qualification, in the light of the context in which it is introduced.

It is necessary, at this point, to prospect another reconstructive hypothesis, according to which novation would be characterized, in reality, in a syncretic mode, of a double nature: it could have traits, depending on the circumstances, both of independent contractual case fortuitously (when the minimum actual unit of the contract is exhausted only under the effect of novation, *unitarily undertaken* as actual moment of an independent contractual event of a settlement – constitution nature), and of individual effect produced by a complex and heterogeneous case fortuitously - a fragment of a minimum more extensive actual unit, which, although not exhausted in an individual novation effect, is meant to include it[14].

In (apparent) compliance with this prospecting, the doctrine emphasized the duplicity and ambivalence proper to the novation phenomenon, without reaching, however, to assign equal importance to the two different senses of novation, of contract and effect: we can speak of genuine novation only in the first case.

In fact, the independence of the effect of novation might be rejected, by postulating instead that the unifying feature of those corresponding effects would be represented by the contract with settlement - constitution effectiveness.

In this case only the subsequent application, by an integral and direct way, of the regulation proper to the institution would become possible, because, assuming that the settlement of the primary obligation was done by objective incompatibility, irrespective of the contractual moment, a irreducible dynamic would be triggered at obligation novation (even) understood as *effectus iuris*.

However, if we look carefully, the *obligatio novanda* settlement, for those who reconstruct novation (and) as *effectus iuris*, cannot be achieved by objective incompatibility (which would necessitate a duality of antithetic effects), so that the constitution of the new relation is not presented as a simple logical antecedent, as *fact* alien to the effective event.

On the contrary, the effect of novation understood unitarily, expression of a power of disposition of the right holder, synthesizes and transcends the individual effects of settlement and constitution.

In the same way in which, for the supporters of the contractual thesis, the cause of novation cannot be broken down into individual fragments that make up the typical contractual case, and the effect of novation constitutes an overrun of the settlement and constitution events and is, by itself, able to independently describe the case[15].

In order to be able to solve once and for all the dilemma concerning the nature of novation, we must therefore, first of all focus the speech on the analysis of novation effects, but without losing sight of the questions above with regard to its structure.

3. Conclusions

Finally, it should be specified that the novation about which we discussed until now is of objective type and, as such, it must be differentiated from subjective novation, which shall be concretized in a contract intended to substitute the primary debtor, which is released, for a new debtor[16]. Even if it is also an event which discharges the binding relation, the subjective novation takes place, by definition, on a subjective level of the relation and involves, in accordance with the express referral made by the legislator, the application of the rules in matter of delegation, expromission and subrogation.

Changing the creditor or the debtor of a legal binding relation is mandatory in order to deal with subjective novation. When a third party undertakes to a creditor to pay its debt, without seeking the assistance of the initial debtor to do this, this is novation by change of debtor. Expromission operates in such a novation. Within this type of novation (via change of creditor) the substitution of the former creditor with a

[13] Pop L., Popa I.F., Vidu S.I., Elementary Treaty of Civil Law. Obligations, Universul Juridic Publishing House, Bucharest, 2012, p. 198 and foll.

[14] Adam I., Civil Law. Obligations. The legal fact in regulating the new Civil Code, C.H. Beck Publishers, Bucharest, 2013, p. 264-269.

[15] Unlike, for example, the alleged substitutive effect or, from the contractual perspective, the relation expressed in terms of substitution, we realize that, as the doctrine has not forgotten to underline, the need to call attention to the content of the "substitution" formula betrays its insufficiency in qualifying, itself, the phenomenon of novation. However, it seems excessive to deny, solely for this reason, the opportunity to express a definition of novation within the meaning of "substitution" and, thus, to consider clearly preferable to focus on the intercurrent connection between the two effects of settlement of the initial obligation and of constitution of a new obligation. In exchange, it seems that these two ways of dealing with the phenomenon are equally suitable to identify it correctly and that subsequent questions on this subject represent, more than anything, mere discussions of a lexical nature.

[16] It should be recalled that the „contract for undertaking the debit of another person, when it is not presented, as effect of the express will of the parties, as case of settlement (by novation) of the pre-existent essential report, generates a succession with a particular title in the debit, determining the entry of the new debtor in the passive subjective situation in which the initial debtor was, as a result of the change caused by convention, which implements the respective event. Also, we cannot let unnoticed the absolute relevance of the difference between the effect of novation and the effect of deprivation of undertaking the debit of another person, by attributing different relevant consequences of settlement to each of the two effective methods and confirming the absolute actuality of the analysis on the effect of succession in our system; the distinction between settlement by novation of the initial compulsory report in the succession in it with a particular title maintains its relevance as regards the regulation of prescription, of privileges, of the succession in the controversial position from the trial point of view, or of the criminal clause, of *pactum non petendo* and of the arbitration clause contained in the initial contract.

new one takes place. The consequence resulting from this type of novation constitutes the debtor's release from the initial creditor and its obligation toward a new creditor. The difference of novation in relation to debt assignment and subrogation in creditor's rights is constituted by debt payment. By comparing debt assignment and subrogation in creditor's rights with novation, we notice that, in the case of the first two legal mechanisms, the initial obligation remains the same and is forwarded to the new creditor while in the case of novation the initial obligation is settled at the same time with its conversion into a new obligation which will necessarily contain a new element as compared to the initial obligation[17].

Considering this summarized preliminary characterization of the institution, many profiles which, in time, have triggered heated debates that have never calmed down between the authors who were in charge of this matter, remain to be clarified.

Indeed, in novation regulation there are a few normative moments that seem to be difficult to reduce to the system.

For this purpose, a useful reading key is represented by the attempt to correctly classify the relationship between the events that change the relation and novation, because the study of novation means, in the background and on a theoretical level the " terminal point" of the events which modify *idem debitum*, coinciding with the very event of novation in which *nova*, inherent *prior debitum*, replace *idem debitum* "opening towards" *novum debitum*".

The doctrinal traditional statement according to which the requirement of novelty, or "*aliquid novi"*, understood as a substantial modification of the benefit object or of the relation title, is co-essential to novation, arises from the reading of these rules. On the contrary, it is concluded that this event can occur in connection with the renegotiation which leads to a new contract regulation of the only methods for the carrying out of the pre-existing benefit.

The other normative feature traditionally attributed to novation relates to the psychological scope and is deducted also from the provisions of Article 1610 of the Civil Code, according to which the intention to novate, the will of discharging the previous obligation "must be indubitable", it must be an unambiguous result[18]. So, it is common practice to say that "*animus novandi*", which consists of the joint and clear intention of discharging the primary obligation, given its substitution to a new one, must be considered, together with *aliquid novi*, in the form of an essential element of the novation contract, in the same way as the subjects and the cause.

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[17] Dogaru I., Drăghici P., Civil Law. General Theory of Obligations, All Beck Publishers, Bucharest, 2002, p. 255 and foll.
[18] Art. 1610 - Law 287/2009 on the New Civil Code.

CHARACTERISTICS OF THE CARGO INSURANCE CONTRACT IN CASE OF INTERNATIONAL LAND TRANSPORT

Dănilă Ștefan MATEI *

Abstract

Cargo international transport is an engine for the development of the economic relations between states involving cross-border movement of goods through the crossing of at least one border of a state (international transport) or by crossing at least two border crossing points, in which case we are in the presence of an international cargo transit. During the transit the goods transported may be subject to an insurance.

The object of the cargo insurance is, thus, represented by the goods, the items expressly listed in the insurance policy, within the territorial limits specified in the insurance policy, both during the transport and during the storage, in the latter case, at the express request of the insured and with the acceptance of the insurer.

This paper analyzes the characteristics of the cargo insurance aiming to present the theoretical and practical aspects of interest with regard to the cargo insurance concluded in case of an international land freight transport.

Keywords: *international freight transport, cargo, insurance, risk, land transport of goods*

1. Introduction

For the goods to satisfy the needs for which they were created, it is necessary that they are transported from the production site to the place where they meet the demand, so that, often, their exploitation is carried out on the international market. Therefore, the transport meets the need for movement of goods, their transit being, often, international (from the territory of a state to the place of destination located in another state).

In the field of international cargo transport we find insurance contracts within sale-purchase contracts, with direct implications on the execution of the contract, including on the transport[1]. The transport and insurance costs directly contribute to the formation of the international prices of goods.

The insurance of the goods that are subject to the international trade activity is concluded depending on the conditions included in the sale-purchase contract, respectively the clauses regarding the conditions of delivery of the goods.

The cargo insurance contract for road transport represents the agreement between the insured and the insurer based on which the insured undertakes to pay a premium to the insurer, and the latter takes over the risk of the of the occurrence of the insured event, binding himself to pay to the insured, on its occurrence, a compensation or an amount insured within the agreed limits of the content. The conclusion of the insurance for the period of transport and storage of the goods that are subject to foreign trade sale-purchase operations is optional[2].

1.1. Insurable interest.

The insurance of the cargo transported is mainly depending on the need for the existence of a patrimonial interest, assessable in money[3] with regard to the insured goods and the compensation. Under no circumstances, the insured will receive a compensation greater than the damage suffered.

For the cargo insurance for the damage suffered during transportation using road vehicles, the holder of the interest of the insurance is the forwarder or the owner of the cargo (the recipient, the purchaser) to whom the compensation is paid if the event occurs.

The forwarder is bound by the generic obligation to prepare the legal and material conditions regarding the movement of the freight carried. The forwarder must, among other things, carry out any necessary operations, from the technical and administrative point of view, in order to make possible the intended transport[4], which may include, according to the time of the cargo risk transfer, the conclusion of the cargo insurance. But, the diligence of the cargo insurance may also belong to the recipient of the cargo.

1.2. The risk of the contract.

Since Incoterms Rules become binding upon their acceptance and insertion in the sale-purchase contract[5], they become of great importance, including in terms of the legal relationship arising from the insurance of the goods which are subject to the sale-purchase and international transport contracts.

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[2] A. Butnaru, op. cit. p. 231.

[3] A. Butnaru, op. cit. p. 231.

[4] Ghe. Piperea, *Dreptul Transporturilor*, curs universitar, Ed a 3-a, Ed C.H. Beck., 2013, pag. 29.

[5] C. Alexa, GH. Caraiani, R. Pencea, *Reglementări și uzanțe în comerțul și transportul international de mărfuri,* Scrisul românesc, Craiova, 1986, p.7-19.

In relation to the Incoterms Rules there will be determined the time when the risk is transferred from the seller to the buyer. In this way, each party will be concerned to conclude the insurance when the risk lies with him.

The general rule is that, during the transport, the goods are carried on the purchaser's risk. The international experience has shown that there are periods, during transport, when the risk is either under the liability of the seller or that of the buyer, or that of the insured, depending on those agreed in the sale–purchase contract.

One of the obligations of the forwarder is to deliver the goods to the carrier. The delivery of goods to the carrier means not only the beginning of the hold of the carrier for the cargo but also the transfer of the risk to the buyer of the goods (its owner).

The circumstances of casus fortuitus and of force majeure raise the question of the risk of the contract both in case of the transport contract and also in case of cargo insurance contract for transport.

In the transport contract, the forwarder, creditor of the specific performance, unfulfilled due to fortuitous causes by the carrier, supports the corresponding damages, not having the right to ask for their coverage by the carrier, but neither does he owe the price of the transport. The carrier bears the risk of the contract exclusively from the perspective of the right for the cost of the transport, in the meaning that loses the amount of money representing the contract price of the transport[6].

If within the insurance contract the case of force majeure represents a clause exempting from liability of the insurer, if this risk occurs, the insurer will not indemnify the owner of the goods. By default, the carrier can not be held liable for loss or damage to goods due to this type of causes. What it is being carried is not the cargo of the carrier but the cargo of the forwarder, the carrier being a simple holder of the goods. The liability of the carrier is a contractual liability, which is based on its fault for failure to fulfill its obligations[7].

1.3. The insurance policy.

The proof for the cargo insurance is the insurance policy which is a document that includes, on principle, the following elements: the name and the address of the insurer, the name and the address of the insured, the object insured, the risks insured, the duration of the insurance, the amount insured, the insurance premium.

The cargo insurance policy used to ensure the goods during the road transport and the storage shall be drawn up in a single original document. At the request and on the expense of the insured, the insurer can issue duplicates or copies of the insurance policy.

In international trade, the insurance policy has the value of a credit instrument. It can be "nominal", "bearer" or "registered", when it can be sent or given as security, as appropriate[8].

The cargo insurance policies are of several types:

1. *subscription policy* (to ensure all goods shipped from the insured within a specific period of time),
2. *floating policies or open policies* (policies that establish a certain limit of values that is ensured and that decreases with each transport carried out, until it is finished),
3. *travel policies* (policies for insurance of the goods from the place of their performance to their place of unloading),
4. *reinsurance policies*.

The mandatory elements in the insurance policy and, also, constituent parts of the insurance contract, are the following: the contracting parties, the object and the insured value, the means of transport, the risks insured and the risks excluded, the insurance premium.

1.4. The parties of the contract.

The parties of the insurance contract are *the Insurer*, that is represented by an insurance company and *the Insured*, who can be any person who has an insurable interest, cargo owners, forwarders, creditors, insurers that reinsure.

1.5. The object of the contract.

The object of the contract is represented by any goods transported in international traffic or that is stored for shipment.

1.6. The amount insured.

For cargo insurances, the amount insured includes the following components: the price of the goods (according to the original invoice or to the value of the goods on the market of the place of shipping, at the time of the insurance), the cost of the transport (e.g.: costs for loading and unloading the cargo), the hoped benefit (e.g.: unforeseen expenses at the conclusion of the loss determination contract) and, possibly, customs duties.

The amount insured is the value within whose limits the insurer pays the compensation.

Within the cargo insurance for transport there are also policies that do not include precise specifications regarding the amount insured. Depending on determining the amount insured at the time of the conclusion of the contract, we can distinguish between *assessed policies* and *not assessed policies.* In case of the not assessed policies, when the insured risks occurs and in order to obtain the compensation, the insured will have to prove the

[6] Ghe. Piperea, *Dreptul Transporturilor,* curs universitar, Ed a 3-a, Ed C.H. Beck., 2013, pag. 32 și 33.
[7] Ghe. Filip, *Dreptul transporturilor*, Ed. Șansa București, 1996, p. 66.
[8] According to the provisions of the Law no. 58 of 1934, the legal provisions regarding the form of the endorsement also apply to the endorsement applied to an insurance policy issued by order.

value of the goods affected by the damage by invoices, delivery notes, bill of lading, bank statements, etc. If the insured or the beneficiary of the insurance holds an assessed policy, it will not to have to prove the value of the goods insured because it was established when the contract was concluded[9].

The insured amount determined under the insurable value, respectively, the so-called under-insurance, makes a partial coverage by the insurer, in relation to the actual value of the damages suffered by the goods during transport, the percentage of the under-insurance being applied to the insured value of the goods.

1.7. The insurance premium

Is the amount of money that the insured pays in advance to the insurer, the latter binding himself to take the risk of occurrence of certain event and to pay the beneficiary, who may be the insured or a third person, a compensation within the limits set by the contract.

Among the determining factors in establishing the level of the insurance premiums we specify:

1. *the scope of the risks* covered by the policy conditions, such as the existence of special risks required to be covered by the insured, determined by the nature and characteristics of the goods (e.g. breakage or scattering in case of transporting glass or food),
2. *use of a particular type of packaging* (e.g. use of a cheaper package),
3. *the duration and methods of carrying out the freight transport* (some insurers do not pay compensation for the damage suffered as a result of the delay or the extension of the travel or they increase the insurance premium when there are more transshipments of the goods as a result of increased risk of damage),
4. *the way that the means of transport looks like* (e.g. the age of the means transport can contribute to the risk assessment and, thus, to the establishment of the insurance premium) and
5. *the conjunctural state of the international insurance market*[10].

1.8. The risks insured.

Road transport insurances were influenced by the maritime transport, the latter having a longer tradition.

For the road transport, the cargo insurance can be carried out for general risks and for special risks, the insurance conditions being classified as general conditions of insurance and special conditions of insurance.

The general conditions of insurance cover either a wide range of risks (e.g.: "all risks" insurance) or "named perils". The special risks are insurable separately, in exchange for the payment of additional insurance premiums.

Within the cargo insurance procedure for international road transport the same insurance conditions as in maritime insurance are practiced, namely: conditions A, B and C.

Condition A ("all risks of loss and/or damage") offers the largest coverage but is also the most expensive. Under this condition, risks listed separately as exclusions are not covered.

Condition B covers the losses and/or the damage of the goods during transport, contains a smaller number of covered risks, risks that are expressly mentioned in the content of the insurance condition. By default, the insurance premium is smaller. Among these risks we specify: fire or explosion, overturning, collision of the means of transport with a foreign object, earthquake, volcanic eruption, lightning, water entering the means of transport, container or storage place, total loss of a package lost or dropped whilst loading onto or unloading from the means of transport. Together with these risks, some insurers also include other risks such as: collapse phenomena (bridges, buildings, tunnels), falling trees, breakage of dams, water pipes, avalanches, lightning, floods, earthquakes.

Condition C covers losses and/or damages of the goods during transport and covers fewer risks than those included under Conditions A and B. There have been included: fires and explosions, overturning or crashing of the means of transport, as well as the collision of the means of transport with a foreign object, other than water.

The insurance of the goods through conditions A, B and C covers certain categories of expenses among which we specify: those made by the insured in order to save the freight loading, for the prevention of an imminent danger or to minimize the losses and/or the damages incurred; the ones regarding the determination of losses and/or damages made by the insured, if the damage is suffered due to a cause which is specified in the insurance; rescue expenses, paid by the insured, established according to the provisions of the insurance contract and/or the applicable law; expenses that represent the rate of liability according to the clause "mutual fault in case of collision" if this clause is provided by the contract[11].

The payment of an additional premium may lead to the extension of any of the conditions mentioned above, so that *special risks* are covered, such as: robbery, theft, non-delivery, strike and risks related to the nature of the cargo.

Within the cargo insurance conditions a part is represented by *the risks excluded*, respectively, those for which no compensation is paid, the losses, the damages or the expenses caused by: willful misconduct of the insured or his representatives, as

[9] C. Iliescu, Contractul de asigurare de bunuri în Romania, Ed. All Beck, 1999, p. 148.
[10] C. Iliescu, Contractul de asigurare de bunuri în Romania, Ed. All Beck, 1999, p. 150-151.
[11] V. Ciurel, Asigurări și reasigurări Abordări teoretice și practici internaționale, Editura, București, 2000, p. 454.

well as the criminal or administrative consequences of this behavior; losses indirectly related to the prohibition of sending or receiving the goods, moral damages, or loss of the profit expected; losses resulting from commercial operations; the usual loss in weight or volume, drying, evaporation, leakage or normal wear and tear of the insured goods; insufficient or improper packing or preparation of the insured goods; inherent defect or the nature of the insured goods; customs or commercial offenses; fines, confiscations, seizure, smuggling, prohibited or clandestine trade; insolvency or failure to fulfill the financial obligations by the owners, managers, or operators of the means of transport.

On principle, these risks are included in the category of uninsurable risks, in the meaning that none of them may be additionally insured.

Furthermore, from the general conditions of insurance are also excluded the risks of war and strikes, these risks could be, however, subject to a special insurance, in exchange for the payment of an additional amount.

Some special goods are subject to special conditions, being possible to conclude a special insurance, considering the nature, the volume, the weight or the value of that cargo (e.g.: transportation of bank bills, securities, coupons, bank notes and coins, precious metals, artworks, dangerous goods, postal parcels, even those with declared value, perishable goods, live animals and others).

Within the transit or combined road transport "the storage risks" condition is also important. This condition covers the losses and the damages of the insured goods, during the storage of the goods, for the following events: fire, explosion, lightning, heavy rain, including its indirect effects, earthquake, hurricane, collapse or landslide, avalanche. The exclusions presented also apply to this condition.

In order for this clause to take effect it is absolutely necessary that the warehouses of the forwarder and the beneficiary are indicated[12]. Romanian arbitration practice takes into consideration the correctness regarding the refusal of payment for the compensation "as long as the warehouses in question, both of the supplier and of the beneficiary, located outside the port of unloading of the goods, were not indicated in the insurance policy"[13].

The special conditions of insurance represent a supplement to the general conditions of insurance of goods, the insured requesting an additional protection for certain risks. The most common *special conditions* are: the risks of war; the risks of strikes; the risks of theft, robbery and non-delivery.

There is also a number of typical risks arising from the nature of the cargo. There are taken into consideration phenomena such as: overheating, spoilage, breakage, scattering, etc.

Unless otherwise provided in the cargo insurance contract, the general exclusions that have been presented are also valid for the special conditions herein mentioned.

Due to the increased incidence of the risks covered, the condition "risks of theft, robbery and non-delivery" need a few specifications.

It covers the losses and the damage for the insured goods caused by theft, robbery and non-delivery of the goods. The compensation is determined starting from the sum insured plus the expenses incurred by the insured on the account of the insurance company aimed at limiting the damage or reconditioning of the goods. Also, one can proceed to some cuts in situations such as: inexact triggering of the risk without bad faith by the insured; causing damages to the insurance company by non-preservation of the right to sue for compensation against those responsible, compensation, possibly, with the premiums remaining to be paid; payment of the deductible, etc. The resulting amount represents the final compensation.

1.9. Interpretation of the contract.

The judge must see the intention of the parties, the meaning and the occurrence of the exclusion clauses of the guarantees or of those regarding the loss of the right (forfeiture) which give the insurer the opportunity to discuss the guarantee itself, emptying the insurance contract of its essence or contents. The interpretative approach of the judge of the case is, currently, extremely complex since the detection of the content of the contractual clauses in order to establish the rights and the obligations of the parties must take into account, besides the regulatory framework conferred by the provisions of the common law, also those of the commercial law and those of the special legal provisions, without ignoring the community law in the field[14].

In addition, the judicial practice has shown that the interpretation of the cargo insurance conditions often presents difficulties, arising from the ambiguity or the lack of information from the insurance conditions or the existence of special conditions, derogating from the general ones. Consequently, we present some of these issues of wide interest:

The cargo insurance contract is the work of the insurer who "thinks it" (conceives it), drafts it and offers it for signing to those who want to be ensured against any sinister or against the event of the occurrence of a risk. The insured usually adheres to the preset contract, without doubting the general and/or special conditions stipulated by it or the content itself of the "prefabricated" legal act.

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[12] C. Iliescu, Contractul de asigurare de bunuri în Romania, Ed All Beck, 1999, p. 153.

[13] Decision no. 139 of the 29th of August 1977 of the Court of Appeal Bucharest quoted by O. Căpățână in Revista română de studii internaționale nr. 3/1980, p. 267.

[14] Mona-Maria Pivniceru, *Efectele juridice ale contractelor aleatorii*, Ed Hamangiu 2009, p. 97.

As a consequence of *the adhesion* character of the insurance contract, the doctrine and the specialized practice stated that clauses that are equivocal, ambiguous or obscure are interpreted in favour of the insured ("*contra proferentem*").

The ambiguity covers two main causes of interpretation/where the interpretation of the contract is required: one is *the lack of information* within the provisions of a contract, a second one is the situation where certain policies are abundant in clauses and documents that provide *excessive information*;

The lack of information found while reading the contract gives it an imprecise and partly ambiguous character; the insufficiency of information may result, for example, from the lack of definitions, the use, by those who write the policies, of generic, inappropriate words or phrases, or that do not circumstantiate the situations and that become inaccurate in a particular context.

In case of lack of information, materialized, for example, by the lack of a definition of the terms used, it appears the problem of resolving differences arising between the "common" meaning of the words and their "legal" or "technical" meanings, meanings absolutely necessary for the courts, for example, when they are called upon to interpret the words or the phrases in a way that should be acceptable and accessible, especially to an ordinary ensured that requested some type of coverage (insurance).

Rules of interpretation. On principle, there are two rules of interpretation that can be applied: *the first* is that, if in doubt, the words of the contract are interpreted to the detriment of the party trying to diminish (or shirk from) their contractual obligations; *the second* establishes that, if in doubt, the words of the contract are interpreted to the detriment of the party who proposed their insertion in the contract (considering that it was its duty that those words/phrases are clear, leave no room for equivocal).

In accordance with the principle (or rule) contra proferentem, if the meaning of a contractual provision is ambiguous, it would be preferred and considered that the meaning is averse to the party that proposed (or imposed) that clause. In the name of fairness, the principle contra proferentem claims not to ever intentionally distort the clear sense of the words used to form the clauses of a contract[15].

An exclusion provided by an insurance contract is formal when it is *express, clear, precise and unequivocal*; it dispels any hesitation between non-insurance and the worsening of the risk insured, i.e. all the uncertainties regarding the intent of exclusion[16].

The exclusion is considered to be clear and precise when it refers to *"precise criteria and assumptions restrictedly listed"*, being desirable that the insurer tries an exhaustive enumeration of the clauses for exclusion from the guarantee.

There are regarded as imprecise the exclusions that relate to approximations or rules (standards) that are unclear, inaccurate, adding more difficulty for the insured when the insurer has the tendency to reduce or even to refuse to grant the guarantee.

The exclusion should also be limited, i.e. to allow the insured to know the exact extent of the guarantee underwritten and to understand the terms of the agreement concluded.

In case an exclusion clause from the guarantee is neither formal nor limited, there are two solutions, both favorable to the insured: either the clause is assessed as lacking validity or it will be considered ambiguous or inaccurate and, consequently, it will be interpreted by the court against the insurer who drafted it[17].

The conflict between the general and special provisions frequently impacts on the object of the insurance contract, especially regarding the extent of the guarantee owed by the insurer;

To be considered as being formal, an exclusion should not only be included in the general conditions of the policy, but also in the particular ones, in view of the fact that *"the clauses of the particular conditions benefit of primacy over the general conditions if they are not compatible with each other".*

2. Conclusions

The distinctiveness of the cargo insurance contract consists of the complement of the technique for taking over the risk by a third party, who, at the same time, does not take part in the operations that he insures, but provides only the performance of the insurance, with the legal aspect concerning the contractual nature of any insurance operation, regardless of the risks covered and the ways of covering.

The presentation led to the finding of the fact that the cargo insurance represents a complex insurance, with multiple characteristics given by its technicality but also by the multitude of legal issues that may arise from the analysis of the general and special conditions, especially when they are drafted inaccurately, equivocally, ambiguously.

[15] Elena-Maria Minea, *Încheierea și interpretarea contractelor de asigurare*, Ed. C.H. Beck., 2006, p. 211.
[16] Elena-Maria Minea, *op cit.* , p. 226.
[17] Elena-Maria Minea, *op cit*., p. 227.

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- O. Căpățână în *Revista romană de studii internaționale nr. 3/1980* for ”Decision nr. 139 din 29 august 1977” a Curții de Apel București.

THE POSSIBILITY OF CONVENTIONAL REPRESENTATION OF A CREDITOR LEGAL ENTITY BY ANOTHER LEGAL REPRESENTATIVE IN THE ENFORCEMENT PHASE

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Abstract

We aim to answer the following question if possible creditor legal representation by proxy another person, during enforcement. The need to find a solution for this issue arose as a result of delivery of Decision No. 9/2016 issued Î.C.C.J., panels for a dispensation of law in civil matters. Part of the answer to this question are undoubtedly of Decision No. 9/2016, specifically the fact that the incidents of enforcement before the judge in court on representation of the legal person is possible only through legal adviser or advocate, within the law, not by an authorized person. Since the Decision. 9/2016 covers only representation before the court shall consider the possibility of this studio extinţe considerations set out decision and the facts constituting the premise of this article.

Keywords: *representation, enforcement phase, legal entity .*

1. Introduction

The issue for discussion is based on Decision No. 9/2016 issued Î.C.C.J., panels for a dispensation of law in civil matters. This decision Î.C.C.J., stated that "the interpretation and application of art. 84 para. (1) of the Civil Procedure Code, the application for summons and conventional representation of the legal person before the courts can not be done by proxy legal person or by legal counsel or lawyer up".

We present some of the reasons on which it based its decision mentioned above.

Decision No reasons were invoked. XXII of June 12, 2006, delivered by the High Court of Cassation and Justice - United Sections in the outcome of the appeal on points of law, namely the argument that "the activities of legal consultancy, representation and legal advice and drafting of legal documents, including introduction of actions in court, with the possibility of certifying the identity of the parties, content and date of documents, defense and representation by legal means the rights and interests of individuals and businesses in relations with public authorities, institutions and any Romanian or foreign constitute, where appropriate, specific activities of the legal profession, regulated in art. 3 of Law no. 51/1995 on the organization and the profession of lawyer, republished (2), as amended, the profession of notary public [Art. 8 9:10 in law notaries and notary activity no. 36/1995, republished (3)] or the bailiff (art. 7 of Law no. 188/2000 on bailiffs, republished, with subsequent amendments)". In paragraph no. 28 was held, referring also to Decision No. XXII of June 12, 2006, that "certain legal activities such as legal representation, drafting of legal documents, formulating actions, exercising and justifying legal remedies may be performed by legal advisors, but the provision of such activities are permitted only as regulated by art. 1-4 of Law no. 514/2003 on the organization and the profession of legal advisor, with completions, ie their capacity as civil servants or employees with individual labor contract, a legal entity of public or private ".

Also in paragraph no. 29 High Court of Cassation and Justice continued playing the reasoning of Decision No. XXII of June 12, 2006 that "since the activities referred not qualify as acts of trade, by reference to the provisions of art. 3 and 4 of the Commercial Code (effective from date of the decision on points of law) (...) they can not be exercised by companies incorporated with such an object, applications for authorization of such companies is inadmissible ".

In its decision stated there was a legal practice in that representation of the legal person by proxy legal person before the bailiff is not admissible and the justification of this case was the need to ensure consistency throughout the proceedings, given that such a prohibition It has already been stated by HCCJ decision to stage the proceedings before the court.

2.1. General considerations on legal representation during enforcement person

By paragraphs 31-34 of Decision No. 9/2016 issued by Î.C.C.J., panels for absolution matters of law, is established that the courts for the legal entity may opt for conventional representation or can stand by the legal representative. In this respect, High Court of Cassation and Justice noted that the situation representation in court legal person can choose only the categories specified in art. 84 para. (1) Civil Procedure Code., legal counsel or attorney, respectively. On the other hand, pursuant to paragraph no. 33 of the decision under review "mandate agreement concluded between two legal effect only in terms of substantive law, not in terms of procedural law governed the matter of representation of mandatory legal rules." Following the

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arguments above, paragraph no. 35 of the decision states that "the activity of conventional representation before the court is a non-commercial activity reserved by lawyers and legal advisors. Or, if they agree on the idea that a legal person to be represented by another person, it concludes, unacceptable, that the representation itself could be object of the trustee.

For the reasons set that decision analysis concerns the situation representation legal person before the court, which follows naturally from the fact that the notification of the application for a ruling to unlock one point of law was made by the Brasov Court strictly on this. However, according to art. 521 par. (1) Civil Procedure Code., complete absolution of points of law only to pronounce on the question of law subject to dispensation.

Regarding the interpretation of Decision No. 9/2016 issued Î.C.C.J., panels for a dispensation of law in civil matters, was put in question whether it is possible creditor legal representation by proxy another person, during enforcement. Part of the answer to this question are undoubtedly of Decision No. 9/2016, specifically the fact that the incidents of enforcement before the judge in court on representation of the legal person is possible only through legal adviser or advocate, within the law, not by an authorized person.

2.2. Considerations on legal representation during enforcement person in front bailiff

Since the Decision 9/2016 covers only representation before the court the question arises whether it is possible to expand its content and representation before the bailiff.

To this end it is necessary to analyze the scope of art. 84 para. (1) Civil Procedure Code which provides that legal entities can be represented conventionally before the courts only through legal adviser or lawyer. The rule established by art. 84 para. (1) Civil Procedure Code is interpreted and applied strictly, so that it can not be extended to the conventional representation of the legal person in situations other than in court. For these reasons, we believe that before the bailiff representing the legal entity is not limited to a lawyer or legal adviser. Moreover, in the absence of the rule laid down in art. 84 para. (1) Civil Procedure Code. Or before the court would not be there any restrictions regarding representation of the legal person.

Of course, we can say on the one hand, the reasons which led to the delivery of Decision. 31-34 of Decision No 9/2016. 9/2016 issued by Î.C.C.J. Such are the reasons underlying the decision delivery mentioned above are the non-commercial character of conventional representation activities and that these activities are reserved by law for lawyers and legal advisers. This key and retain their validity before the bailiff which could lead to the conclusion that even before the bailiff legal person must be represented by a lawyer or adviser only conventional legal considerations applying by analogy Decision no. 9/2016 pronounced by I.C.C.J On the other hand, as was pronounced and practice, there is a need for consistency in the application of rules on corporate representation.

2.3. Considerations on representation legal person consent enforcement and appeal to execution.

Since the notification of the court with the request for a declaration of enforceability is made by the bailiff, the question arises as to what conditions might censorship as a representative of the legal person which in practice acts as intermediary between the legal person-creditor and attorney / legal counsel who signed the request for enforcement to the bailiff. In this respect, it was noted that as long as the notification of the court is carried out by the bailiff, such a vote can not be achieved by means of a plea lack of representative, but only during checks on a declaration forced, which include checks on the request for enforcement.

However, checks that the court can do during enforcement are limited to checking that the reasons provided by art. 666 par. (5) pt. 1-6 Civil Procedure Code[1]. From reading the text of the law said that application for a declaration could be rejected for the existence of other impediments stipulated by law, under art. 666 par. (5) pt. 6 Civil Procedure Code, for lack of proof of the quality of conventional representative signatory of the application for enforcement. Of course it is debatable whether the absence of proof to the quality of representative conventional application for enforcement is a real impediment provided by law according to the real meaning of 666 par. (5) pt. 6 Civil Procedure Code.

The doctrine[2] consistently stated that the text envisages strict impediments and provided by law ie special legislation temporarily suspending the right to seek or continue enforcement of certain executory contracts[3]. In light of such an interpretation, without proof quality representative is such an impediment that

[1] Cited legal text provides that the court may reject the application for a declaration of enforcement only if:
1. the application for enforcement is the responsibility of another organ of execution than before it;
2. decision or, where appropriate, the document does not, by law, enforceable;
3. document other than a judgment, does not meet the formal requirements required by law;
4. The amount is not certain, liquid and due.
5. debtor enjoys immunity from execution;
6. Title contains provisions which can not be brought out by enforcement;
7. There are other impediments provided by law.

[2] G. Boroi (coord.), O. Spineanu-Matei, D. N. Theohari, A. Constanda, M. Stancu, C. Negrilă, D.M. Gavriș, V. Dănăilă, F.G. Păncescu, M. Eftimie, Noul Cod de procedură civilă. Comentariu pe articole, vol. II, Ed. Hamangiu, 2016, p. 430.

[3] It considered such a failure impediment requirements of article. 603 par. (3) NCPC, as amended by O.U.G. no. 1/2016. According to art. 603 par. (3) NCPC "if the arbitral award concerns a dispute relating to the transfer of ownership and / or the establishment of another real right

would result in the rejection of the application for a declaration only by an interpretation in full and in any case strictly required by art. art. 666 par. (5) pt. 6 Civil Procedure Code.

Regarding appeal to execution, we appreciate that there may be a reason for its admission that the request for enforcement was filed legal person as proxy another person. The reasons are the same as we have shown above, recitals Decision No. 9/2016 issued Î.C.C.J. It can not be extended to the conventional representation of the legal person before the judge.

At the end of this brief analysis we express our hope that the judicial practice uniform will solve the problem at hand, even if the solution would appear to be without a fracture consistent corporate representation rules. Would like in this context to a possible legislative amendment or decision I.C.C.J legally binding, legal persons may be represented exclusively by a lawyer or legal adviser only before the courts, not before the bailiff. We appreciate that this is the solution that respects equally the letter and spirit of the law, even if a solution contrary there are many arguments opportunity.

We believe that our solution is consistent with those stated by the High Court of Cassation and Justice Decision no. 9/2016. The Court stated in that decision that the reasoning contained in recitals Constitutional Court Decision no. 485 of June 23, 2015, which was declared unconstitutional the provisions of Art. 13 para. (2) sentence II, art. 84 para. (2) and art. 486 par. (3) of the Code of Civil Procedure with respect to claims arising from mandatory preparation and presentation of the appeal by legal persons by a lawyer or legal adviser, can not be applied mutatis mutandis to the provisions of art. 84 para. (1) of the Code of Civil Procedure because, in the latter case, the text concerns only the limiting conventional legal person before the court, without prejudice to the legal status of legal representation and without turning obligation representation and assistance councilor legal or lawyer in a condition of admissibility of the action or a barrier to access to justice. Also art. 209 par. (1) of the Civil Code provides that a legal person exercises its rights and fulfills its obligations through its management as of the date of their creation. In the absence of the administrative, until the date of their exercise rights and obligations concerning legal entity shall be made by the founders or by individuals or legal persons appointed for this purpose, as required by art. 210 par. (1) of the civil code. Since the limit in art. 84 para. (1) of the Code of Civil Procedure shall act only where the legal person opts for conventional representation in court, in which case they can choose the only category referred the text said that, without representation conventional procedural rights of legal person may be exercised by the legal representative.

The decision considerations set Î.C.C.J. showed that a mandate agreement is concluded between two legal entities, this effect only in terms of substantive law, not in terms of procedural law governed the matter of representation of mandatory legal rules. The use of the adverb "only" label art. 84 para. (1) of the Code of Civil Procedure exclusive highlights how conventional corporate representation before the courts, which can be achieved only two categories of representatives nominated by text. This conclusion follows from the phrase "under the law", referring to laws governing the professions of legal adviser and lawyer.

The activity of conventional representation to the court is a non-commercial activities reserved by law lawyers legal counsel. Or, if they agree on the idea that a legal person to be represented by another person, it concludes, unacceptable, that the representation itself could be object of the trustee. Given the mandatory nature of the procedural rules, the interpretation that legal person could be represented in court by another person, including as regards the application for summons is legally unfounded.

The Court's reasoning in the foregoing considerations lead to the conclusion that the problem itself is not legal entities representation by another person in general, but to the courts. High Court made no finding on conventional representation of legal persons before the bailiff as notification was not given this object. Consequently, it must extend to other situations, principles stautuate the decision cited, especially since in the spirit of the Code of Civil Procedure in force, enforcement, the latter is no longer a part of the civil trial, but a Skin distinct phase resulting in further formulation of the Code of civil procedure and Law no. 76/2012 on the implementation of the Code of Civil Procedure.

3. Conclusions

Since the response to the above, we believe that if a declaration of enforcement, the application for enforcement was lodged legal person by proxy legal person, they will not be rejected for this reason. Notification is perfectly valid executor in case of representation by another person, and a declaration of enforcement shall be made by the bailiff, according to art. 666 par. (1) Civil Procedure Code. That the law assigns bailiff standing in a declaration of enforcement removes any question about the representation of the legal person in the process. It is therefore removed a possible discussion on the lack of representative trustee legal person as bailiff is formulating a declaration of enforcement, and the latter has been duly informed, for

on immovable property, arbitration award will be presented the court or notary public to get a decision court or, where appropriate, a notary authentic. After verification by the court or by the notary public to the conditions and following the procedures required by law and paid by part of the tax on transfer of ownership, it will proceed to registration in the land and will be transferred property and / or the establishment of another real right over immovable property in question. If the arbitration award is forecloses checks referred to in this paragraph shall be made by the court in the proceedings for a declaration of enforcement (Idem, p. 430).

the above reasons, and if request for enforcement was submitted by the legal person by legal representative.

The same solution also applies to the appeal to execution. While it is possible to represent the legal person in front executor by proxy legal person, this can not be invoked as grounds for illegality of enforcement.

Finally, legal representation by proxy legal person is prohibited only in front of the court, regardless of the procedure, so including incidents that may occur during execution.

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BANK RESOLUTION

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Abstract

The bank resolution represents one of the technical and legal instruments introduced in the legislative framework belonging to the banking financial market. Within the resolution process, credit institutions and other financial entities, together with supervisory and resolution authorities, are required to develop and implement a series of measures, operations and procedures aimed for preventing and overcoming financial difficulties .The resolution tools, as regulated in Law no. 312/2015 on recovery and resolution of credit institutions and investment companies, as well as on amending and supplementing certain acts in the financial system, and applied by the National Romanian Bank , as a resolution authority, shall be use to defend financial stability and to protect the public interest.

Keywords:*bank resolution, sale of business, bridge institution, asset separation, bail in tool*

1. Introductory note

In order to protect the interests of depositors and to ensure the stability and viability of the national and European banking system, prudential supervision rules and procedures have been established. Moreover, the authorities vested with implementation, supervision and implementation of all specific activities to prevent and identify deviations from the policies viable and sustainable in the banking system have been entitled.

The central banks of each state are responsible for defining the prudential financial supervision operations[1].

As it is known, the legal systems are required to keep up with practical realities in the field, so, in that sense, the Law no. 312/2015 on recovery and resolution of credit institutions and investment companies, as well as on amending and supplementing certain acts in the financial system[2], was adopted, and it is transposing the main European regulations in the field, such as EU Regulation no. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms, Directive no. 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments[3].

Although the title of the law clearly shows that recovery and resolution are envisaged, in reality the resolution is largely about the recovery of credit institutions and investment firms.

2. Entities subject to bank resolution

It emerges from the law economy that the provisions on recovery and resolution apply to the following categories of entities: credit institutions, investment firms, financial institutions, financial holding companies, mixed financial holding companies, financial holding companies with mixed businesses, parent financial holding companies in a Member State, parent financial holding companies in the European Union, mixed parent financial holding companies in a Member State and mixed parent financial holding companies in the European Union.

According to the law, the entities empowered with resolution prerogatives are the National Bank of Romania and the Financial Supervisory Authority.

Thus, the National Bank of Romania is the resolution authority for:

a) credit institutions, Romanian legal entities;
b) branches in Romania of credit institutions from third countries;
c) financial institutions, Romanian legal entities;
d) financial holding companies, mixed financial holding companies and financial holding companies with mixed businesses, Romanian legal entities and parent financial holding companies in Romania, parent financial holding companies in the European Union, mixed parent financial holding companies in Romania, mixed parent financial holding companies in the European Union, Romanian legal entities which are part of a group subject to supervision on a consolidated basis but which also includes a credit institution.

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[1] For details, see V. Nemeş, Banking Law, University Course, Publishing Universul Juridic, Bucharest 2011, p. 70-71.
[2] Official Gazette of Romania no. 920 of 11 December 2015.
[3] OJ L 176, 27.6.2013, p. 1–337, OJ L 173, 12.6.2014, p. 349–496.

The Financial Supervisory Authority is the resolution authority for:

a) investment firms, Romanian legal entities;
b) Romanian branches of investment firms from third countries;
c) financial institutions, Romanian legal entities; c) financial holding companies, mixed financial holding companies and financial holding companies with mixed businesses, Romanian legal entities
d) parent financial holding companies in Romania, parent financial holding companies in the European Union, mixed parent financial holding companies in Romania, mixed parent financial holding companies in the European Union, Romanian legal entities which are part of a group subject to supervision on a consolidated basis whose parent is an investment firm or which, if the parent company is a financial holding company or a mixed financial holding company, but does not also include a credit institution.

All decisions regarding financial recovery and resolution adopted by the National Bank of Romania or, where appropriate, by the Financial Supervisory Authority, will take into account the potential impact on all Member States where the credit institution, investment firm or group is operating, so as to minimize the socioeconomic negative effects and financial stability in those Member States.

In addition, minimizing adverse effects with an impact on the financial stability, at a European level, is also the main objective pursued by consolidated supervision of entities operating on the European financial and banking market.

3. Measures, operations and procedures specific to the bank resolution

Within the ample resolution process, credit institutions and other financial entities, together with supervisory and resolution authorities, are required to develop and implement a series of measures, operations and procedures aimed for preventing and overcoming financial difficulties .

The main measures, operations and procedures set up at European level and detailed in the Law no. 312 / 2015 are the following: financial recovery procedure, specific operations regarding the preparation and implementation of the resolution, resolution procedure, resolution tools, early intervention, temporary administration and special administration.

All these are operations and administrative procedures because are set up and carried out under the supervision of the supervisory / resolution authorities, excluding the intervention of the courts.

In the following, we will briefly outline the main rules under which they are set up, run and ended, both at an individual and a group level.

4. Financial recovery

One of the first mandatory operations for credit institutions and other financial entities subject to the resolution is to develop strategies for financial recovery[4] for crisis situations.

Thus, in accordance with the provisions of the Law no. 312 / 2015, credit institutions which have a significant share in the national financial system elaborate their own recovery plans which will consist of measures to be taken by the entity to restore its financial position in the event of its significant deterioration.

Under the Law, a credit institution is considered to have a significant share in the national financial system if it fulfills any of the following conditions:

a) the total value of its assets exceeds 30 billion EUR;
b) the share of total assets in Romania's Gross Domestic Product (GDP) exceeds 20 %, unless the value of total assets is less than 5 billion EUR (article no. 9).

As explained above, the law obliges each supervised entity to develop its own recovery plan[5]. The Recovery Plans must contain specific elements and are subject to verification and approval by the National Bank of Romania, and mainly envisage their own scenarios of overcoming the major situations of financial difficulties and, obviously, avoiding bankruptcy.

5. Preparing and implementing bank resolution operations

Preliminary remarks

Another implementation mechanism for preventing, avoiding and overcoming financial crisis situations is the resolution.

In this context, the Law stipulates that the National Bank of Romania, as the resolution authority, shall draw up a resolution plan for each Romanian credit institution that is not part of a group subject to consolidated supervision.

Where appropriate, the National Bank of Romania shall also consult with the resolution authorities in the jurisdictions in which the credit

[4] The financial-banking recovery is not to be confused with the recovery proceedings in the judicial reorganization enshrined in Law No. 85/2014 on insolvency and insolvency prevention procedures. For details, see, St. D. Carpenaru, M.A. Hotca and V. Nemeş, Insolvency Code-Commented, Publishing Universul Juridic Bucureşti 2014, p. 371 et seq .; R.Bufan, (collectively), Practical Insolvency Treaty, Publishing Hamangiu, Bucharest, 2014, p. 583 et seq.

[5] For aspects of the common reorganization plan, see St. D. Carpenaru, M.A. Hotca and V. Nemeş, op.cit. P.380 et seq .; R. Bufan (collectively), op. Cit. P. 591 et seq.

institution's significant branches are located, as the resolution plan is relevant to those branches.

5.1. The resolution plan

The same as the financial recovery, the resolution requires a draft resolution. The difference is that, if the recovery plan is drawn up by each credit institution, the resolution plan is drawn up by the National Bank for each entity subject to supervision.

At the request of the National Bank of Romania, as a resolution authority, the credit institution provides assistance in drafting and updating the resolution plan (article no. 53).

The law also regulates the very frequent situations in which the supervised entities are part of a financial group.

In particular, the law stipulates that, in the absence of a joint decision between the resolution authorities, the National Bank of Romania, as the group-level resolution authority, adopts its own decision on the group's resolution plan, soundly supported and taking into account the viewpoints and reserves of the other resolution authorities, and notifies the parent company in the European Union of the decision taken (68th article).

5.1.1. Intragroup financial support

In order to overcome hard financial times, credit institutions and entities subject to financial supervision that are part of a financial group may resort to the conclusion of intragroup financial support agreements.

In particular, financial institutions which are included in consolidated supervision within the European Union may conclude intra-group agreements on the granting of financial support to any party of the agreement that meets the conditions for early intervention under the law.

5.1.2. Financial Support Agreement

Under the law, the intra-group financial support agreement may cover one or more subsidiaries of the group and may provide financial support from the parent company to its subsidiaries, from its subsidiaries to the parent company, between subsidiaries within the group that are party of the agreement or any other combination of the parties of the agreement.

The Financial Support Agreement may take the form of a loan, the provision of personal guarantees, the provision of assets for use as collateral or any combination of these forms of financial support, in one or more transactions, including between the beneficiary and a third party.

6. Early intervention

General notions

A range of measures that can be taken in the implementation of the financial resolution are the early intervention measures.

In this respect, article no. 149 of the law stipulates that, when a credit institution infringes or, due to, among other things, a rapid deterioration in the financial situation, is likely to breach the requirements of Regulation (EU) no. 575/2013, Government Emergency Ordinance no. 99/2006 and the regulations issued by the National Bank of Romania on their application, capital market provisions transposing Title II of Directive 2014/65 / EU or any of the provisions of art. 3-7, art. 14-17, art. 24, 25 and 26 of Regulation (EU) No. 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets may, as appropriate, shall take at least the following measures:

a) require the management body of the credit institution to implement one or more arrangements or measures set out in the recovery plan or to update such a recovery plan when the circumstances which led to the early intervention differ from the assumptions set out in the initial recovery plan and implement one or more of the arrangements or measures set out in the updated plan within a certain time frame, in order to ensure that the conditions reffered to in the introduction of the article no longer apply;
b) request the organs of management the credit institution to examine the situation, identify the measures to overcome any identified problems and to elaborate an action program to address those issues and a timetable for their implementation**;**
c) require the management body of the credit institution to convene a general meeting of the credit institution's shareholders or, if the management body fails to comply with this requirement, to directly convene the meeting and, in both cases, to determine the agenda of the meeting and demand that certain decisions be taken into account for their adoption by the shareholders;
d) request for the replacement of one or more members of the organs of management or senior management body of the credit institution(if they are found unfit to perform their duties according to the Law) ;
e) request the organs of management of the credit institution to draw up a plan of debt restructuring with all or part of the creditors of the credit institution, in accordance with the recovery plan, as appropriate;
f) request changes to be made to the business strategy of the credit institution;
g) request changes to be made to the legal structure or operational structure of the credit

institution**;**

h) obtain, including through on-the-spot inspections, and provide the National Bank of Romania as the resolution authority, all the necessary information in order to update the resolution plan and to prepare a possible resolution of the credit institution as well as to perform an assessment of the assets and liabilities of the credit institution, in accordance with the legal provisions.

For the purposes of the Law (article 149 (2)), the rapid deterioration of a credit institution's financial situation includes a deterioration in liquidity, an increase in indebtedness, on non performing loans or concentration of exposures, assessed on the basis of a set of indicators, which may include the requirements of credit institution's own funds plus 1,5 percentage points[6].

7. Replacement of the senior management body and governing body

Preliminary remarks

Another measure that could be taken by the resolution authority is the replacement of the senior management body and the governing body of the entity.

In particular, as stipulated in the art. 152 of the Law, in case of a significant deterioration in a credit institution's financial situation or when there are serious breaches of the credit institution's laws, regulations or instruments of incorporation or serious administrative irregularities and if the other measures that have been taken in accordance with the law are not sufficient to put an end to this deterioration, the National Bank of Romania may request the replacement of the senior management body or the governing body of the credit institution as a whole or some of its members. Executive management can be replaced by a temporary administrator or a special administrator as we will see in the following chapter.

7.1. Appointment of a temporary administrator

As stated above, one of the measures that can be used is the appointment of a temporary administrator. The Temporary Administrator shall be appointed if the replacement of the senior management body or the governing body is insufficient to overcome the difficult situation.

In particular, the National Bank of Romania, as the competent authority, may designate one or many temporary administrators of the credit institution, including the Bank Deposit Guarantee Fund.

The National Bank of Romania may appoint any temporary administrator either to temporarily replace the governing body of the credit institution or to temporarily work with the governing body of the credit institution.

The responsibilities of the temporary administrator and the way of working together with the bodies of the institution subject to the resolution are determined by the National Bank of Romania.

Responsibilities may include some or all of the powers of the management body of the credit institution in accordance with the constituent instruments of the credit institution and national applicable law, including the power to exercise some or all of the administrative functions of the credit institution's governing body.

The National Bank of Romania may request that certain actions of the temporary administrator be subject to its prior approval and demand the latter to prepare reports on the financial position of the credit institution and on the actions undertaken during its term of office.

The appointment of a temporary administrator must not exceed one year. This period may exceptionally be renewed if the conditions for appointment of the temporary administrator continue to be met (article 159).

7.2. Appointment of a special administrator

The National Bank of Romania, in its capacity of resolution authority, may appoint a special administrator[7] to replace the governing body of the institution subject to the resolution, in which case it shall make its appointment public on its official website. The Special Administrator must have the necessary qualifications, knowledge and expertise to perform his / her duties. The Bank Deposit Guarantee Fund may be appointed as a special administrator (article 194 of the Law).

The Special Administrator shall have all the powers of the general meeting of the shareholders and the governing body of the respective institution, which will be undertaken under the strict supervision of the National Bank.

The mandate of a special administrator shall not exceed one year. The mandate may be renewed for periods of up to one year. The law takes into account the mandate of the special administrator, but in reality it is a factual procedure of special administration.

The fate of the temporary administration and special administration procedures depends on the results achieved by the credit institution to which they have been set up. If the financial and management crisis

[6] It is noted that the "rapid deterioration of the financial situation" within the meaning of the financial and banking regulations concerns the state of insolvability of the entity concerned.

[7] The financial administrator of the bank resolution procedure is not to be confused with the special administrator established by the Law no.85/2014, either because the latter is elected by the associates / members of the insolvent debtor in a judicial procedure rather than administrative and may be, in principle, any individual. For more details, see St. D. Carpenaru, M.A. Hotca and V.Nemes, op.cit.p.156 et seq.; R. Bufan (collectively), op. Cit., P. 171 et seq.

has been overcome, then the proceedings will be lifted and the institution will resume its activity under the leadership of its own administration and management bodies, and if the procedures fail, bank resolution procedure or even bankruptcy will be put in place[8].

8. Bank resolution procedure

8.1. Preliminary clarifications

The resolution procedure is an extreme procedure to be applied in the event of a major financial difficulty and includes specific objectives, conditions and rules for setting up, running and finalizing.

For the purposes of the Law (article 181), a credit institution is deemed to enter or is likely to enter into a state of major difficulty if at least one of the following conditions is met:

a) the credit institution violates the requirements underlying the maintenance of the authorization or there is objective evidence that they will be violated in the future;
b) the assets of the credit institution are lower than the debts or there are objective elements on the basis of which it can be determined that this will happen in the near future;
c) the credit institution is unable to pay its debts or other obligationswhen due, or there are objective elements that can determine that this will happen in the near future;
d) an exceptional public financial support is required.

According to the Law, the National Bank of Romania, in its capacity as resolution authority, when it applies resolution instruments, takes into consideration the objectives of the resolution and chooses those tools and competencies that allow the highest possible achievement of the objectives considered to be relevant in every single situation.

8.2. The objectives of the bank resolution

The main objectives of the resolution are regulated in the art.178 of the law.

Thus, according to the cited rule, the objectives of the resolution are as follows:

a) ensuring the continuity of the critical functions;
b) avoiding significant adverse effects on financial stability, in particular by preventing the contagion, including within the market infrastructures and by maintaining market discipline;
c) protecting public funds by minimizing reliance on exceptional public financial support;
d) the protection of depositors covered by the deposit-guarantee legislation and investors subject to the provisions for compensation under the capital market legislation;
e) protecting clients' funds and assets[9].

8.3. Conditions for initiating the resolution procedure

According to the Law, the National Bank of Romania undertakes a resolution action on a credit institution only if it considers that the following conditions are met cumulatively:

a) The National Bank of Romania determined, in its capacity as competent authority, that the credit institution is entering or is likely to enter into a state of major difficulty;
b) Given the time horizon and other relevant circumstances, there is no reasonable prospect that the state of major difficulty could be hindered in a reasonable period of time, through alternative measures coming from the private sector, including measures taken by an institutional protection scheme, or through supervisory measures, including early intervention measures or measures to reduce the value or convert the relevant capital instruments;
c) The resolution action is necessary from the public interest point of view.

A resolution action is considered to be of a public interest if is necessary to achieve one or more objectives of the resolution , is proportionate to one or more objectives of the resolution and the liquidation of the credit institution according to the insolvency proceedings applicable to credit institutions would fail to achieve the objectives of the resolution to the same extent (article 182).

8.4. Bank resolution tools

According to the provisions of art. 216 of the Law no. 312/2015, the banking resolution instruments are the following:

a) selling the business;
b) the brigde-institution tool;
c) the asset separation tool;
d) the bail-in.

As with the other measures, the resolution instruments are put in place by the National Bank of Romania in its capacity of resolution authority.

8.4.1. The tool for selling the business

General notions

Under the Law, the instrument of selling the business consists of the transfer of shares or any other proprietary instruments, as well as any assets, rights or

[8] For details on bankruptcy of credit institutions, see St. D. Carpenaru, M.A. Hotca and V. Nemeş, op. cit. P.530 et seq .; R.Bufan (Collectively), op.cit., P. 850 et seq.

[9] The objectives of the banking resolution are similar to the purpose and goals of pre insolvency proceedings, D. Carpenaru, M.A. Hotca and V. Nemeş, op. Cit. P.22 et seq .; R. Bufan (collectively), op cit. p. 91 et seq.

obligations of an institution subject to the resolution or all of them.

The transfer for the sale of the business is operated by the National Bank of Romania and can be made in favor of a buyer who is not a bridge institution.

A peculiarity of the sale of the business is that, according to the Law, the transfer of shares, property instruments or assets takes place without the consent of the shareholders of the institution subject to the resolution or of any third party other than the buyer, and is not subject to any procedural requirements laid down by applicable company law or capital market legislation.

However, in all cases, the business transfer operation is subject to the following principles (article 237):

a) the bid should be as transparent as possible and must present as accurately and fully as possible the obligations, shares or other property instruments proposed for sale;
b) the sale procedure must not unduly favor or discriminate any potential buyer;
c) the transfer must be free of any conflict of interest;
d) must not give any unfair advantage to any potential buyer;
e) must take into account the need for the resolution action to take place rapidely;
f) the aim should be to maximize, as much as possible, the sale price of the shares or other instruments of ownership, assets, rights or obligations concerned.

In this respect, article 228 of the Law stipulates that the National Bank of Romania may, with the consent of the buyer, undertake the transfer powers in respect of the assets, rights or obligations transferred to the buyer in order to transfer assets, rights or obligations back to the institution subject to the resolution, or shares or other ownership instruments, back to their original owners, and the institution subject to the resolution or the original owners has/have the obligation to take back any such assets, rights or obligations, shares or other proprietary instruments.

8.4.2. Bridge institution tool

Preliminary remarks

The bridge institution tool is still a sale / transfer of business but this time to a special entity, known as a bridge institution.

To this end, article 239 of the Law provides that the National Bank of Romania is empowered to transfer shares or other instruments of ownership and any assets, rights or obligations of one or more institutions subject to resolution or all of them, to a bridge institution.

As a result, if the transfer of shares / titles of ownership, rights and obligations is made to a bridge institution then the rules are in force and we are in the presence of the resolution tool called "bridge institution", and if the transfer is made to any other entity, the rules are also in force and we are in the presence of the resolution tool called "selling the business".

The setting up of a credit-bridge institution is subject to special rules derogating from the common law of financial institutions and other entities with legal personality.

By law, the bridge institution is a legal entity which meets several requirements.

Thus, in terms of the capital it is wholly or partly owned by one or many public authorities and the bridge institution is controlled by the National Bank of Romania. It follows that, from the perspective of the shareholders, the public institution can be fully owned by the state or, at most, a joint one, that is, of public and private participation. In the case of a joint venture, the National Bank will decide on the proportion of holdings to be set up in the bridge institution. In other words, the set up of a bridge institution with exclusive private participation is excluded.

Also regarding the capital, according to art. 260 of the Law, the National Bank of Romania may authorize a credit-bridge institution with a share capital below the level provided by art. 11 of the Government Emergency Ordinance no. 99/2006[10] but which cannot be less than the equivalent in lei of 1 million Euros. In this case, the National Bank of Romania shall notify the credit-bridge institution and the European Commission, together with the motivation for the certain level of the share capital.

Regarding the shareholders, it is expressly stipulated that, by way of derogation from the provisions of Law no. 31/1990, a bridge institution authorized according to the provisions of Government Emergency Ordinance no. 99/2006, may be formed as joint-stock company with a sole shareholder.

The Law also stipulates that the Bank Deposit Guarantee Fund, in its capacity as administrator of the bank resolution fund, may be a shareholder of the bridge institution.

As to the purpose, such entity is created in order to receive and hold some or all of the shares or other proprietary instruments issued by an institution subject to resolution or some or all assets, rights and obligations of one or many institutions subject to the resolution (article 240).

Regarding the set up, it must also be noted that according to the Law, the content of the documents regarding the establishment of the bridge-institution is approved by the National Bank of Romania.

[10] According to this text, the National Bank of Romania cannot grant the authorization of a credit institution if it does not have separate funds or an initial capital level at least equal to the minimum established by regulations which cannot be less than the equivalent in RON to 5 million EUR.

8.4.3. Asset separation tool

Overview

This resolution tool involves also a transfer, but only of assets. Unlike the sale of the business and the bridge institution instrument, the asset separation tool applies only to the assets, rights and assets of institution subject to the resolution, excluding the transfer of shares or other proprietary instruments.

The transfer is made to an entity with a special status, called "asset management vehicle".

Specifically, the Law stipulates that, in order for the asset separation tool to be effective, the National Bank of Romania is empowered to transfer the assets, rights or obligations of an institution subject to resolution or a bridge institution, to one or many asset management vehicles. Therefore, assets belonging to an institution subject to the resolution and those belonging to a bridge institution can be separated and transferred.

However, it should be noted that the National Bank of Romania may implement the asset separation tool by creating a vehicle for this purpose only if the following conditions are met:

a) the situation on the specific market for those assets is of such a nature that the winding-up of those assets in insolvency proceedings could have a negative effect on one or many financial markets;
b) such a transfer is necessary to ensure the proper functioning of the institution subject to the resolution or the bridge institution;
c) such a transfer is necessary to maximize the revenues generated from the liquidation (article 272).

As with other resolution instruments, the transfer may take place without having the agreement of the shareholders of the institutions subject to the resolution or any third party other than the bridge institution and is not subject to any procedural requirements stipulated by the applicable Company Law and capital market legislation, as the case may be.

Under the Law, an asset management vehicle is a legal entity whose share capital is wholly or partly owned by one or many public authorities and was created in order to receive, in whole or in part, the assets, rights and obligations of one or many institutions subject to a resolution or a bridge institution (article 269).

The asset management vehicle is permanently subject to control by the National Bank of Romania.

Similar to the bridge institution, the Guarantee Fund may be a shareholder in an asset management vehicle.

8.5. The bail-in tool

An ultimate resolution tool which attempts to overcome the state of financial difficulty is the bail-in tool.

In this respect, the Law stipulates that the National Bank of Romania, as a resolution authority, may apply the bail-in tool in order to achieve the objectives of the resolution and in accordance with the resolution's principles, for achieving the resolution's goal of overcoming crisis moments and avoiding financial collapse in the banking market.

In particular, the Law stipulates that the National Bank of Romania may apply the bail-in tool for the purpose of implementing the resolution only if, in its opinion, there is a reasonable prospect according to which the application of this instrument, together with other relevant measures, including measures implemented in accordance with the reorganization plan will result in the achievement of the relevant objectives of the resolution, as well as the restoration of the long-term viability and financial soundness of the credit institution or entity concerned (article 283 of the Law no. 312 / 2015).

As a precautionary measure, according to the Law, credit institutions are required to comply with and maintain, permanently, a minimum requirement/situation of own funds (capital) and eligible debts, which are set and calculated as the sum of the own funds and eligible debts, expressed as percentage of the total debts and own funds of the credit institution. From a common law perspective, it would be a balance between the assets and liabilities of the credit institution on which the resolution procedure was opened.

In addition to own funds, on special occasions there may be initiated specific procedures applied to the use of financial stabilization instruments. According to the Law, the stabilization instruments are the *tool of financial support through public injection of capital and tool of temporary private-ownership of the State* (art. 355 of Law no. 312/2015)

As regards public financial assistance, the Law stipulates that, in order to participate in the resolution of a credit institution, including by intervening directly in order to avoid its liquidation, to achieve the objectives of the resolution set up in relation to Romania or the European Union as a whole, it may be granted *exceptional public financial support* through additional instruments of financial stabilization, in accordance with the provisions of art. 221, art. 353 and the EU State Aid Framework. Such measures are taken under the leadership of the Ministry of Public Finance as a competent ministry in close cooperation with the National Bank of Romania, as a resolution authority.

With special regard to situations where the resolution authority is the National Bank of Romania, the Law stipulates that, in accordance with the provisions of Company Law no. 31/1990, the Ministry of Public Finance, as a competent ministry, may participate in the bail-in of a credit institution or of an entity subject to resolution by means of equity instruments in exchange for common equity Tier 1 instruments and Tier 1 extra or Tier 2, in accordance

with the requirements stipulated in the Regulation (EU) No. 575/2013.

As regards *the tool of temporary private-ownership of the State*, this is implemented under the coordination of the Ministry of Public Finance, as a competent ministry, when it is considered that the application of resolution instruments would not be sufficient to protect the public interest, when the credit institution has previously been granted a public contribution of capital through the public injection of capital as a financial tool,so that the entity may be transferred to the private ownership of the State. This decision shall be taken after consulting the National Bank of Romania, as competent and resolution authority.

Specifically, the law stipulates that the Ministry of Public Finance may undertake one or more transfer orders in which the beneficiary of the transfer is an entity designated by the competent ministry or a joint stock company entirely owned by the State (Article 357 of the Law no. 312 / 2015).

We must also add that *exceptional public financial support* means in this cases State aid within the meaning of Article 107 paragraph (1) of the Treaty of the functioning of EU or any other public financial support at supra national level(which if provided for at national level would constitute State aid), provided in order to restore or preserve the viability or solvency of entities referred to in Article 1 of the Law.

9. Conclusions

As provided in article 7 paragraph 2 of the Law no.312/2015, the resolution tools are destined to protect the public interest, defending financial stability and shall be applied when the financial/credit institution cannot be wound up under ordinary insolvency proceedings, as this could destabilise the financial system.Having in mind the effects of the latest financial crisis, besides the provided tools for defending the financial stability, competent authorities must also discourage unsustainable financial speculation without real added value and impose higher requirements for systemically important institutions that are able, due to their business activities, to pose a threat to the economy.

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PREREQUISITES OF THE RESOLUTION OF A CONTRACT

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Abstract

I herein want to emphasise the prerequisites of the resolution of a contract according to the Romanian Civil Code of 2009. The prerequisites of the resolution of a contract are substantially different from those identified under the former fundamental civil legislation (the Romanian Civil code of 1864). This study aims at a better understanding of the new prerequisites of the resolution of a contract: a. a fundamental non-performance of the obligation; b. an unjustified non-performance of the obligation; c. mora debitoris The analysis of these prerequisites reveals a new possible trait of the resolution: a remedy for the non-performance of the contract rather than a sanction or a variety of contractual liability. Thus the modern legislator of the Romanian Civil Code of 2009 proposed to partially change the physiognomy of the resolution of a contract, different from the former institution and here we are in front of a new law institution. The resolution of a contract under the Romanian Civil Code of 2009 is regulated under The 5th Book – The Obligations, The second chapter – The enforcement of the Obligations, The 5th Section – Resolution of the Contract, respectively under the Article 1549 – 1554. As will be shown below, the resolution of a contract has a homogeneous structure without being spread in different parts of the Civil code. The earning lies in the action of organism the new legal provisions, apparently enriched in comparison to those found in the Romanian Civil Code of 1864. Most notably, the Romanian Civil Code of 2009 preserves the Roman legacy. The modern legislator had a difficult task: 146 years of legal doctrine and jurisprudence transposed into a new legislation which, of course, has its flaws. Nevertheless, it should be praised, as it encompasses useful tools to regulate social relations

Keywords: *Prerequisites, resolution, resiliation, contract, non-performance, obligations, resolutive condition Romanian Civil Code of 2009, Romanian legislator, Romanian Civil Code of 1864, sanction, remedy, Roman law, pacta sunt servanda, Romanian civil law.*

1. Introduction

The entry into force of the Romanian Civil Code of 2009 on October, 1st 2011 has brought about several changes and novelties in civil law. As it would have been expected, the vast majority of the institutions were kept in the new fundamental civil legislation. A great deal of these were improved, enriched with the developments achieved by both the authors and the jurisprudence throughout the 146 years of rule of the Civil Code of 1864.

Due to its critical importance, which derives from the fact that it represents the vehicle by which each party achieves its interests, contract law has been subject to many changes. Of all the modifications brought about by the Romanian Civil Code of 2009 in this area, I shall analise the prerequisites of the resolution of a contract.

For the first time in Romanian civil law, the resolution of a contract has a set of rules that shape its regime, as opposed to the former legislation where scarce rules spread throughout the Civil Code of 1864 and the Commercial Code of 1881 called upon the authors and the jurisprudence to discern its origin, conditions and effects.

The prerequisites of the resolution of a contract are substantially different from those identified under the former fundamental civil legislation. Despite this, there has been noticed a misunderstanding of the new prerequisites of the resolution of a contract in the sense that many practicioners of the law tend assimilate the new prerequisites with the old ones.

This study aims at a better understanding of the new prerequisites of the resolution of a contract.

1.1. Old and new legal provisions.

The Romanian Civil Code of 1864 had two main provisions regarding the resolution of a contract – art. 1020-1021.

According to art. 1020, the resolutive condition is always implied in bilateral contracts when one of the parties does not fulfill its commitment.

Art. 1021 provides that in this case, the contract is not terminated ipso jure. The party whose obligation has not been fulfilled can either claim the forced performance or the resolution of the contract. The resolution must be asked in court which, depending on the circumstances, can grant a grace period.

According to the Romanian Civil Code of 2009:

- the creditor is entitled to the fully, exact and in time performance of the obligation. (2) When, without justification, the debtor does not perform its obligations and there is a mora debitoris, the creditor shall, without waiving his right to damages: 1. ask for the forced performance; 2. obtain the resolution of the contract or the diminishment of his obligations; 3. use any other means provided by law fo the fulfilment of his right;
- if he does not claim the forced performance, the creditor is entitled to the resolution of the contract and could be entitled to damages. (2) The contract can be partially terminated, when its performance is divisible.

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With respect to the plurilateral contract, the non-performance of the obligation from one party does not lead to the resolution of the contract, except under the circumstances that the non-performed obligation should have been regarded as fundamental. (3) Unless otherwise provided, provisions related to resolution shall also be applied to resiliation (art. 1549);

- the resolution can be ordered by the court or it can be unilaterally declared by the party. (2) Also, when expressly provided by law or agreed by the parties, the resolution can operate ipso jure (art. 1550);
- the creditor is not entitled to resolution when the non-performance is not fundamental. With respect to continuing contracts, the creditor is entitled to resolution, even if the the non-performance is not fundamental, but it is repetitive. Any contrary stipulation shall be disregarded. (2) He is, however, entitled to perfom a diminished obligation, if such performance is possible under the circumstances. (3) If the diminishment of the obligations is not possible, the creditor is only entitled to damages (art. 1551);
- resolution of resiliation can intercede via a written notification sent to the debtor when the parties have agreed so, when there is an ipso jure mora debitoris or when the debtor has not performed his obligation within the grace period granted to him via the mora debitoris. (2) The declaration of resolution has to be made within the statute of limitations. (3) The declaration of resolution shall be registered in the Real Estate Register or in other public registers so it can be opposed to third parties. (4) The declaration of resolution is irrevocable, upon communication to the debtor or upon the expiration of the grace period (art. 1552);
- the commissary pact is effective if it expressly provides the obligations whose non-performance lead to the ipso jure resolution of the contract. (2) In the case provided for in paragraph (1), the resolution is subject to mora debitoris, unless the parties have agreed that the resolution shall result from the non-performance. (3) Mora debitoris is not effective, unless it expressly indicates the conditions of the commissary pact (art. 1553);
- the resolved contract is regarded as non existent. Unles otherwise provided by law, each party is held to restitution of prestations. (2) The resolution does not extend to dispute resolution clauses or to clauses meant to be effective even if the contract is terminated. (3) A contract which is resiliated ceases to exist, but only for the future (art. 1554).

The sources of inspiration for the legislator seem to be the Italian and Québécois Civil Codes. According to art. 1453 of the Italian Civil Code, (1) nei contratti con prestazioni corrispettive, quando uno dei contraenti non adempie le sue obbligazioni, l'altro può a sua scelta chiedere l'adempimento o la risoluzione del contratto, salvo, in ogni caso, il risarcimento del danno. (2) La risoluzione può essere domandata anche quando il giudizio è stato promosso per ottenere l'adempimento; ma non può più chiedersi l'adempimento quando è stata domandata la risoluzione. (3) Dalla data della domanda di risoluzione l'inadempiente non può più adempiere la propria obbligazione.

According to art. 1604 of the Québécois Civil Code, (1) Where the creditor does not avail himself of the right to force the specific performance of the contractual obligation of the debtor in cases which admit of it, he is entitled either to the resolution of the contract, or to its resiliation in the case of a contract of successive performance. (2) However and notwithstanding any stipulation to the contrary, he is not entitled to resolution or resiliation of the contract if the default of the debtor is of minor importance, unless, in the case of an obligation of successive performance, the default occurs repeatedly, but he is then entitled to a proportional reduction of his correlative obligation. (3) All the relevant circumstances are taken into consideration in assessing the proportional reduction of the correlative obligation. If the obligation cannot be reduced, the creditor is entitled to damages only.

2. A brief review of the foundations and prerequisites of the resolution of a contract

Since legal provisions regarding the resolution of a contract were scarce in the Civil Code of 1864, the task of identifying the prerequisites of the resolution of a contract was left to the authors and the jurisprudence.

The nature and number of such prerequisites is influenced by the foundation of the resolution of a contract (tacit *resolutive* condition, a form of contractual liability, the theory of the *causa* and the theory based on the *causa*, *the pacta sunt servanda* rule and the notion of guilt).

According to the first theory and based on art. 1020, cited above, each bilateral contract includes a tacit *resolutive* condition whose fulfilment consists in the non-performance of the obligation.

According to the second theory, the non-performance of the obligation leads to a damage suffered by the creditor. Such damage shall be repaired via the resolution of the contract, followed by its effect – restitution in integrum

The third theory claims that one party performs its obligations because and if the other party performs its own obligations and vice versa.

The reason for the fulfilment of one's obligations lies in the fulfilment of the obligations undertaken by the other party.

There is no reason to perform the obligation if the other party has failed to perform his.

A combination of the elements found in the fourth theory constitutes the foundation of the resolution of a contract.

Most authors concluded that the prerequisites of the resolution of a contract are as follows:

- the non-performance of an essential obligation;
- the guilt of the debtor;
- the damage suffered by the creditor;
- mora debitoris and

- the absence of a non-liability clause.

3. Content

Taking into consideration the previously cited provisions, the prerequisites of the resolution of a contract are as follows:

a) a fundamental non-performance of the obligation;
b) an unjustified non-performance of the obligation;
c) mora debitoris.

3.1. A fundamental non-performance of the obligation

A contract can shall be terminated if the debtor has failed to perform his obligation in a fundamental manner.

The non-performed obligation does not necessarily need to be one of the essential obligations engendered from the contract.

If the non-performance qualifies as fundamental, it shall lead to the resolution of the contract, even if the obligation is not an essential one, but a secondary obligation.

This is one of the differences in comparison to the old legislation, where many authors were of the opinion that only an essential non-performed obligation shall lead to the resolution of the contract.

The non-perfomance of an obligation shall be regarded as fundamental, if the creditor is deprived of what he was entitled to expect when he concluded the contract. From this point of view, this prerequisite for the resolution of a contract seems to be a revival of the theory of the causa, elaborated by Henri Capitant as basis for the resolution of a contract.

3.2. An unjustified non-performance of the obligation

Only an unjustified non-performance of the obligation shall lead to the resolution of the contract.

Art. 1556-1557 of the Romanian Civil Code of 2009 provides that exceptio non adimpleti contractus and the impossibility of performance constitute justified causes of non-performance.

According to these legal provisions:

- when the obligations engendered from a bilateral contract are due and one of the parties does not perform or does not offer the performance of the obligation, the other party can, in a proper manner, refuse to perform his/her obligation, unless it does not result from law, the parties' will or customs that the other party is obliged to perform first. (2) The performance cannot be refused if, according to circumstances and taking into consideration that the non-performance is not fundamental, the refusal would be contrary to good-faith (art. 1556);
- when the impossibility to perform is total and final and it regards an important contractual obligation, the contract is terminated ipso jure and without any notification from the moment of the fortuitous event. Provisions of art. 1274 (2) shall apply accordingly (art. 1557).

As a consequence, the contract shall be terminated when the debtor does not have grounds for exceptio non adimpleti contractus or when it is not impossible for him to perform his obligation.

3.3. Mora debitoris

Finally, the contract shall be terminated, if mora debitoris is in place. It can be instated following a notification sent to the debtor by the creditor or when the creditor files an action in court against the debtor.

Also, mora debitoris can be instated ipso jure, if provided by law or agreed by the parties.

Under the former legislation many authors were of the opinion that the prerequisites of the contract were: non-performance of an essential obligation; the guilt of the debtor and, occasionally, mora debitoris.

It can easily be noted that the Romanian Civil Code of 2009 does not include the guilt of the debtor among the prerequisites for the resolution of a contract. This means that the resolution of a contract seems to be one of the remedies for the non-performance of the contract and of its obligations.

It no longer has the nature of a sanction and is not a variety of contractual liability.

Caution is advised when the creditor wants to unilaterally terminate the contract or, as the case may be, when the judge is called upon to rule the resolution of a contract, because it should be perceived as a last resort used by the creditor only when it is no longer possible to receive from the debtor the prestation he was to entitled to expect at the time of the conclusion of the contract.c

Unfortunately, even if it is clear that the guilt of the debtor is not one of the prerequisites of the resolution of a contract, some courts ruled in favour of the resolution of some contracts and based their rulings on the applicable law starting from October, 1st 2011, but referred to the old prerequisites or mixed the new with the old ones.

Here are two examples:

- „the resolution of a contract is the sanction that intercedes when obligations engendered from a bilateral uno ictu contract are culpable not performed, resulting in the ex tunc cessation of the contract". It then goes on in a confusing manner referring to a fundament non-performance of the obligation and to the mora debitos;
- „the resolution constitutes a cause for anticipated cessation of a contract which intercedes when a party does not culpably perform the obligations engendered from that contract". „(...) two prerequisites must be met: (i) mora debitoris and (ii) no justified cause for the non-performance of the obligations."

4. Conclusions

The resolution or *resiliation* of a contract comprises of a new set of prerequisites and it has a new configuration with respect to the Romanian Civil Code of 1864 and also with the earning of the ancient Roman legislation, governed of their pragmatism. The analysis of these prerequisites reveals a new possible trait of the resolution: a remedy for the non-performance of the contract rather than a sanction or a variety of contractual liability. Such interpretation will partially change the physiognomy of the resolution of the contract which, until yesterday, was more a sanction than a remedy. Today, we analyse the new legislation together with its flaws, but considering its benefits and innovations.

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ISSUES RELATED TO THE APPEARANCE, EVOLUTION, FUNCTIONS AND UTILITY OF THE LEGAL EXPENSES INSURANCE CONTRACTS, ESPECIALLY WITHIN THE EUROPEAN UNION'S STATES

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Abstract

This report aims to provide a concise comparative analysis of the features of legal expenses insurance (also known as insurance for legal protection or LEI), that can be found and have been adopted in several European jurisdictions (France, England and Wales, Germany, Austria, Switzerland, Finland etc), as well as in other law systems (Australia and Japan). We are studying the reasons that led to the implementation of this instrument in each jurisdiction, the evolution of its use and spread and, also, its effect on counteracting the shortcomings of the systems of justice fees and legal aid, resulting in providing access to justice, as a part of the right to a fair trial, as it is guaranteed by art.6 par.1 of the ECHR.

Keywords: *the right to a fair trial, access to justice, the European Convention of the Human Rights, justice fees, sharing of the legal expenses, insurance for legal protection (LEI).*

1. The importance of the research. Introductory concepts regarding the free access to justice in the ECHR system. The implicit limitations of the respective right, related to the ability of the states to regulate the duty to pay justice fees, as well as the instruments they implement, so that the exercise of „the discretion" would not be an obstacle in the way of the access to justice.

This study has a special practical importance, whereas its conclusions have in view the actual ways of ensuring access to justice, as a part of the right to a fair trial, as it is guaranteed by art.6 par.1 of the European Convention of the Human Rights.

Due to the lack of a Convention's specific regulation, regarding the content of the right to a fair trial, this one has been settled, in a praetorian way, within the jurisprudence of the Strasbourg Court[1].

As for the inclusion of the access to justice among the rights guaranteed by the Convention, which represent the content of the right to a fair trial, this has been achieved, for the first time, in the case Golder vs. United Kingdom[2], when the European Court of the Human Rights noted the fact that article 6 par.1 „does not state a right of access to the courts or tribunals in express terms. It enunciates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term". This is the reason why it has been concluded that the Court should be the one to decide, by interpretation of the content of article 6, if the right of access to court is to be included in the mentioned content.

It has been noted[3] in the same above mentioned case that the Strasbourg Court admitted that the right of access to justice cannot be an absolute right, as it is subject to some limitations[4]. The Court established that those limitations are implicit, as the settlement of the right of access by the states is compelled by its very nature and the differences in settlement will be determined by the available resources and specific needs of each nation (more precise, its' society)[5].

These limitations are the expression of the states' sovereignty, this being the basis for granting them an „appreciation margin"[6].

The appreciation margin (discretion) has been defined as the recognized ability of the states to exert their national sovereignty, in the way of limiting the revaluation of some of the fundamental rights acknowledged by the Convention. The jurisprudence of the European Court has been permissive and constantly

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[1] I.Deleanu, Drepturile fundamentale ale părților în procesul civil, ed.Universul Juridic, București, 2008, p.130.

[2] The case Golder vs. the United Kingdom, par.28-31, 36,material studied online at December, 16th. 2016 at the address: http://hudoc.echr.coe.int/eng?i=001-57496.

[3] C.Bîrsan, Convenția Europeană a drepturilor omului. Comentariu pe articole. Ediția 2, edit.C.H.Beck, București, 2010, p.430.

[4] "as this is a right which the Convention sets forth (see Articles 13, 14, 17 and 25) (art. 13, art. 14, art. 17, art. 25) without, in the narrower sense of the term, defining, there is room, apart from the bounds delimiting the very content of any right, for limitations permitted by implication", Golder case, precit, #38.

[5] „Certainly, the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access "by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals"…", The case Ashingdane v. the United kingdom, par.57, material studied online, at 04.01.2017, at the address: http://hudoc.echr.coe.int/eng?i=001-57425 .

[6] In this regard, there are of utmost importance (relevance), the reasons stated, both, in the previous case (Ashingdane) and, also, in the case Cordova v.Italy (no.1, 40877/98), par.54. The case Cordova v. Italy, studied at 26.12.2016, at the address: http://hudoc.echr.coe.int/eng?i=001-60913 .

granted to the signatory states „some discretionary powers", „a certain freedom" or „an estimation power". This Court's approach has been qualified as „allowable and even necessary", in the context of numerous normative acts, with interpretable provisions[7].

The appreciation margin is shown by the very settlement of certain time limits of elapse and prescription, levying of legal taxes related to the justice activity or by the requirement of covering certain preliminary procedures, as a prior condition for the referral to the court.

On another case[8], it was noted that the appreciation margin must be exerted with caution, so that it would not alter the very substance of the right guaranteed by the Convention.

Even if the Strasbourg Court is the authorized forum to observe the compliance with the provisions of the Convention, this does not also imply empowerment of the Court to evaluate and decide upon the best solution to apply in the specific case.

On the same occasion of solving the Ashingdane case[9], there were noted the criteria that states must satisfy to exert „the appreciation margin" (hence, the name of the „Ashingdane Criteria"[10]), in order to prevent the arbitrary application of the law and to ensure the right to access. These rules must be observed cumulatively and they are the following:

- the regulated measure or the ordered proceeding (aiming restriction of the right to access) has to be motivated by its very purpose (a "legitimate aim"). This is the case of consecrating a system of legal fees, aiming to protect the general interest, expressed by the proper administration of justice, which cannot be possible without a suited financing;
- the adopted proceeding (which leads to restriction of the right) must be proportional to the general interest that it has to defend. The reasonable relationship of proportionality ends when the very substance of the right of access is altered.

In the specialty literature, it was noted[11] that, in certain cases, the Court (E.C.H.R.) additionally asks for the fulfillment of the requirement that the normative act (the national norm), or the jurisprudence that represents the basis of the restriction of the right of access, should be clear, accessible and foreseeable[12].

The latter condition is pursued only in those cases when evaluating the satisfaction of the first two requirements is delayed or obstructed because, *primo*, it is considered that the restriction of the right has been a disproportionate measure in relation to the particular circumstances of the case or, *secundo*, the reality referred to justice has not been the subject of enough causes to make the interpretation be unequivocal.

In fact, the approach of this exam is not based on the specific requirement of the law, as it happens in the case of the relative rights, guaranteed by the art.8-11 of the Convention, (for these last ones, the right of interference must be provided by the national law, as it is, *per se*, a condition of legality), but it seeks exclusively to confirm the occurrence of an alteration to the very substance of the right or it is able to help assessing the proportionality degree of the measure[13].

Even if among the means to exercise state sovereignty, within the above-mentioned context, there also is the empowering of the member-states to regulate the imposing of the justice fees, for the purpose of partly covering the expenses of the public service of justice, the imposition of this requirement[14] has to comply to the same line of thinking presented above, so that it should not be exerted arbitrarily, but by observing some of the requirements noted in the European court of human rights practice and which also determines the evaluation of the proportionality of limiting the right of access.

As a consequence, the provisions leading to an exaggerated amount of court fees have been declared unacceptable. Nevertheless, the limitation of access is not caused, *eo ipso*, by the respective exaggerated amount, but by the specific situation or circumstances of the justice seeker, who is expected to pay those taxes. Such a situation, that can block the access, is "the total lack of plaintiff's means"15 or the fact that the party has no income[16].

The profession or social statute of the party is also irrelevant (*exempli gratia*, businessman), as long as the respective amount, "from the ordinary justice seeker's perspective, was unequivocally substantial", so that

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[7] I.Deleanu, Instituții și proceduri constituționale în dreptul român și în dreptul comparat, edit.C.H.Beck, București, 2006, p.318.

[8] The case Ashingdane v. the United Kingdom, cited above, par. 57.

[9] ibidem.

[10] The reasons for the need of obeying those rules were frecvently indicated within ECHR jurisprudence and may be found, inter alia, in the following cases: Bellet v. France (23805/94), Fălie v. Romania (nr. 23257/04), Kemp and others v. Louxemburg (no. 17140/05), R.P. and others v. the United Kingdom (no. 38245/08), Čamovski v. Croatia (no. 38280/10), Kardos v. Kroatia (no. 49069/2011), Baka v. Hungary (no. 20261/12), Zavodnic v. Slovenia (no. 53723/2013).

[11] D.Bogdan, Procesul civil echitabil în jurisprudența CEDO. Vol.I. Accesul la justiție, edit. Hamangiu, 2009, București, p.27.

[12] The case Lupaș and others v. Romania, #67, material studied online at the date of 04.01.2017, at the address: http://hudoc.echr.coe.int/eng?i=001-78568; the same conclusions were took over and used, among others, in the cases Tsasnik and Kaounis v. Greece (no. 3142/08), #35 and Nasui v. Romania, # 20 (no. 42529/2008).

[13] D.Bogdan, cited above, p.27.

[14] ECHR held that they „have never denied that the interests of the good justice administration might justify imposing of financial restrictions regarding a person's access to a tribunal", the case Beian v. Romania (nr.2), 07.02.2008, par.26, material studied online at 05.01.2017,at the address: http://hudoc.echr.coe.int/eng?i=001-84881 .

[15] The case Ait-Mouhoub v. France (28.10.1998), par.61, material studied online at 05.01.2017, at the address : http://hudoc. echr.coe.int/eng?i=001-58259.

[16] The case Mehmet și Suna Yigit v. Turkey (17.10.2007), par.38, material studied online at 05.01.2017, at the address: http://hudoc.echr.coe.int/eng?i=001-81734.

"the fee required for the plaintiff to formulate court action was excessive" and "led to his divestment from entering legal proceedings and his case not be heard by a court", which disagrees with the guarantees of a fair trial[17]. It also is irrelevant if the justice seeker, whose right to access has thus been violated, is a legal person, since they, too, benefit from the rights registered under "the same laws and same procedures"[18].

However, the Court decided[19] that "the judicial tax regime" is "flexible enough", when the party is offered "the opportunity to request (total or partial) exemption from payment of tax", if it satisfies the eligibility requirements or if it shows the risk to face "certain special difficulties". If these conditions are met, the establishing of the amount of legal fees, by reference to the dispute, fell under "the discretion (appreciation margin) of the state".

As a conclusion, the examination of internal rules, regarding the organization of court fees system, compatibility with the aim of an effective access to justice, will be undertaken necessarily by observing the dichotomy: *de facto* obstacle-positive obligation.

Given that the justice seeker's insufficient funds represent a hindrance[20] for the right of access, so that the regulating and organizing of the legal fees system complies with the above mentioned requirements, in order to ensure a real access to court, each state has the positive obligation[21] to adopt the necessary measures they appreciate to be useful, including among them, for example, the establishing of a legal aid system, to counteract the possible shortcomings of the requirement to tax the filled applications, claims and actions.

In our view, among the measures that must be considered by the Court when it decides if the provisions of art.6 par (1) of the Convention have been violated, there are also those related to the existence and functioning without failure of a legal expenses insurance system (LEI). Even though the states do not control the insurance companies that operate on their territory, the objective possibility of the justice seekers to ensure the financing of their actions to court, using this method, must be evaluated and taken into consideration as one of the factors to define the person's "specific situation", because, along with the possibility to access the public legal aid, it represents one of the instruments that help ensuring the free access to justice.

2. Legal expenses insurance. Definition. Legal nature. Classification.

Legal expenses insurance (or legal protection insurance) has been established in France, in 1820, the clients of the insurers being able to choose that the latter administrate their legal matters, regardless their quality in the litigation: plaintiffs or defendants. Another 100 years passed until this kind of policy started to be widely used. Their popularity emerged considering the beginning of the use of automobiles, so that they were adapted as provisions (clauses) of the car insurance contracts. The need to circulate in all the European countries also brought a series of risks, such as the differences between the national legal systems and the language differences, all these being covered by the very above mentioned instrument. Even nowadays, the legal expenses insurance (also known as legal protection insurance) is the most common, as an add-on to the motor insurance[22].

The shortcomings of the legal aid system, which did not cover a significant amount of justice seekers, have been crucial for the appearance of the legal expenses insurance (LEI), which was dedicated to the middle class people, as well as to the small businesses, namely people too wealthy to benefit from the legal aid, but, at the same time, not having enough financial means to cover all costs related to each and every insignificant litigation[23].

Legal expenses insurance (LEI) has been defined[24] as "a means of financing unpredictable legal costs by spreading the risk of liability among subscribers to a scheme (more exactly, the LEI insurance scheme), thereby reducing the cost to each".

Although the doctrine also uses the term of "legal expenses insurance", we think the phrase "legal protection insurance" is more appropriate, for it refers to a wider range of legal activities. In this respect, we must take into consideration the fact that the range of expenses payable by the insurer is not limited only to the legal fees (due to the state for the public justice service), but it may also include the ones for mere giving legal advice, drafting of legal documents (contracts) or initializing and carrying out of amicable procedures (such as mediation) etc.

[17] The case Kreuz v. Poland (19.06.2001), par.61-66, material studied online at 05.01.2017, at the address: http://hudoc.echr.coe.int /eng?i=001-59519.

[18] The case SC Marolux SRL and Jacobs v. Romania, par. 33-34, material studied online at 05.01.2017, at the address: http://hudoc.echr.coe.int/eng?i=001-123332.

[19] The cause Urbanek v. Austria, 09.12.2010, published in R. Chiriță (coordinator), Dreptul de acces la o instanță. Jurisprudență C.E.D.O., edit. Hamangiu, București, 2012, p.135-136.

[20] For explanations regarding the notion, the juridical nature and the list of the factual obstacles which may affect the right of acces to a tribunal, see C.Bîrsan, cited above, p.437-442.

[21] For concluzions about the evolution of the ECHR jurisprudence regarding the recognision of the existence of the positive duties of the states and, latter on, about the expanding of this category's limits, see D. Bogdan, cited above, p. 14-15.

[22] Legal expenses insurance (LEI) Report – European market overview, Germany, the U.K. and Bulgaria, SeeNews (Research on demand), cited above, p.5.

[23] M.Reimann (editor), Cost and fee allocation in civil procedure, Ius gentium: comparative perspectives on law and justice 11, edit. Springer, Dordrecht, Heidelberg, New York, London, 2012, p.39.

[24] material studied online at 23.12.2016, at the address: http://www.lawfoundation.net.au/report/lei.

Art.127-1 of Insurances Code from France[25] offers a comprehensive definition of this type of policy. According to its content[26], we are dealing with a legal protection insurance when this one aims "any operation which, in exchange for the payment of a premium or a tax, previously established, consists of taking over the procedural costs or provision of services on behalf of the insurance policy, in case any dispute or litigation arises between the insured party and a third party, especially for the purpose of defending or representing the insured party in his claim in a civil, criminal, administrative or any other kind of procedure, or against a complaint involving him, or to amicably achieve remedial of the caused damage."

Legal expenses insurance (LEI), or Legal protection insurance, is another category (a separate category) of "non-life" insurance[27]. This type of insurances ("Legal expenses and costs of litigation") has been specifically established by being included at point A of art.17 of the Annex to the Directive no. 73/239/EEC[28], the first Directive related to non-life insurances).

As for the overall share within the non-life insurances category, the LEI policies have a low percentage, of less than 2% (with variations between 1.5%-1.8% within the period 2002-2013, then a constant growth till 2010 and a slight decrease between 2011 and 2012, followed by a revival in 2013, which shows that this type of insurance is very sensitive to the economic fluctuations)[29].

A decisive fact for the individualization of LEI insurances is that the insured risk is represented by the necessity to cover the court costs related to justice actions brought against the policies' holders, irrespective of the fact the claimant is an individual or a legal person.

This type of insurance has its origins in Europe, where it is operated predominantly by private businesses (insurance companies) for profit. Policies tend to provide cover for unforeseeable legal events and may be sold either to individuals, or to a group or a category of subscribers, as stand-alone contracts or on add-on basis to other insurance contracts (for example, to a motor insurance)[30].

The range of legal services covered by legal protection insurances is a wide one, from legal advice, to drafting of legal documents (*exempli gratia*, drafting of a contract or a will), or representing the parties in the court[31].

However, in case the legal protection insurance had been concluded voluntarily (*i.e.,* it is an independent policy), the settlement (the financing) of the above listed activities will be ensured up to the value limit established by the policy, irrespective of the fact that the expenses thus covered are those advanced by the victim of the accident for court referral, or, if the case, are the expenses that must be refunded to the adverse party by the losing party[32].

Therefore, the services granted to the holder of a legal protection insurance are not only limited to refunding the amounts paid by this one as lawyer's fee or other related court fees, but, in time, they were extended to offering professional advice, by the in-house lawyers of the insurance companies or by outsourced appointed professionals. The insurance holder can be granted professional assistance also for concluding extrajudicial transactions, or can be represented in court by the insurer himself. The range of the services settled on behalf of the respective insurance differs from a jurisdiction to another, due to the fact that they have different ways of regulating the outsourced legal services.

As a rule, the insurer is allowed to provide legal assistance, as well as assistance related to extrajudicial transactions. *A contrario*, in most of the EU states, the representation in court or in other administrative procedures is not allowed, or they must comply with conditions that differ from a system of law to another. The most restrictive related legislation is in Germany, where the only benefit the insurers can give is payment of damages, since they are not authorized to offer legal advice, to assist the insurance holders in the

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[25] the law no. 2007-2010 of 19 february 19, 2007, material studied online at 27.12.2016, at the address: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=C02F5FB732C5E1E02EFEC240A3AB16AB.tpdila21v_3?idSectionTA=LEGISCTA 000006157261&cidTexte=LEGITEXT000006073984&dateTexte=20161227.

[26] The article no. 127-1 of the French civil procedural code states that: Est une opération d'assurance de protection juridique toute opération consistant, moyennant le paiement d'une prime ou d'une cotisation préalablement convenue, à prendre en charge des frais de procédure ou à fournir des services découlant de la couverture d'assurance, en cas de différend ou de litige opposant l'assuré à un tiers, en vue notamment de défendre ou représenter en demande l'assuré dans une procédure civile, pénale, administrative ou autre ou contre une réclamation dont il est l'objet ou d'obtenir réparation à l'amiable du dommage subi.

[27] Information from the guide "The legal protection insurance market in Europe", edit. oct.2015, p.4, material prepared by RIAD (the International Association of Legal Protection Insurers), studied online la 16.12.2016, at the address: http://riad-online.eu/fileadmin/documents/homepage/News_and_publications/Market_Data/RIAD-2015.pdf.

[28] First Council's Directive no 73/239/EEC of 24 July 1973, on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance, material studied online at 29.12.2016, at the address: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31973L0239.

[29] Information from the guide "The legal protection insurance market in Europe", oct.2015, cited above, p.4-5.

[30] material studied online at 23.12.2016, at the address: http://www.lawfoundation.net.au/report/lei.

[31] Legal expenses insurance (LEI) Report – European market overview, Germany, the UK and Bulgaria, SeeNews (Research on demand), p.5, material studied online at 18.12.2016, at the address: https://seenews.com/static/ pdfs/LegalExpensesInsurance ReportEuropeanMarket Overview.pdf.

[32] Report from the Commission to the European Parliament and the Council on certain issues relating to Motor Insurance, COM (2007), 0207 final, pct 2.2. material studied online at 21.12.2016, at the address:
http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52007DC0207.

extrajudicial procedures or to represent them in court. Giving legal advice is prohibited in Poland, as well[33].

Classification of LEI type insurances subjects to the following criteria:

a) the date of concluding the insurance contract, considering the date of occurrence of the insured event;
b) according to the legal nature of the insurance and
c) according to the object of the contract (usually revealed by the policy's holder).

a) Depending on the date the policy has been concluded, the legal protection insurances can be: before-the-event (BTE) insurances or after-the-event (ATE) insurances, specifying that the latter category is sensibly more expensive than the first one[34].

The after-the-event type insurances are available only in England and Wales and, later on, we will come back with related details. Unlike the before-the-event type policies, they are purchased either when a litigation situation occurs, or even after the time the referral to court has been made. In order to study the particularities of the ATE type insurances, we must observe the risks involved in starting a lawsuit within the British legal system, such as: high litigation expenses, difficulty in estimating the costs and the risk undertaken by the losing part of having to pay burdensome legal costs. These risks motivate the parties to adopt safety measures for the event they lose in court, so that they shouldn't be forced to pay both their own lawyer's fee and a significant part or even the entire amount of the adverse party's expenses.

All these precautions can be materialized, on one hand, by concluding an ATE type insurance, which provides protection (to a certain point), in case the insured party would be compelled to pay for the litigation expenses of the adverse party and, on the other hand, by concluding a "no win-no fee" type convention with their own lawyer.

In England and Wales (but not in Scotland, too), the winning party is granted the right to ask for the adverse party to be ordered to pay the insurance premium related to the ATE policy, this one being included in the category of other litigation expenses. On the other hand, in case of losing, the risk is undertaken by the insurer, so that the insurance premium will not be paid at all. The immediate effect was that the insured party cannot be forced, under any circumstances, to pay for the litigation expenses.

Considering this situation, likely to defy the principle of equality of the parties, Lord Jackson's Report included, among its recommendations, the regulation of the inadmissibility of recovering the ATE insurance premiums and the success fees from the defendant and the analyzing of the opportunity to adopt the BTE (before-the-event) insurance system[35].

b) From the perspective of its legal nature (its' form), this type of insurance can be materialized in an added clause (package-deal or add-ons) within another insurance contract, over liability for traffic accidents, or professional indemnity or even a home insurance contract, the latter being the most prevalent form within the EU states. Still, in some jurisdictions (like Germany), the legal expenses insurances can even be stand-alone products[36].

In Switzerland and Finland, the package-deal type insurance (as a clause) can also be added to the insurance contracts for commercial activities liability. When the legal protection insurance is embedded in another policy, it devolves upon the insurer not only the task of undertaking the risk related to the liability, but also the financing of the costs related to the litigation following the occurrence of the insured event. From this type of legal protection insurance usually benefit the defendants in cases of tort liability and, for the insurers, it involves covering both the expenses of the insured party for preparing the defense and the possible litigation costs that ought to be paid in case the plaintiff wins.

The price related to the package-deal type insurances is kept to a reasonably low level, because the insurance scheme provides a spread of litigation costs to all the subscribers from the respective category, so the number of litigations occurred is small comparing to the number of sold policies.

This type of legal protection insurance is widely spread all over most of the E.U. states, but also in Australia, Japan etc. Its popularity within these jurisdictions is confirmed by the high percentage of citizens owing such an instrument, many middle class members being protected by such an insurance related to daily activities, such as: home ownership, driving a car, pursuing of a profession or developing a business.

As for the stand-alone type policies, they are also rather popular and spread (mainly in the West European states) and they are individual insurances, protecting the parties against any possible legal costs and aim both parties of a trial (the plaintiff and the defendant). There are two restrictions to this type of insurance: 1. limitation to a certain type of litigations, namely the ones frequently involving individuals (*e.g.*, tort liability related to the performance of real estate rental/lease

[33] Information from the Report "The legal protection insurance market in Europe", ed. oct.2015, drafted by RIAD (The International Association of Legal Protection Insurers), cited above, p.5.

[34] Legal expenses insurance (LEI) Report – European market overview, Germany, the UK and Bulgaria, SeeNews (Research on demand), cited above, p.5.

[35] M.Reimann (editor), Cost and fee allocation in civil procedure..., cited above, p. 40-41.

[36] Legal expenses insurance (LEI) Report – European market overview, Germany, the UK and Bulgaria, SeeNews (Research on demand), cited above, p.5.

contracts and consumer rights; there are cases when this insurance is also applicable in family law disputes) and 2. limitation in establishing an upper limit for the amounts to be covered by the insurer. Even if this type of insurance also provides a spreading of costs among subscribers, it still involves higher costs comparing to the package-deal type of insurance, since the insured risks are higher (whereas it addresses the plaintiffs as well), which means higher prices. In spite of this fact, most of the middle class people can afford the payment of the premiums[37].

It was found[38] that the stand-alone type legal insurance policies (always concluded voluntarily by the insured party) are offered, in most of the member-states, either by companies specifically dedicated to this type of insurance, or by companies that offer other types of insurances, as well. Still, the development level of the market for these insurances is different from a jurisdiction to another, depending on the degree of maturation of the market's profile, so, in some states, this type of insurance is completely non-existent (such as in Romania) or is very much less on demand and use, while in others (such as Great Britain, Belgium, Germany, Sweden) it is owned by a big part of the population, either as a stand-alone insurance, or as an add-on to contracts like motor insurances or home insurances.

c) The beneficiary of this insurance can be an individual and/or his family. In this case, the insurance covers the amounts related to legal services provided for the following: general legal advice, neighborhood relations, injuries to the beneficiary, work litigations and even disputes with consumers. Motor legal expenses insurance (MLEI) is a higher category of insurance, which exceeds the upper limits and damage types covered by the standard motor insurances. Finally, the Commercial LEI insurances cover the costs related to any commercial litigation, such as: litigations related to the enterprise and enforcing of the contracts, debt collection, litigations related to ownership right, work disputes and tax issues[39].

During 1969, in Rome, it was founded the International Association of Legal Protection Insurers ("Rencontres Internationales des Assureurs Défense" - RIAD), an independent organization, consisting of insurance companies' representatives, but also legal specialists, from 8 European states. Meanwhile, the organization grew, so that it came to enlist members from 18 European states, Canada, Japan and South Africa.

RIAD's purpose is to establish a global network, capable of giving, to the legal protection insured persons, an easy, affordable and high quality access to justice and the law[40].

To reach this goal, the members of this organization assumed and observed the rules of a strict conduct code, according to which the specialized services are provided. At the same time, the organization submits to interested parties and informs the public about the specific activity of the legal expenses insurance companies, facilitates the dialogue between its board, politicians, authorities with control duties and other entities, in order to promote the interests of this specific insurance market. In this regard, the annual conventions are particularly useful.

The RIAD members provide both the related financing and the legal services for the legal protection insurances, expressed either by offering legal advice or by representing the insured persons in the dispute settlement, both, amicably or legally.

Therefore, members holding the status of insurance companies provide, to their clients, products that can: a) finance a quick access to already established legal and support services and b) absorb any risk that clients might face regarding the lawyers' fees or other court costs. The other RIAD members (that provide specialized legal services) offer to the clients high quality services, so that the legal protection can be effective[41].

3. Legal protection insurances regulation within the European Union.

The regulation of legal protection insurances within the union is provided by the Directive no.87/344/EEC[42].

Article no. 2 of the above mentioned Directive establishes its scope.

Therefore, article 2 par.(1) settles the regulation framework of the legal protection insurances, defined by the fact that, in exchange for payment of a premium, the insurers take over the risk of covering the legal costs, but also provide other services related to the object of the insurance, such as:

a) to make sure that the damaged or injured party will be properly indemnified, either by concluding a transaction, or by initiation of legal or criminal proceedings;

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[37] M.Reimann (editor), Cost and fee allocation in civil procedure..., cited above, p. 39-40.

[38] Report from the Commission to the European Parliament and the Council on certain issues relating to Motor Insurance, COM (2007), 0207 final, cited above, pt. 2.3.

[39] Legal expenses insurance (LEI) Report – European market overview, Germany, the UK and Bulgaria, SeeNews (Research on demand), cited above, p.5.

[40] Information from the webpage of RIAD, studied online at 26.12.2016, at the address. http://riad-online.eu/about-us/riad-what-is-that/ .

[41] ibidem.

[42] Council Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance, studied online at 22.12.2016, at the address: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31987L0344:EN:HTML .

b) in case the insured party holds the status of defendant, to provide proper defending of its interests, namely to represent it in any related procedure, should it be civil, administrative or criminal or any other form of complaint.

Article 2 par.(2) also settles the application limits of the normative act, stating that its provisions does not apply in the following circumstances:

− in case of legal expenses insurance policies, when the arised disputes or litigations concern operation of ships;

actions taken, in any investigation or proceeding, by the insurer who insured the party for this type of risk, if the insurer is also a beneficiary of these actions;

− in exceptional situations, generated by the member states' sovereign will, regarding the following assumptions:

1. when the legal protection activities take place in another member-state than the one the insured party is resident of;
2. when the insurance policy concerns only legal assistance granted to persons facing a dispute on the occasion of traveling, therefore while being away from the place their permanent residence is;
3. in case the contract stipulates unequivocally that it covers only the situations mentioned in par. 1) and 2) and it is subsidiary to assistance.

The means to concretize the legal protection insurance are established in article no. 3 par.(1): it has to be either a stand-alone contract, different from other types of insurances, or an add-on to a policy related to covering legal expenses. In this latter case, if the member-state requires it, the value of the premium matching this type of insurance must be indicated. Article no.3 par.(2) provides a series of obligations for the member-states, expressed by taking proper action to prevent any conflict of interest situation.

According to article no.4 par(1), the following express clauses must be included in the legal protection insurances:

1. If, during an investigation or a proceeding, it is necessary to hire an attorney or another law specialist, who is granted, by the national law, the right to offer assistance, to represent and defend the insured party's interests, the latter is given the liberty to choose his own attorney or specialist;
2. The insured person is granted the right to freely choose an attorney or another qualified person to offer assistance (if the law provides it), also in case a conflict of interests arises.

Paragraph (2) of the same text defines the notion of "attorney" by reference to the names (titles) under which the exercise of this profession is recognized in the Directive CE no.77/249/EEC.

As an exception, article no. 5 par.(1) regulates exhaustively the cases when the member-states can grant derogations from the provisions of article no. 4 par.(1), namely when a series of terms are cumulatively met:

1. the insurance covers the expenses generated by using of vehicles on the territory of the respective state;
2. the policy is related to a contract that stipulates ensuring of assistance in case of an accident or a malfunction of such a vehicle;
3. the legal liability is covered neither by the legal protection policy, nor the assistance policy;
4. in case that all parties in the litigation have their legal protection policy concluded with the same insurer, the necessary measures are ordered to ensure that the assistance and representation granted to each party are provided by „fully independent" lawyers.

Even when applying such a derogation, article no.5 par.(2) states that it doesn't exempt the member-states from further applying the provisions of article no. 3, related to the form of the contract and to the measures to prevent and combat any conflict of interests.

4. Debates regarding the application of provisions of article no 4 par.(1) of the Directive no.87/344. Interpretations given in ECJ Jurisprudence.

4.1. On the subject of recognizing, for the member-states, their ability to control the limits of the amounts payable by the insurers on the basis of the legal protection policies (LEI), in case the insured party freely chooses its own lawyer, ECJ ruled on the occasion of the execution of a request for a preliminary decision[43], regarding the interpretation of the text of art.4 par(1) lett.q of the European Union Council Directive no.87/344 EEC.

In the mentioned case, the forum did not recognize the interpretation that, in the lack of an express stipulation of article no.4 par(1) lett.a, to indicate who has the authority to decide whether it is necessary to request the services of a law professional (the insured party or the insurer), it is to understand that the liberty the insured party benefits of, starts only if the insurer considers it is necessary to request that lawyer.

A contrario, it has been decided that the text „must be interpreted as meaning that precludes a legal protection insurer, who stipulates in his insurance contracts that legal assistance is in principle granted by his collaborators, to also stipulate that the costs related to legal assistance, provided by a lawyer or a representative freely chosen by the insured party, cannot be incurred unless the insurer agrees it is required to entrust the case to an outside counsel".

This resolution was based on the following considerations:

[43] The preliminary decizion of the ECJ, regarding the cause Sneller v. DAS Nederlandse (C-442/12), studied online at 23.12.2016, at the address: http://curia.europa.eu/juris/document/document.jsf?text=&docid=144208&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=779980.

− the mere interpretation of the norm's text cannot lead to a solution, whereas the interpretation of the E.U. law provisions is exclusively made by referring to the specific context that generated the normative act, as well as to the objectives pursued by the legislator when adopting that regulation (the Eschig Decision[44]);

− the Court interpreted the provisions of the 11-th consideration of the Directive no.87/344 and of the article no. 4 par.(1) of the same Directive, that the liberty to choose a lawyer or other persons accredited to provide representation is justified by the insured party's very interest for legal expenses and it is recognized for any legal or administrative procedure (Stark Decision[45]). For this reason, the interpretation will be that the free choosing of a lawyer, by the insured party, does not justify the legal expenses' restriction only to the situations when the insurer decides it is necessary to engage a lawyer outside.

− in supporting this resolution, the intended purpose, when adopting this Directive, was of no less importance, namely to ensure a wide protection of the insured parties' interests, that does not agree to the restrictive interpretation of art.4 par(1) lett.a of the Directive.

− furthermore, as regards the free choosing of the representative, it has been noted that art.4 par(1) has a general applicability, so it has a binding force (with referral to Eschig par.47 and Stark Decisions, par.29).

− concerning the ability to control the limits of the insurance premiums' amounts, it was found that there are cases when the means (the criteria) according to which the insured party chooses its representative justifies the imposing of restrictions for the expenses that it has to advance or to settle with the insurers. In this respect, it has been reiterated the outcome of the Court in the Stark decision. According to ECJ jurisprudence, enshrining the right to choose a lawyer „does not involve the member-states' obligation to impose, in every circumstance, full coverage of the expenses incurred by defending an insured party, as long as this liberty is not without content". The lack of content would occur in case the upper limit established for the obligation of bearing the costs would lead to the impossibility of reasonably choosing a lawyer or a representative (as per Stark decision, par.33). The shortcomings of such a restriction can be avoided by the contract's parties themselves, as, based on the principle of contractual freedom, they can establish a higher limit for covering the legal expenses, with a possible increasing of the premium amount (Stark decision, par.34).

4.2. As regards the freedom of the insured party to choose a lawyer, it was considered the distinction between the terms of „administrative procedure" (inquiry) and (legal) „procedure", used by article no 4 of EU Council Directive no.87/344 EEC.

This text specifies that the insured party is granted the freedom to choose his lawyer (or another person, authorized by the national law to provide legal services) in case the situation requires it, „in order to defend, represent or serve the interests of the insured party in any inquiry or (legal) procedure".

In the European Court of Justice practice, there have been noted[46] the following aspects:

Primo, art.4 par(1) of the above mentioned Directive establishes that all contracts of legal protection insurance (LEI) will stipulate the insured party's right that, in any inquiry or legal procedure that requires the services of a lawyer or another authorized professional (representative) to defend, to represent or to serve its interests by any other means, it can freely choose that lawyer (representative);

Secundo, the distinction between „administrative procedure" (inquiry) and (legal) „procedure" is unequivocally clear by the very regulation of article no.4 par.(1), so that the two terms are opposite. However, the insured party has the right to choose his representative in both situations.

The opposite solution, of the application of article no. 4 par.(1) only for the procedures undertaken before an actual court (namely, the ones with administrative jurisdiction) would result in making meaningless the notion of „administrative procedure" (inquiry), specifically indicated in the Directive. Given that, as the referred text doesn't make a distinction, applying of any restriction to the „administrative procedure" (inquiry) is considered unacceptable.

Tertio, regarding the constant jurisprudence referring to interpretation of the provisions of the Union law, it is noted that it involves, besides the examination of the wording, also the examination of the norm's context, but also of the European legislator's intend in adopting it (as examples, in this regard, the St.Nikolaus Brennerei und Likorfabrik Decision, 337/82, EU:C:1984:69, par.10, the VEMW and others Decision, C-17/03 EU:C:2005:362, par.41, as well as Eschig Decision, C-199/08, EU:C:2009:538, par.38).

As the intend of Directive 87/344 [and, even more, of the article no. 4 par.(1), lett. a)] is to protect the interests of the insured parties, the regulation of a general applicability and of a required value, recognized for the right of choosing the lawyer or the representative, are incompatible with the restrictive

[44] the case Erhard Eschig împotriva UNIQA Sachversicherung AG (C-199/08), studied online at 03.01.2017, at the address:http://curia.europa.eu/juris/document/document.jsf?text=&docid=72645&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=328942.

[45] the case Gebhard Stark v. D.A.S. Österreichische Allgemeine Rechtsschutzversicherung AG (C-293/10), consulted online at 03.01.2017, at the address: http://curia.europa.eu/juris/document/document.jsf?text=&docid=81542&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=329332.

[46] C.E.J. preliminary decision (7.04.2016), related to the cause Massar v. Das Nederlandse (C-460/16), # 18-23, studied online at 16.12.2016, at the address: http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d602888ad73f4f4de1a9b7a80c4107c494.e34 KaxiLc3eQc40LaxqMbN4PahaLe0?text=&docid=175672&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=835112.

interpretation of the mentioned text of the Directive [invoking the motives from the Eschig Decision[47] (C-199/08), as well as the Sneller Decision[48]].

5. Particularities of the legal protection insurances instrument within some of the EU member-states, as well as within other jurisdictions.

It was noted[49] that, in most of the European Union member-states[50], besides the organization and functioning of a legal aid system (in order to ensure the free access to justice) it has also been established a specialized private insurance system, for covering the legal protection expenses (LEI).

A statistic[51] made during 2013, revealed a ranking of the EU member-states, based on the reference to the percentage rate of each state on the profile market. Thus, Germany was on the first place, with a rate of approx. 45%, followed by France (13%), Netherlands (9%), Great Britain (7.4%), Austria (6.3%) Belgium (5.4%) and Switzerland (5.1%).

In another study[52], it was found that, as regards the add-ons type legal protection insurances, the absolute market leader is Sweden, where the percentage of the households benefitting of such a policy is about 90%. The explanation for this performance is the fact that the LEI clauses are automatically included within most of the home insurances policies.

The LEI type insurances market is on a constant growth. Thus, starting with 2008, the Great Britain's market has been outrun by the Dutch one. The same study revealed the fact that Germany, France, Netherlands and Great Britain totalize 74% of the profile market's overall, while in the other jurisdictions (except for the ones targeted in the report, namely: Germany, France, Netherlands, U.K., Austria, Belgium, Switzerland, Italy, Spain and Finland) it is shown a low interest for this instrument, totalizing a cumulative market share of below 5%[53].

In the following, we will review a few relevant examples, regarding the particularities of the legal protection insurances systems, but also the means by which it has been tried to implement them in some states:

5.1. England and Wales.

As we showed in the above, these jurisdictions are the only ones to use the after-the-event (ATE) type LEI insurance, namely the policy concluded after the occurrence of the litigation.

Unlike the before-the-event type policies, the ATE policies are purchased either the moment when the dispute arises, or even after the moment the legal procedures have been initiated.

In order to study the particularities of the ATE type insurances, we must observe the risks involved in starting a lawsuit within the British system, i.e.: high litigation expenses, difficulty in estimating the costs and the risk undertaken by the losing part of having to pay burdensome legal costs. These risks motivate the parties to take safety measures for the event they lose in court, so that they shouldn't be forced to pay both their own lawyer's fee and a significant part or even the entire amount of the adverse party's expenses.

All these precautions can be materialized, on one hand, by concluding an ATE type insurance, which provides protection (to a certain point), in case the insured party would be compelled to pay for the litigation expenses of the adverse party and, on the other hand, by concluding a "no win-no fee" type convention with their own lawyer.

In England and Wales (but not in Scotland, too), the winning party is granted the right to ask for the adverse party to be ordered to pay the insurance premium related to the ATE policy, this one being included in the category of other litigation expenses. On the other hand, in case of losing, the risk is undertaken by the insurer, so that the insurance premium will not be paid at all. The immediate effect was that the insured party cannot be forced, under any circumstances, to pay for the litigation expenses.

Considering this situation, likely to defy the principle of equality of the parties, Lord Jackson's Report included, among its recommendations, the regulation of the inadmissibility of recovering the ATE insurance premiums and the success fees from the

[47] the case Erhard Eschig v. UNIQA Sachversicherung AG (C-199/08), CEJ has noted that not even in the case that the ensured event takes place and determins prejudice to a significant number of policy holders, the ensurer is not entitled to designate himself a person to represent all those ensured persons, material accessed online at 26.12.2016, at the address: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62008CJ0199&qid=1482765745355&from=EN .

[48] The case Jan Sneller v. DAS Nederlandse Rechtsbijstand Verzekeringsmaatschappij NV (C-442/12): in this case, CEJ has ruled that is incompatible with the provizions of article no.4, lett.a) of the Directive no. 87/344 the solution of conditioning the assumption of costs associated with the attorney fees only if the insurer "considers it necessary to entrust the case to an outside counsel" other than its' ordinary collaborators. In this regard, the interpretation of the norm will not be influenced neither by the fact that, in the administrative or judicial proceedings in question, legal assistance is or not compulsory, under the rules of national law. Material studied online at 26.12.2016, at the address: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62012CJ0442&from=EN.

[49] Information from the Report „European Judicial Systems. Efficiency and quality of justice no.23" (ed.2016), drafted by the European Comission for the Efficiency of Justice (CEPEJ), Consolidated report regarding the „Authorities responsible for ensuring/granting of the judicial aid and the existence of a private legal protection insurance system", studied online at 27.12.2016, at the address: http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2016/publication/CEPEJ%20Study%2023%20report%20EN%20web.pdf.

[50] the only countries which do not have such an implemented system were, in 2014, Romania and Bulgaria.

[51] Information from the guide "The legal protection insurance market in Europe", edit. oct.2015, cited above, p.3.

[52] Legal expenses insurance (LEI) Report – European market overview, Germany, the U.K. and Bulgaria (September 2013), p.5, studied online at 29.12.2016, at the address: https://seenews.com/static/pdfs/LegalExpensesInsuranceReportEuropeanMarketOverview.pdf .

[53] "The legal protection insurance market in Europe", edition oct.2015, cited above, p.3.

defendant and the analyzing of the opportunity to adopt the BTE (before-the-event) insurance system[54].

As regards the representation of the insured party in commercial type litigation, usually the party already knows a specific legal adviser and prefers to be represented or advised by this one in the litigation. The insurance companies will try to influence the insured party to accept appointing and using their lawyers, invoking that they will not settle the entire expenditure. This practice is illegal (as we already showed in above). The contractual obligation of paying the amounts related to the legal expenses led to an ongoing concern of the insurers to reduce the level of those costs, which also involves using of professionals with the smallest fees, a solution that might be likely to contravene the interests of the insured parties.

The British insurance companies' Regulation admits to the insured parties the right of appointing their own lawyer. This solution is also confirmed by the Solicitors' Code of Conduct. Therefore, any clause that provides the limitation of the client's right to freely choose his lawyer is likely to question his independence and contravenes his interests.

Even if the insurance companies' Regulation also indicates the hypothesis that the insurer is entitled to appoint the lawyer (only after the initiation of the legal procedure), the same document shows that the right of the insurance holder to choose his representative arises the moment when this one can ask the insurer to pay the insured amount. In the legal practice, it has been assessed that the right of choosing the representative arises when it is obvious that the dispute will develop in a litigation proceeding.

In spite of these established regulations, the insurers do not accept their interpretation, so that they would not be able to coerce, to the insured parties, a specific defender, by selecting him from their own panel of lawyers, which would mean, for them, not having any control over the legal costs or the way the legal service is provided. In sustaining the opposite solution, the insurers invoke the following arguments:

a) that only their panel of lawyers have enough experience in understanding and interpreting the insurance policies, due to the complexity of those conventions,
b) that certain policies do not also cover the legal expenses (even if it is not the case),
c) that the above mentioned Regulation does not apply to this type of insurance, too (which also is a false assertion).

The insurer's practice, to limit the settled amount to the equivalent upper limit value of their own panel of lawyers' fees, or the refusal to pay the fees of the lawyer chosen by the insured-client, can abusively limit this one's right of choosing his own defender[55].

As shown above[56], the provisions of article no.4 par(1) lett.a) of the E.U. Council Directive no.87/344 EEC, have been interpreted by ECJ by reference to the interest protected by the European legislator, meaning that, starting from the need for protection of the insured parties interests and by observing of the general and binding aspect of the right of choosing the representative, a conditionality of this right would be the same with a restrictive interpretation of the provision, which is not allowed.

As a conclusion, it is obvious that all the insurers that provide legal protection insurances all over Europe are compelled to allow their clients to freely choose their lawyer. The importance of conceding this right is proved by the situations when the form of exercising the profession, chosen by the insured party, had already provided a certain number of hours of legal activities (e.g., for clarifying the context of the litigation). In a situation like this, appointing one of the insurer's own lawyers would be an unjust solution.

In case the insured parties are not allowed to choose their own lawyers or there are signs of any conflict of interests between them and the insurers, they may undertake the following steps:

1. notify the insurer about the choosing of the lawyer (or the professional company) which is to provide assistance and representation, as soon as he had made his decision, so that any disagreement related to this aspect can be solved in due time. During these debates, the chosen lawyers or representatives can also intervene, by bringing arguments to prove their related experience and show their willingness to update the insurers about the evolution of the entrusted case;
2. ask for the insurance broker's help, to pressure the insurer to recognize the client's options for his representation. In this case, the higher chances go to the big clients, that can influence the insurer to make a decision, especially if the latter is interested in keeping those clients;
3. when running out of options, the clients are invited to address the Financial Ombudsman service[57], for settling the differences with the insurer[58].

5.2. Germany.

The percentage rate of the German profile industry on the European market of the legal protection insurances was of 44%, in 2013, a result that can be explained by the fact that it does not necessarily reflect the market volume, but rather its rate of coverage, considering that, in Germany, there are almost 50

[54] Legal expenses insurance (LEI) Report – European market overview, Germany, the U.K. and Bulgaria (September 2013), cited above, p.5.

[55] The Guide „Legal expenses insurance and commercial disputes", edition 2011, accessed online at 19.12.2016, at the address: http://www.out-law.com/topics/dispute-resolution-and-litigation/pre-action-considerations/legal-expenses-insurance-and-commercial-disputes/.

[56] See the reasons of the CEJ preliminary decision, regarding the case Sneller v. DAS Nederlandse (C-442/12), cited above.

[57] The Financial Ombudsman is a national authority, founded by and subordinated to the British Parliament, whose task consist in solving the disputes regarding the financial services. Official page accessed at 19.12.2016, at the address: http://www.financial-ombudsman.org.uk/about/index.html.

[58] the Guide „Legal expenses insurance and commercial disputes", edition 2011, cited above.

operational insurance companies, offering LEI type policies and totalizing a number of 20 million contracts (including both the group and the individual ones). Even if the number of clients for this service diminished from 55% in 2003, to less than 43% in 2013, this decrease does not necessarily reflect a restriction of the activity, as much as a result of reaching a high maturing level of the market, comparing to other EU markets' important growth.

The beneficiaries of a legal protection insurance have the advantage of being able to exercise, or, if the case, to defend their subjective rights, any time it is required, without being held back by financial reasons. However, this advantage also comes with some shortcomings, as it can lead to a different perception within the society and to a malevolent exercising of certain procedural rights. Therefore, the client that has continuously paid his insurance premiums during the last decade will be much less interested in amicably solving the litigation, even if he is given an advantageous offer. Furthermore, even if he loses the case, the client, already caught in a vicious cycle, will also act on appeals, as long as their costs are still borne by the insurer. An experimented judge can easily see what party holds such a policy, by simply observing their attitude during the trial[59].

The explanation for the fact that the risk of the legal costs is more easily insured in Germany is that it's easier to anticipate those costs, in this jurisdiction[60].

This easy way of anticipating the costs is determined by the regulations[61] concerning the calculation method of the fees for the legal services. Thus, the related costs for the legal services are fixed, being established by reference to the value of the litigation's object, in a manner similar to that of establishing the justice fees.

Due to the structure of this legislative framework , the action's holder (the claimant) can calculate, before initiating the legal proceedings, what are the amounts he should advance, both for justice fees and his defender's fee[62].

There is no domestic norm to force the insurers operating in Germany offer the clients a certain type of legal protection insurance, as those contracts' provisions can be established on the basis of the contractual freedom's principle. Usually, the insurance services providers use a standard policy, drafted according to the provisions of the General Conditions for the Legal Protection Insurances (Alldemeine Bedingungen fur die Rechtsschutzersicherung – ARB 2010)[63].

5.3. Austria.

This law system has similar characteristics to the German one, as it is easy to anticipate the costs of a possible trial, the costs of the lawyers' fees also being easily predictable, whereas there are regulated norms[64] for calculating them, established according to the value of the litigation's object. As a consequence, in this country, as well, there has been noted a significant growth of the popularity of the insurance policies related to all legal expenses.

Even if the LEI type contractual clauses, included within the home insurance policies or motor policies can ensure the financing of the legal activities related to those litigations, in most of the cases, the interested people are forced to additionally purchase stand-alone type LEI insurance contracts. To answer the market's demands, many insurers have accommodated the motor insurance policies, to automatically include the LEI clauses[65].

The procedure by which the insurer provides the necessary amounts is started by a notification from the client (claimant) or his lawyer, revealing the intention to initiate a litigation. The insurance company makes sure that two cumulative conditions, related to the litigation, have been met, namely: if the litigation, by its nature, corresponds to the ones covered by the policy and if there are clues that it will not exceed the insured amount. If these conditions are met, the insurer confirms, in writing, to the client the coverage of the costs[66].

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[59] G. Dannemann, Access to Justice: an Anglo-German Comparison, material accessed online at 18.12.2016, at the address: http://germanlawarchive.iuscomp.org/?p=374#Legal%20Expenses%20Insurance.

[60] ibidem.

[61] According to the Law on the Remuneration of Attorneys (Gesetz über die Vergütung der Rechtsanwältinnen und Rechtsanwälte - RVG), material studied online at 27.12.2016, at the address: https://www.gesetze-im-internet.de/englisch_rvg/englisch_rvg.html.

[62] The brochure „Law – Made in Germany", p.29, material studied online, at 30.12.2016, at the address: http://www.lawmadeingermany.de/pdfs/Law-Made_in_Germany_FR.pdf.

[63] ARB 2010, material studied online at 27.12.2016, at the address: https://www.arbeitsgemeinschaft-finanzen.de/mediathek/ARB_2010.pdf.

[64] the General Fee Criteria for Lawyers *(Allgemeine Honorar-Kriterien für Rechtsanwälte)* material studied online at 27.12.2016, at the address: https://www.rechtsanwaelte.at/index.php?eID=tx_nawsecuredl&u=0&g=0&t=1482967599&hash=d7b836769c25fd18c3e9d08521e11dd4a366a485&file=uploads/tx_templavoila/ahk_28052015_01.pdf and The Lawyers' Scales of Fees Act (Rechtsanwaltstarifgesetz), material studied online at 27.12.2016 at the address: https://www.rechtsanwaelte.at/index.php?eID=tx_nawsecuredl&u=0&g=0&t=1482968050&hash=d1869c7c70adaad63606eacc0bccf7b46c5e48d0&file=uploads/tx_templavoila/ratg_01012016_01.pdf.

[65] M.Roth, Litigation in Austria – Are costs and fees worth it?, article published in M.Reimann (editor), Cost and fee allocation in civil procedure..., cited above, p.75.

[66] Roth in Vershraegen (Ed.), Austrian law – an international perspective: selected issues, Jan Sramek Verlag 2010, p.144; Wandt, Versicherungsrecht, 5th. Edition, Heymann, 2010, para.938, apud. M.Roth, Litigation in Austria – Are costs and fees worth it?, article published in M.Reimann (editor), Cost and fee allocation in civil procedure..., cited above, p.75.

5.4. France.

The legal protection insurances are regulated, in France, in the Insurances Code[67], (Book I, title II, chapt.VII, articles L127-1-127-8).

The essence of the legal protection insurance is the fact that it is optional. This convention is like a precaution measure, taken for the situation when the client is involved in a legal procedure and it consists of transferring the related risk to the insurer.

The difference between the LEI insurance and the public legal aid is of a legal nature: while the public legal aid is based on the social solidarity concept, law provided, the LEI insurance is based on common risk-taking (according to a contract). In this respect, the insurance for the legal expenses has the same foundation as the one for fire insurance or hospital insurance[68].

Article L127-2 of the Insurances Code provides the means to materialize the legal protection insurance: either as a stand-alone contract, or as a distinct add-on clause of an independent policy, which has to define the LEI insurance's content and to indicate the related insurance premium's value.

Article L127-2-1 defines the concept of "insured event" (sinister) as being the refusal to a request made to, or made by the insured party, as the case. So, the legal quality of the client (plaintiff or defendant) is not relevant.

According to article L127-2-2 par.(1), the consultations granted or the legal actions taken before the moment of the insured event's occurrence does not justify the unlocking of the guarantee. Any contractual clause to provide another solution is considered unwritten. As an exception to this rule, par.(2) of the same article provides that the request of those consultations or taking of those legal actions might be settled by the insurer, provided that the client proves an emergency situation, that required those measures.

Article L127-2-3 states it is compulsory to offer the client a lawyer's assistance or representation, provided that the client or even the insurer acknowledges the fact that the opposite party in the trial benefits of the same conditions for representation.

The provisions of article 4 par.(1) of the Directive no.87/344 EEC are applied in the domestic law by the regulation of art.L127-3 par(1), which provides that when it is required to use the services of a lawyer or another person legally authorized to represent or defend the client's interests, the latter has the right to freely choose in this respect.

According to art. L127-3 par.(2) the client's right to choose his lawyer (or another representative) must be stipulated in the contract for all situations generating a conflict of interests between the client and the insurer. Under no circumstances a contractual clause can provide the restriction of the client's right to choose, unless the upper limit of the guarantee's value is not exceeded (par.3).

Finally, the par.(4) of article L127-3 states that the only case when the insurer is allowed to recommend a lawyer to his client is when the client himself has made a written request in this respect.

On the same line, article L127-5-1, states that the amount for the lawyer's fee will be established only by negotiation between the client and the lawyer. The French legislator specifically forbade the insurers to intervene in this matter.

According to article L127-4, if the case is that the insurer and the client do not agree upon the actions to be taken in order to settle the litigation, this impasse can be overcome with the help of a third party, jointly designated by the first two parties. Furthermore, if parties cannot agree upon the third party, the decision will be made by the court, following a brief procedure. As a rule, the insurer will have the obligation to pay the costs related to that procedure. As an exception, the court can rule for the client himself to make the payment, if it has been established he abusively started that procedure.

In case the client starts the above mentioned contentious procedure and is granted a more advantageous solution than the one suggested by the insurer or by the third party indicated in the previous paragraph, the insurer will have to offset the expenses related to that action, up to the guarantee's value upper limit.

In the situation the procedure is held before the third party or in court, the procedural terms established for the appeal are suspended for all the legal procedures covered by the policy and the client can initiate the procedure, by formulating the court referral, until the designated third party finds a solution and presents it to the parties.

Art.L127-5 states the obligation of the insurance companies, should a conflict of interests between them and their clients arise, to inform them they can exercise the rights stated by articles L127-3 and L127-4.

5.5. Switzerland.

In Switzerland, the legal protection insurance policies have been used since 1925, they are widely spread and they cover various legal aspects.

For those who are interested, there have been made available motor insurances, individual insurances and professional and business risk insurances. Regarding the package-deal type insurances, in this jurisdiction, as well, they involve a limitation of the covered litigations' range, so that they cannot be used in family litigations, neighborhood relations, real-estate issues or construction work contracts.

There is a maximal upper limit for the amounts that can be insured by a LEI insurance and it established

[67] The Ensurance's Code, material studied 29.12.2016, at the address: https://www.legifrance.gouv.fr/affichCode.do;jsessionid =98DC092B94BD5DE64CE2BC704BAE4543.tpdila09v_1?idSectionTA=LEGISCTA000006157261&cidTexte=LEGITEXT000006073984 &dateTexte=20161229.

[68] R.Perrot, Institutions judiciaries, 15e. edition, ed. Montchrestien (LGDJ), Paris, 2012, p.83.

by most of the profile companies to the amount of CHF 250000 (corresponding to approx. USD 250000). The insurer has the option to deny the financing of the client's actions, should he consider there are no chances of success, in which case he has to inform the client, in writing, about his opinion. The resolution of the financing denial can be appealed to a quasi-arbitrary court, on the insurer's expense[69].

5.6. Finland.

For individuals, the legal protection insurances (LEI) are included as clauses (standard, therefore, compulsory clauses) in the home insurance general policies. The companies, as well, can use such an instrument, in regards to certain claims against them (for example, in case of work accidents, or for discriminatory treatment etc).

Under these circumstances, the range of litigations for which the legal expenses can be insured is rather restricted, as most of the litigations categories (divorce and child custody, work or business litigations) cannot be financed in this way. The amount paid in 2012 was, in general, of 8500 Euro the most, which sufficed only for a modest financing or low value litigations and it only covered the insured party's legal expenses.

The using of this type of insurance policies by legal entities clients has been estimated as much more reduced, specifying that unequivocal statistical data could not have been accessed. Depending on the contractual terms, these insurances cover the financing of the client's expenses and they could, also, involve the adverse party's expenses, should the client have any claims, being forced to pay for them, as well[70].

5.7. The Japanese System – a successful implementation model of the legal expenses insurances mechanism.

From the regulation point of view, the legal protection insurance contracts have to comply to the provisions of the Insurances Law and the insurers observe the provisions of the Insurance Business Act. There is no equivalent norm for the EU Directive no.87/344/EC.

The first LEI type insurances appeared, in Japan, in middle 90's. They did not consist of stand-alone contracts, but they were add-on special clauses to non-life type insurance contracts, such as automobile insurances, fire insurances or holder's accidents insurances. Therefore, also the litigations, for which those clauses were effective, were limited to the ones pursuing compensation of damages to the clients' properties or those following a car accident.

During 2012, it was founded a specialized insurance company, providing, to the interested people, stand-alone LEI policies, to cover the financing of a wider range of civil litigations: from divorce cases or inheritance to individual work litigations or even litigations related to contracts' interpretation and unfolding.

Rights protection insurance or Attorney insurance (or „Kenrihogo-hoken") is a system created by JFBA Legal Access Center (JFBA-LAC) and which is administrated by the latter, in cooperation with insurance companies. On September 1-st, 2014, 12 insurance companies joined the system, among which, 3 of the 3 largest groups of non-life insurances.

The „Attorney insurance" system is organized in such a way to observe the provisions of the Attorney act, which do not allow to provide consultancy or representation by other persons than lawyers (art.72), or to intermediate such services, all these actions being submitted to criminal law. Therefore, the insurance companies can neither provide legal services themselves, nor indicate specific lawyers to the clients.

In this context, the only task the insurers have is to finance the related legal costs (justice fees, management of evidence costs, expertise fees etc.), but also the lawyers' fees. On the other hand, in order to properly inform and guide the client, upon this one's special request, JFBA-Access Center will ask the local bar to recommend a lawyer.

Lately, the popularity of this insurance system has grown exponentially. Rights protection insurance had reached a number of 20 million contracts, in 2012, and was used in over 20000 trials, helping to significantly improve the access to justice for the Japanese citizens[71].

5.8. Australia – a different approach for the legal protection insurances (starting by the state's involvement, followed by the slowly transferring to the private insurance system).

The concern for ensuring the free access to justice to the middle class people, not eligible for the public legal aid but, still, not affording to pay the legal services costs, made the object of a huge public debate, in Australia, starting with middle '80s.

The ability of the legal protection insurance systems to provide an improved access to legal services, has been noted in the conclusions of the Australian Senate's Cost of Justice Inquiry-1992, the Access to Justice Advisory Committee's Report - 1994 and observed in the research made by the Law Council of Australia.

In 1983, the Law Foundation started to search for means to improve the general access to justice, by providing legal services affordable to people with small

[69] C. Zellweger, Pricey but predictable: civil litigation costs and their allocation in Switzerland, material published in M.Reimann (editor), Cost and fee allocation in Civil procedure..., cited above, p. 284.

[70] J.Männistö, Cost and fee allocation in Finland, published in M.Reimann (editor), Cost and fee allocation in civil procedure..., cited above, p.133.

[71] M.Omoto, Judicial system and finance for civil litigations in Japan (contribution paper to the 24th. RIAD Congress in Sevilla, Spain), p. 3, 6-7; material accessed online at 28.12.2016, at the address: http://riad-online.eu/fileadmin/documents/homepage/News_and_publications /Reports_Information/general_publications/_final_version__Judicial_System_and_Finance_for_Civil_Litigation_in_Japan.pdf.

and medium income. After reviewing several possibilities, it has been considered that the most efficient one would be the establishing of a company specialized in legal protection insurances marketing. In this respect, the Law Foundation and the Government Insurance Office=GIO have established, in 1986, the Legal Expenses Insurance Limited (or LEI Ltd.).

This company operated between July, 1989 and 1996, when the shares of the Law Foundation have been bought by GIO, who, subsequently, liquidated its portfolio of this type of insurances.

The fact that this enterprise supported by state, was not successful, was due, on one hand, to the particularities of the Australian legal system, which does not benefit of a specific regulation regarding the establishing of the lawyers' fees (as we showed *supra* that is the case in some European states, like Austria and Germany), so that it was nearly impossible to estimate the costs for those procedures.

On the other hand, the lack of success was also due to the mistrust in this type of insurances. It has been tried to implement a solution which borrows specific elements of this profile insurances from both USA (where these policies provide protection to insured groups – mostly, members of unions, for usual and predictable legal costs) and Europe (where the insurances address the individuals, but provide protection for a small number of litigations types). The result was a product intended for groups of potential clients (unions, clubs and associations), which was financing the legal costs indicated in the policy, but was also entitling the holders to certain complementary services, such as phone counseling and a small category of in-house type legal services for all litigations.

Even so, neither the large public, in general, nor the potential clients aimed by the insurers, in particular, did realize the benefits of this type of insurance, especially that nor the insurance brokers were familiar to the product's particularities, so they were not able to efficiently promote it. The recession, along with the lack of providing any fiscal facilities, were all the more reasons to prevent the employers from purchasing legal protection insurances, as benefits granted to employees.

Even if it didn't have the expected results, the LEI Ltd. Company's action contributed to the establishing of a legal protection insurances industry in Australia.

After the LEI Ltd. company's liquidation, the respective insurance policies continued to be offered by several insurance companies (private companies). Most of the legal protection insurances offered afterwards were aiming the needs of the educated and financially independent citizen and of his family, addressing, especially, to those concerned by the economic stability. Usually, the protection offered by these policies extends, also, to the client's family, living under the same roof. The same as in Europe, the legal protection insurances can be used related only to certain types of litigations (such as, cases of civil liability tort, the consumer's right, home selling or buying litigations, auto liability, defense in litigations related to the anti-discrimination legislation). They don't include matters of family law, inheritance or real estate business, transfer of real estate property, most of criminal cases.

However, the number of insured persons is not established, but the popularity is significantly lower than the one that these instruments have on the United States and Europe markets[72].

In order to improve the market and to widespread the use of this type of insurance, there have been made several suggestions[73], among which:

1. Taking certain fiscal policy measures, expressed by including the costs related to purchasing the legal protection insurances in the scope of deductible expenses;
2. The government should assume the role of promoting the LEI type insurances, so that the public can realize the necessity and the benefits resulting from purchasing this product;
3. Still the government, as being the employer of an important number of people, can encourage the spread of this type of insurance amongst its employees, by supporting certain collective bargaining schemes (enterprise bargaining etc.);
4. To complete the above mentioned promoting activity, the insurance brokers should be properly trained and improved as regards the particularities of this product.

6. Conclusions (and accounts) regarding the use of the stand-alone legal protection insurance contracts in the Romanian jurisdiction.

In Romania there is a widespread use of the clauses referring to the legal protection, included in the professional liability insurance contracts (*exempli gratia*, for lawyers', architects', physicians', expert accountants', assessors' liability etc), RCA type contracts (for motor insurances), home insurance contracts, or the employer's tort liability contracts. Policies that are found less often are the ones intended for the clients-legal persons, like general liability contracts or policies that aim the risks related to a specific business (such as: insurances for construction and assembly works, or insurances for forwarding liability). In these cases, as well, the legal protection insurance is embedded in the main contract and not as a stand-alone type.

Although we went through the websites of at least 20 insurance brokers, we could not find, in their general offer, any product, addressed either to individuals or to

[72] A.Goodstone, Legal expense insurance: an experiment in access to justice, Justice Research Centre, Sidney, 1999, material studied online at 27.12.2016, at the address: http://www.lawfoundation.net.au/ljf/site/articleIDs/1A084093CE99046ACA257060007D1456/$file/insurance.html.

[73] Ibidem.

legal persons, to be an actual insurance contract for this type of risk. The author shows he found no different situation regarding the profession liability and couldn't find any signs of it either, in the specialty literature or the national courts' practice.

The same fact is revealed also in the „European Judicial Systems. Efficiency and quality of justice no.23 (ed.2016)" report74 drafted by the European Commission for the Efficiency of Justice (ECEJ). This document shows that the only Union's member-states not having such a system, in 2014, were Bulgaria and Romania.

The explanation of this fact is that, usually, the legal protection insurance systems are very developed in the states where the costs related to lawsuits are predictable, for the exact reason that there are established lawyers' fees (as we showed in the above75, regarding the fees' regulation for the law professionals, in Germany and Austria). We consider that this justification can only be partly accepted, since the lawyers' fees, in Romania and Bulgaria, are among the modest ones from the entire European Union.

Therefore, we think that the only possibilities to finance the costs of a civil lawsuit in our jurisdiction remain: either to be borne by the involved parties (both, individuals and legal persons), or, if the case, to obtain the approval for the public legal aid, for individuals (under the conditions of the article no.4 of the Emergency Government Ordinance no.51/2008, regarding the legal aid within civil trials) and facilities regarding the payment of the justice fees, granted to the legal persons (according to article no.42 par.(2) of the Emergency Government Ordinance no.80/2013, regarding the court fees).

Given that, both in the national courts' jurisprudence and in CEDO's practice, there have been criticism referring to the inefficacy of the legal assistance system, it results that the implementation and the promotion of certain legal protection insurance policies would be very useful and would be an additional guarantee to ensure an effective access to justice. It remains to be seen how and when such a reform in insurance will be adopted, considering the system's fragility and the development level of the market profile in Romania.

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[75] See footnotes no. 60 and 63.

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A FEW ASPECTS REGARDING THE SIMULATION OF CONTRACT IN THE ROMANIAN CIVIL CODE

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Abstract

The article aims to analyze some key aspects of simulation in contracts, as regulated by the Romanian Civil Code . The process of simulation will be explained, based on the provisions of the previous Civil Code, but also with reference to the relevant provisions of the legislation of some European countries. The analyse will focus on the apparent act, and also on the secret one and a special emphasis on intention to simulate, animo simulandi, the key aspect of the matter. Also the effects of the simulation will be reviewed, both from the point of view of the parties and that of third parties, the concept of third parties having another meaning in this procedure.

Keywords: *simulation, arbitration clause, relativity of contracts, overt act, covert agreement.*

1. Introduction

Pursuant to art. 1280 Civil Code, contracts take effect only between the parties, unless the law provides otherwise. This is the meaning of the principle of relativity of the effects of the contract, which can be translated in that rights and obligations arising from a valid contract will benefit or will be incumbent only on people who took part in person or by proxy, at the conclusion of the contract and whose will is present in said document.

This principle, in order to be fully and properly understood, must be interpreted with reference to the provisions of art. 1282 paragraph 1 Civil Code, according to which the contractual rights and obligations of a party shall be transferred, at his/her death, to his/her universal successors or with universal title, if the law, the stipulation of the parties or the nature of the contract do not indicate otherwise.

Thus, the principle of relativity shall be understood in the sense in which it establishes that rights and obligations arising from a contract belong to the original parties, but also to their successors in title, that is the universal successors, with universal title and particular title, as regards the latter with the observance of the conditions set by art. 1282 paragraph 2 Civil Code.

Per a contrario, to all other persons not falling into any of the categories mentioned above, and who are called proper third parties, the contract will take no effect, in the sense that they will not acquire rights, obligations or that contract. The justification of the relativity principle is simple: on the one hand, the very volitional nature of the civil legal act requires such a rule, meaning that if it is natural for a person to become a debtor or a creditor for he/she expressed his/herwish to do so, so it is natural that another person does not become a debtor or creditor unwittingly, and on the other hand, the contrary solution would be liable to undermine personal freedom[1].

However, the properly so called third parties can not be totally indifferent to the new legal situation created by the contract concluded between the parties. For this reason, the current Romanian Civil Code expressly provided a principle that in the former civil regulation of our country did not benefit from a legal basis, but was recognized form a jurisprudential and doctrinary point of view, namely the principle of enforceability. Thus, according to the provisions of art. 1281 Civil Code, *the contract is enforceable against third parties, who can not affect the rights and obligations arising from the contract. Third parties may rely on the contractual effects, but without the right to demand its execution, except as required by law.*

From the analysis of the article, can be drawn two conclusions regarding the content of this principle[2]: on the one hand, third parties can not affect the rights and obligations arising from the contract, otherwise being drawn their liability in tort, and on the other hand, third parties may rely on the effects of the contract, but can not demand its execution, except provided by law (for example with regard to insurance contracts, or if, the legislature recognizes for the benefit of certain persons, third to a contract, a so-called direct action against one of the contracting parties).

However, in order to talk about the enforceability of a contract to third parties, it must meet certain forms of disclosure, about which the legislature speaks, in principle, in Chapter IV of the Preliminary Title of the Civil Code, entitled *Disclosing rights, acts and legal facts (art. 18-24).*

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[1] G. Boroi, C.A. Anghelescu, *Curs de drept civil. Partea generală*, second edision revised and completed, Ed. Hamangiu, Bucharest, 2012, p. 221.

[2] See in this regard, C. Zamșa, în F.A.Baias, E.Chelaru, R. Constantinovici, I. Macovei, *Noul cod civil. Comentarii pe articole.*, second edition, Ed. C.H.Beck, Bucharest, 2014, p. 1459.

From reading the chapter mentioned above, we conclude that, in cases expressly provided by law, rights, acts and facts relating to the status and capacity of persons, those related to property belonging to them and any other legal relations[3] are subject to disclosure (through the forms expressly defined by the legislature), that disclosure can have either an enforceability effect of acts to third parties (as a general rule) or a constitutive or translational effect of rights between the parties and to their successors, universal, with universal title or particular title (as an exception, when the law expressly requires it), and that the sanction in case of violation of these formalities is either unenforceability of acts, rights or legal relations against third parties, or no translative or constitutive effect of rights, between parties.

However, a contract may be enforceable against third parties, even if were not respected the disclosure formalities provided by law, if such third parties are proven to have known on any other way about the contract (art. 22 para, 1 Civil Code).

We can therefore conclude that a contract is enforceable against third parties either by fulfiling disclosure formalities established by law or by knowledge in any other way by third parties about the conclusion of that act.

The difference between the two ways of knowledge by third parties of the reality recorded by contract lies in terms of evidence. Thus, if the parties performed the necessary disclosure formalities, art. 21 para. 1 of the Civil Code presumes that that act, right exists and, therefore no one can claim its lack of knowledge. In this case, the presumption will benefit the parties, who must only prov the fulfillment of the disclosure formality.

On the other hand, if the parties have not fulfilled these formalities, it is presumed that third parties are not aware of the act or the right claimed, in which the parties have the burden of proof for the purposes of proving a matter of fact, namely that third parties have ben made aware, by any other way, of the act or the right in question.

There may also be exceptions from this principle of enforceability, i.e. those cases where a third party will be entitled to disregard, to ignore, therefore to reject those legal situations that have been created by certain contracts. In other words, the parties of these agreements will not be able to prevail against third parties of certain legal situations which they have created by their contractual will[4].

The simulation is regarded as such an exception, given the parties' intention to conceal the true relationships between them, often with the aim of frauding either the interests of unsecured creditors or the interests of their successor in title.

2. Brief comments on the simulation operation in the Romanian Civil Code of 1864

The previous Civil Code has not given legal consecration to simulation, as in the current regulation. The only provision is found in art. 1175 Civil Code., according to which "*The secret document that modifies a public act, has power only between the contracting parties and their universal successors; such an act can not have any effect against the others*".

Although the above article was placed in the chapter on evidence, namely the one related to documents, yet it has been widely accepted that the simulation involved the completion of two acts (in the sense of negotium, not in the sense of instrumentum) and a public act apparently disguised and a secret act (improperly called counterletter), which contained the true will of the parties.

It is assumed that the simulation is generally aimed at fraud and thus it resembles the deceit. However, simulation differs from deceit by several important characteristics. Firstly, the deceit is fraudulent by definition, while simulation may sometimes not aim at fraud, although in practice it is rare. Secondly, the deceit is always directed against one party, while simulation is the work of both parties, directed against third parties[5].

The simulation conditions, its effects and the regulatory field, although outlined in the jurisprudential the doctrine plan, they are also found in the current regulation, with the same ideas, with quite a few differences, which we will address at the right time.

3. Simulation in the current Romanian Civil Code

3.1. Notion

Unlike the previous civil code, the simulation has a legal regime in the new regulation, in art. 1289-1294 Civil Code.

Thus, simulation can be defined[6] as the legal operation in which, through a public legal act, but apparently, it creates a new legal situation than the one established by a legal hidden, secret but real act, inappropriately also called counter-letter[7].

To understand the definition given above, we consider it necessary to explain some terms used in explaining the concept.

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[3] On the object of enforceability, more broadly, see I. Deleanu, *op.cit.*, p. 67 et seq.

[4] C. Stătescu, C.Bîrsan, *Drept civil. Teoria generală a obligaţiilor*, Ed. Hamangiu,Bucharest, 2008, p. 77.

[5] C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Tratat de drept civil român*, vol.II, Ed. All, Bucharest, 1998, p. 523.

[6] For further definitions of this legal transaction proposed by doctrine and jurisprudence, particularly those before the current Romanian civil code, see F.A.Baias, *Simulaţia. Studiu de doctrină şi de jurisprudenţă*, Ed. Rosetti, Bucharest, 2003, p. 46-49.

[7] G. Boroi, L. Stănciulescu, *Instituţii de drept civil în reglementarea noului Cod civil*, Ed. Hamangiu, Bucharest, 2012, p. 172.

The secret act is the one expressing the real will of the parties and establishes the true legal relationship between them; to be valid, the secret act must only satisfy the merits test, the validity requirements of civil legal act, and not the formal tests, as evidenced by the *per a contrario* of the provisions of art. 1289 paragraph 2 Civil Code[8].

The problems have been raised in the literature[9] with regards to the persistence of secrecy of the act containing the real will of the parties, if it is subject to a form of disclosure. Thus, it has been said that whenever the counterletter is subject to a form of disclosure which, by its nature, is intended to make aware the third parties of the effects of legal acts (registration in the land register, entry in the Electronic Archive for Security Interests in Movable Property, etc.), its secret act character will miss. But as the same author goes on, receiving a certain date is unable to remove the secret character of the counterletter, not even by its registration at the fiscal authorities, as the tax administration is not a discolosing authority[10].

The public act is the one that creates the appearance and which is concluded to this end, i.e. to dissimulate reality under its lying cover; its existence is essential to the existence of the simulation[11].

As to this act, both the substantive conditions (capacity, consent, object and cause) and the the formal issues required by law must be satisfied. Moreover, if the secret act is an act for whose validity the law requires compliance with a specific substantive requirement (eg, donation), although this act shall not take the form of the authentic document, however, for the validity of the simulation, as legal operation , the public act must be concluded in that form, even though the law does not require the compliance with formal conditions for its valid conclusion[12], the the secret to act to "borrow" the form from the public act.

3.2. Conditions of validity of the simulation

To be valid as a legal operation, the simulation must satisfy, in a review, a number of conditions, that we also mention:

1. there is a secret act;
2. there is a public act;
3. the secret act must be concluded concurrently or possibly before the conclusion of the public act and
4. both legal acts must be concluded between the same parties[13].

According to another review[14], also embraced by by the the latest jurisprudence of the High Court of Cassation and Justice[15], in addition to the two acts

5. the existence of the simulaiton agreement is needed or the will of the parties that the legal operation produces all the legal effects specific to simulation, *animus simulandi*, which differs from the discrepancy that can occur spontaneously between the declared will and the real will, which will be solved by interpreting the contract[16].

As for the simulation agreement, it has been defined as a manifestation of will which "tells" that the public act is simulated, which expresses the will of the parties to create the appearance, to hide the reality of relationships between them, and it connects, unites the hidden act with the public, ostensible act[17]. Therefore, the simulation agreement is a legal act, regarded as negotium (whose document confirming it can even miss), by which the intention to simulate (simulating animus) is reflected[18], it may also have a fully-fledged existence (as for the simulation by disguise or for the simulation by interposition of persons), or it could lose their autonomy, being absorbed by the secret document (such as the simulation by fictional act).

As for the condition of simultaneity of colncluding the secter and the public document, some clarifications are necessary here, too.

This simultaneity must not be seen in terms of the document confirming the agreement but, as shown by the former Supreme Court, it is sufficient that the secret act precedes the public act or to be simultaneous with this one, even if the document in which the secret document was recorded has been written after the public act. In other words, it is essential that the agreement between the parties, so the convention in respect of legal operation, is prior or concomitant with the public act[19].

On the other hand, since the simulation agreement is a prerequisite, it has been admitted that once the decision to simulate was taken, so *animus simulating* was expressed between the simulators, the time period

[8] Another opinion has been expressed, namely that the secret act should also meet the formal conditions required by law if the simulation is achieved by interposition of persons or mandate without representation, cases in which the parties in the public act are not the same as the parties in the secret act; see F.A. Baias în F.A.Baias, E. Chelaru, R. Constantinovici, I. Macovei, *Noul cod civil. Comentariu pe articole,* ediția a II-a, Ed. CH BECK, Bucharest, 2014, p. 1438.

[9] See for example, L.Pop, I.F.Popa, S.I.Vidu, *Tratat elementar de drept civil. Obligaţiile*, Ed. Universul Juridic, Bucharest, 2012, p. 219-220.

[10] *Idem*, p.220.

[11] F.Baias, *op.cit.*, p. 55.

[12] In this regard, see G. Boroi, L. Stănciulescu, *op.cit.*, p. 176; în sens contrar, a se vedea P.Vasilescu, *Drept civil. Obligații*, Ed. Hamangiu, 2012, p. 493.

[13] C. Stătescu, C. Bîrsan, *Drept civil. Teoria generală a obligaţiilor*, Ed. Hamangiu, Bucharest, 2008, p. 78; we consider that this condition must be fulfilled only if the act takes the form of fictitious simulation and disguise, not when the simulation is by interposition of persons.

[14] L. Pop, I.F.Popa, S.I.Vidu, *Tratat elementar de drept civil. Obligaţiile*, Ed. Universul Juridic, Bucharest, 2012, p. 223; F.A.Baias, *Simulația*, p. 67 și urm.

[15] ICCJ, secţia I civilă, dec. nr.5782 din 12.12.2013, pe www.scj.ro.

[16] L.Pop, I.F.Popa, S.I.Vidu, *op.cit.*, p. 223.

[17] F.A. Baias în F.A.Baias, E. Chelaru, R. Constantinovici, I. Macovei, *Noul cod civil. Comentariu pe articole*, p. 1432.

[18] P. Vasilescu, *Drept civil. Obligații*, Ed. Hamangiu 2012, p. 492.

[19] Trib. Suprem, s.civ., dec. nr. 1325.1979, în V. Terzea, *Codul civil. Volumul II*, Ed. C.H.Beck, București, 2009, p. 889.

elapsed between the dates when the contracts are concluded and form the simulation is irrelevant[20].

3.3. Forms of simulation

The new civil code has not expressly provided the simulation forms, referencing only to one of the ways that the parties can use to hide their true will, namely fictivity (art. 1291 Civil Code.), form the legal appearance[21].

For these reasons, in this paper we limit ourselves to briefly resume the forms of simulation, recalling that this legal operation can be achieved by fictivity, by disguise (total or partial) and by interposition of persons; in the legal literature[22], distinction has already been made between *absolute* simulation and *relative* simulation, the latter being classified in *objective simulation* (when objective elements of the act are hidden, such as the nature of the contract, its object or its cause) and *subjective simulation* (for simulation by interposition of persons).

In its first form, of the fictional act, simulation assumes the existence of only two of its three elements, the public act and the simulation agreement respectively. Thus, the parties conclude an act which is apparently devoided of any effects through the simulaiton agreement, the participants in the simulation remaining in the state before the conclusion of the public act; no new rights and obligations arise between the parties, except for those strictly determined by the will to simulate (e.g. the obligation to consent to the dissolution of the public act within a certain period, the right of the person having consented to the simulation to get some remuneration, etc.)[23]. In short, through the fictional act the parties "pretend" to conclude a legal act (aiming at often defrauding the interests of certain categories of participants in legal relationships - creditors), in reality the act is non-existent.

The disguise, the second way to hide the reality may be total or partial, depending on the item on which the parties conclude the simulation agreement. Hiding the nature of the contract that represents the real will of the parties makes disguise to be total, while dissimulating only certain aspects of the secret contract will be just a partial disguise (i.e., hiding the real price, hiding the real date on which the secret act was concluded, hiding the way that obligation is to be executed, etc.).

Finally, the simulation by interposition of persons implies the conclusion of the public act between certain parties, while the secret act (and the simulation agreement) is attended by a third person, who will be the real beneficiary of the public act, in whose patrimony the legal effects of the concluded act will be produced.

3.4. Effects of simulation

3.4.1. General effects of simulation

In terms of produced effects, the Romanian legislature in 2009 remained committed to the principle of simulation neutrality, art. 1289 paragraph 1 Civil Code. providing that the secret act shall take effect only between the parties and, if the nature of the contract or the stipulation of the parties do not provide otherwise towards the universal successors and with universal title. So simulation, as a rule, is not sanctioned than when it is aiming at an unlawful cause, the secret act having effects only between its parties, but also towards the persons related to the third parties, towards the third parties in good faith only the public act is enforceable.

As a rule, the simulation sanction is unenforceability against third parties in good faith of the legal situation created by the secret act, and if necessary, removing the simulation by action in simulation[24].

There are also situations in which the simulation of the parties will is sanctioned by absolute or relative nullity, depending on the nature of the interests protected, nullity that can cover either the secret act, or the whole legal operation.

By way of example, we mention art. 992 Civil Code., which reads as follows: (1) The sanction of relative nullity provided in art. 988 par. (2) art. 990 and 991 also applies to the liberalities disguised as a contract for consideration or provided to a third party. (2) Are presumed, until proven otherwise, as third parties, the ascendants, descendants and spouse of the person incapable of receiving special favors, and the ascending and descending spouse of such person.

In this case, the applicable sanction will be the relative nullity of liberalities disguised as a contract for considerationor made by interposition of persons, in other words, only the secret act will be abolished and not the entire legal operation.

On the other hand, nullity will affect the entire legal operation when required by art. 1033 Civil Code., according to which (1) *any simulation in which the donation was the secret contract in order to circumvent the cancellation of donations between spouses is void/ invalid. (2) Any relative of the donee to whose legacy he would be calling upon donation and did not result as a consequence of the marriage to the donor is presumed third party, until proven otherwise.*

As to the type of nullity, we believe that in the situation cited above, the applicable sanction would be the absolute nullity, and not the relative nullity of the simulation, although at first glance, it would be about a particular interest.

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[20] P. Vasilescu, *op. cit*, p. 492.

[21] Regarding the appearance of right, see I. Deleanu, *op.cit.,* p. 63-64.

[22] F.A.Baias, *Simulația,* p. 97 ș.u.; L. Pop, *Tratat de drept civil. Obligațiile. Volumul II: Contractul,* Ed. Universul Juridic, Bucharest, 2009, p.619; P. Vasilescu, *op.cit.* , p. 490.

[23] F.A.Baias, *Simulația,* p. 99.

[24] G. Boroi, M.M.Pivniceru, C.A.Anghelescu, T.V.Rădulescu, T.E. Rădulescu în G. Boroi, M.M.Pivniceru (coord.), *Fișe de drept civil. Partea generală. Persoane. Drepturi reale principale. Obligații. Contracte. Succesiuni. Familie*, Ed. Hamangiu, București, 2016, p. 149.

However, given that by the mentioned article, the legislature intended to defend the principle of revocability of donations between spouses, revocability that is the essence of this type of contract signed between two parties who have a certain quality (spouses), we consider that the interests protected is a general one, reason for which the nullity that occurs is the absolute nullity.

3.4.2. The effects of simulation between the parties

The secret act shall effect effects between the parties of the simulation, as required by art. 1289 paragraph 1 Civil Code. The same act shall also take effect on the universal successors or those by universal title, if the nature of the contract or the stipulation of the parties does not indicate otherwise.

So, as a rule, the category parties also includes the universal successors or those by universal title (not those with particular title), unless the nature of the contract (e.g. a contract *intuitu personae*) or the will of the originating parties (in case which simulation is used to defraud the interests of these categories of successors) make the assignee be seen as third parties towards simulation.

However, we can not generalize the rule established by Art. 1289 paragraph 1 Civil Code., in the sense that, depending on the form of simulation, even the public act can produce effects between the parties; thus those elements of public act to which makes reference the simulation agreement will not produce any effect between the simulation parties, but items which are not affected by the parties' intention to simulate become effective provided for in the public act (the case, for example, of a simulation by partial disguise)[25].

The secret contract between the parties shall take effect only if the conditions of validity, the substantive issues are met (capacity, consent, object and cause) without needing to satisfy also the formal conditions, as required by art. 1289 paragraph 2 Civil Code.

3.4.3. The effects of simulation towards third parties

Two clarifications are needed to understand the effects on simulation towards third parties.

The first issue to be determined even from the very beginning is that, in the field of simulation, the third party term is more comprehensive than that in the principle of relativity matter.

In the field of simulation, the third parties towards the secret act are: unsecured creditors of the parties, successors with particular title, universal successors and successors with universal title, where the simulation is the intended defrauding of their interests.

Secondly, simulation effects differ according to whether third parties in good faith or in bad faith.

Third parties in good faith are the third parties who on the date their interests arose, related to the contract concluded by the participants in simulation, were unaware of the existence of the simulation; third parties in bad faith are therefore those who have found in any way, about both the existence and the content of the simulation[26].

Once these clarifications made, we can say that, according to art. 1290 paragraph 1 Civil Code. the parties cannot invoke the secret contract against the third parties in good faith. But the latter may invoke against the parties of the simulation the existence of the secret contract through actions in simulation (art. 1291 paragraph 2 Civil Code.), as well as they may also invoke the public act, depending on their interests.

Towards third parties acting in bad faith, the parties may only invoke the secret act, but they do not have the same right of option the third parties in good faith have[27].

Moreover, according to art. 1290 paragraph 1 Civil Code., the secret contract cannot be invoked by the parties, by their successors universal, with universal or particular title or by creditors of the person responsible for the disposal apparently against third parties who relying in good faith on the public contract, have acquired rights from the real purchaser.

3.4.4. The effects of simulation among third parties

The issue of the simulation among third parties would arise in a situation where a third party would have interests in evoking the real act, while others cannot evoke the effects of the public act.

The legislator in art. 1291 Civil Code. foresaw two possible situations: 1. the situaiton of the creditors who have started foreclosure on the property which was the material object of the fictional act; in this case, for the unenforceability of the secret act to be, effectively in favor of the unsecured creditors of a real acquirer, it is necessary that, besides the condition of good faith that those creditors have started foreclosure and have registered it in the land register or have obtained a lien on those assets[28]; and 2. the conflict situation between creditors, in which case, from the perspective of the current civil code, not the good faith of the creditors, but rather the debt date would be important; thus, if the date of the debt the creditor has against the fictional person involved in disposal precedes the secret contract, the holder of the claim will provide from the asset of his debtor, but if the date of the debt six arose

[25] F.A.Baias în F.A.Baias, E. Chelaru, R. Constantinovici, I. Macovei, *Noul cod civil. Comentariu pe articole*, p. 1437.

[26] G. Boroi, M.M.Pivniceru, C.A.Anghelescu, T.V.Rădulescu, T.E. Rădulescu în G. Boroi, M.M.Pivniceru (coord.), *Fișe de drept civil. Partea generală. Persoane. Drepturi reale principale. Obligații. Contracte. Succesiuni. Familie*, p. 151.

[27] Idem.

[28] In this regard, see F.A.Baias în F.A.Baias, E. Chelaru, R. Constantinovici, I. Macovei, Noul cod civil. Comentariu pe articole, p. 1441.

after the conclusion of the secret contract, the conflict will be settled in favor of the real creditor acquirer[29].

3.5. Action in simulation

Finally, one last point that we would like to discuss within this article is the action in declaring the simulation.

This is the way to disclose the dishonest nature of the public contract and the existence of another contract.

The initiators of the action in declaring the simulation may be the parties, where, for evidence, the general rules on the testimony shall apply, provided by art. 309, 310 C.proc.civ.; or may be third parties, in which case, since it is about proving a legal fact, they will be able to use any evidences.

In addition, as it is an action made by a party or of an action made by a third party, we consider that the extinctive prescription issue will be seen differently.

If the claimant in such an action is a third party, either in good or in bad faith, it is a declaratory action (Art. 35 Civil procedure code) and therefore it is imprescriptible; but if the claimant is a party in the simulation, since the declaration of the simulation is the only means by which the aimed purpose is achieved (performance of the secret contract or even its termination by cancellation, rescission, termination, etc. .), we are in front of an injuction, the prescription being subject to the rules of the purpose action matter.

As to the passive capacity to stand trial, it belongs to all the contracting parties involved in simulation; if the claimant is a third party and the defendant is just one of the parties, the court will have to introduce, under art. 78 C.proc.civ., the other contracting party, for unenforceability to be declared against it, too.

Finally, also as a procedural element, the court members will be established by public act, if it is simulation by fictional act or by disguise (total or partial); but if simulation consisted in interposing a person, the question about the act on which the members of the court will be established cannot raise any more, as the element of difference between the public and the secret act is reprsented by one of the contractual parties, its value is the same[30].

4. Conclusions

Although it currently benefits from a pretty thorough regulation, the legal regime of simulation has not been changed in substance compared to what the legal doctrine and the jurisprudence outlined before 1 October 2011. The legislature kept, as a rule, unenforceability as the main penalty against simulation, put an end to older controversies (the conditions that must be satisfied by the secret for the simulation to take effect), but it has also omitted to deeply focus on the effects of simulation, speaking in principle, only about simulation through fictivity, neither mentioning the disguise nor the interposition of persons.

Of Italian origin, the simulation regulation is welcome in the Romanian legal field, the provisions of the Civil Code being completed with provisions from other special laws.

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[29] Idem.

[30] For further details, see G. Boroi, M.M.Pivniceru, C.A.Anghelescu, T.V.Rădulescu, T.E. Rădulescu în G. Boroi, M.M.Pivniceru (coord.), Fişe de drept civil. Partea generală. Persoane. Drepturi reale principale. Obligaţii. Contracte. Succesiuni. Familie, p. 152-153.

AN OVERVIEW ON THE TRANSLATIVE VERSUS THE CONSTITUTIVE EFFECT OF THE INHERITANCE PARTITION IN ROMANIA

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Abstract

Nowadays, the article 995 of the Romanian Code of Civil Procedure regulates the so-called constitutive effect of the partition decision. Although the 2004 draft of the new Civil code stipulated a retroactive (declarative) effect for the inheritance partition, the Amending Commission preferred to formulate the legal effects of partition in this way: each co owner (coheir) becomes the exclusive owner of the assets or, as the case, of the sums of money that were assigned starting only the day established in the partition act, but not before the day of the concluding of the act in case of voluntary partition or, as the case, from the date of the final court decision.

Since the Civil code's perspective seems to imply a translative effect, for a better understanding of the constitutive effect of the inheritance partition, this short overview attempts, on the one hand, to determine if the partition is or not a translative act, and, on the other hand, to examine if a possible translative effect of the property of the partition decision can be reconciled with the constitutive character stipulated in the Code of Civil Procedure.

Keywords: *inheritance partition, constitutive effect, translative effect, declarative effect, retroactive effect.*

1. Introduction

The inheritance partition is the operation through which it is put an end to the state of co-ownership between co-heirs, in the sense that the asset or the assets (inherited) mutually owned are divided, in their materiality, among the heirs who thus become exclusive owners of their respective assets[1]. Thus it is replaced the ideal undivided quota on the inherited assets, with exclusive rights of each of the co-heirs on some assets (values) determined in their individuality[2].

The Civil Code from 1864 established the rule of the declarative (retroactive) character of the partition so that each co-heir was presumed to have inherited all by himself/herself and *immediately* all the assets that composed his/her part and that he/she had never been the owner of the other assets from the inheritance.

The New Civil Code from 2009[3] stipulates, however, that each co-owner (co-heir) becomes the exclusive owner of the assets or, as the case, of the sums of money that were assigned to him/her starting only the day established in the partition act, but not before the day of the concluding of the act, in case of voluntary partition, or, as the case, from the date of the final court decision; and the Civil Code of Procedure stipulates that the partition decision has *constitutive* effect.

In the doctrine, on the one hand, it is claimed the *translative* character on property of the partition[4] , and on the other hand, it is claimed that the partition is not an translative act on property, but a *constitutive* act, because the co-owners who become individual owners of the inherited assets assigned through partition, obtain their rights „*directly from the partition act*, not as a result of an actual transfer of undivided quotas among co-partitioners"[5]. There are also authors who, even though admit the constitutive character of the partition decision, however claim „the *translative* effect on property of the partition decision"[6] but without going into details on how this property transfer operates.

Thus, it is not without interest to search within this study to what extent the partition is or not a *translative* act on property in the light of the Civil Code and if a possible translative effect on property of the partition decision is reconciliable with its *constitutive* character provisioned by the Code of the Civil Procedure.

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[1] See Gabriel Boroi, Carla-Alexandra Anghelescu, Bogdan Nazat, *Curs de drept civil: drepturile reale principale (Course of Civil law: Main Real Rights)* (Bucureşti: Hamangiu, 2013), 115.

[2] See Francisc Deak, Romeo Popescu, *Tratat de drept succesoral. Transmisiunea şi partajul moştenirii (Treatise on Succession law. The Transmission and the inheritance's partition)*, vol. III (Bucureşti: Universul Juridic, 2014), 178.

[3] *Law no. 287 from 17th July 2009 on the Civil Code*, republished in the Official Journal of Romania, Part I, no. 505 from 15th July 2011.

[4] See Eugen Chelaru, *„Comentariu la art. 680 Cod civil" (Commentary on article 680 from the Civil code)* in *Noul Cod civil: comentariu pe articole (The New Civil Code: comments on articles)*, coord. Flavius-Antoniu Baias et al. (Bucharest: C.H. Beck, 2014), 792; Alin-Adrian Moise, „Scurte consideraţii despre partajul voluntar în sistemul Codului nostru civil" (Short consideration on the inheritance voluntary partition in the system our Civil code), *Dreptul* 11 (2012): 60; Corneliu Bîrsan, *Drept civil: drepturile reale principale în reglementarea noului Cod civil (Civil Law: Main Real Rights in the new Civil Code)* (Bucharest: Hamangiu: 2013), 240.

[5] Dan Chirică, Tratat de drept civil: succesiunile şi liberalităţile (Treatise on civil law: successions and liberalities) (Bucharest: C.H. Beck, 2014), 623; József. Kocsis, Paul Vasilescu, Drept civil – Succesiuni (Civil law - Inheritances), (Bucureşti: Hamangiu, 2016), 315.

[6] Mihaela Tăbârcă, Drept procesual civil (Judicial Civil Law), vol. II, (Bucureşti: Universul Juridic, 2013), 743-744.

2. Joint ownership resulted from inheritance

According to the legal definition provided by the art. 953 from the Civil Code, the inheritance is the transmission of heritage from one deceased physical person towards one or more living persons[7]. The acceptance of the inheritance consolidates the transmission of the heritage rightfully performed at the date of the death. Thus, as a result of the acceptance, the transmission of the inheritance that operated *ope legis* from the moment of the opening of the inheritance, but provisional, is consolidated by becoming final. In the case of the plurality of heirs a *co-owned succession* intervenes, each co-heir receiving an ideal quota from his/her right, none of them being the exclusive holder of an asset or of a material fraction of an asset.

Thus, the legal regime of the co-owned succession is governed by two principles: each co-heir has an individual right, absolute and exclusive of his/her quota having as an object the assets in severalty, but none of the co-owners is the exclusive holder of any undivided asset or assets, regarded in their materiality[8]. Therefore, the co-heirs have an abstract quota from each molecule of the inherited assets[9] and the acquisition of this quota takes place *retroactively* starting with the day of the opening of the inheritance. In the same way, the art. 688 from the Civil Code from 1864 stipulated: „the effect of the acceptance goes up to the day of the opening of the succession".

3. Inheritance partition

The Project of the Civil Code provisioned in the art. 786 that each co-owner becomes the exclusive owner of the assets or, as the case, of the sums of money that were assigned to him/her starting *only the day of the partition*. However, in the case of the co-owned succession, the rights of exclusive property were considered to be born at *the date of the opening of the succession*[10]. The inheritance partition regulated in this way was in agreement with the dispositions from the old Civil Code and the ones from the present Civil Code of Québec which in the art. 884, with the marginal name „partition is *declaratory* of ownership", provisions that „Each co-partitioner is deemed to have inherited, alone and directly, all the property included in his share or which devolves to him through any partial or complete partition. He is deemed to have owned the property from the death, and never to have owned the other property of the succession."

However, the Amending Commission preferred to regulate the partition unitarily, so that in its final form the art. 680 of the Civil Code from 2009 regarding the *legal effects of the partition* provisions that each co-owner becomes the exclusive owner of the assets or, as the case, of the sums of money that were assigned to him/her starting only *from the day established in the partition act*, but not before the day of the concluding of the document, in the case of the voluntary partition, or, as the case, from the day of the final court decision. In the case of the estates, the legal effects of the partition take place only if the partition act authenticated or the final court decision, as the case, were entered in the Real Estate Register.

4. The Concept of Translative Effect

In the *civil law doctrine* it is considered a *translative* legal act the one that has as an effect the resettlement of a subjective right from the patrimony of one person to the patrimony of another person[11] and which produces the effects only for the future *(ex nunc)*. We mention, as an example, that the Civil Code, art. 1674, regarding the sale contract provisions that, excepting the cases stipulated in the law or if by the will of the parts does not result the contrary, the property will be rightfully *moved* to the buyer from the moment of the concluding of the contract, even if the asset has not been handed over or the price has not been paid yet, the sale having, therefore, a translative effect on property.

According to art. 17 from the Decree-law no. 115 from 27th April 1938 on the unification of the dispositions regarding the Land Registries, the real rights on estates were obtained only if between the one who gave and the one who received the rights there was an agreement of will on the constitution or the *resettlement*, under a shown cause, and the constitution or the resettlement was registered in the Real Estate Register.Thus, there was a distinction between constitution, on the one hand, and *transmission*, on the other hand. We also meet this distinction nowadays, for example in the art. 2617 from the Civil Code according to which the constitution, *the transmission* or the termination of the real rights on an asset that has changed the settlement are governed by the law of the place where this could be found when the legal fact that generated, modified or terminated the respective right took place; or in art. 936 which, also, makes a distinction between the constitutive and translative legal acts.

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[7] For details see Ioana Nicolae, Devoluţiunea legală şi testamentară a moştenirii (Devolution of Inheritance by Law and by Will), (Bucharest: Hamangiu, 2016), 2.

[8] See Francisc Deak, Tratat de drept succesoral (Treatise on Succession Law), (Bucureşti: Actami, 1999), 547.

[9] See Dimitrie Alexandresco, Explicaţiunea teoretică şi practică a dreptului civil român în comparaţiune cu legile vechi şi cu principalele legislaţiuni străine: Succesiunile ab intestat (Theoretical and Practical Explanations on Romanian Civil Law as Compared to the Old Laws and to the Main Foreign Laws), vol. III - part II, (Bucureşti: Atelierele Grafice Socec & Co., 1912), 446.

[10] Proiectul Noului Cod Civil (The Draft of the New Civil Code) (Bucharest: C.H. Beck, 2006), 167-170.

[11] See Gabriel Boroi, Carla-Alexandra Anghelescu, Curs de drept civil: partea generală (Course of Civil law: the General Part), (Bucureşti: Hamangiu, 2016), 116.

5. The Concept of Constitutive Effect

5.1. Civil Law

The Civil Code uses the term *constitution* regarding the mortgage (art. 2353, 2358, 2387, 2406), the superficie (art. 693), the usufruct (art. 710, 721), the right to manage (art. 868), the right of concession (art. 872), the right to use free of charge (art. 874), the creation of a deposit (art. 2191 and 2192) or of a society (art. 1882). That is why, in the *civil law* doctrine it is considered a *constitutive* legal act that gives birth to a *civil right* that did not previously exist[12]. Thus, it is placed in opposition the *translative* civil legal act (through which a pre-existent right is transferred), on the one hand, and the *constitutive* legal act (that gives birth to a right that did not previously exist), on the other hand[13].

5.2. Judicial Civil Law

In the matter of civil procedure, through the *constitutive* court decision of rights we understand that decision through which it is created a state law that is different from the one existing so far, a new legal situation[14] and which produces effects only for the future. In the doctrine of civil procedural law there is no discussion on a different category of translative court decisions of rights[15], but only on declarative or constitutive decisions of rights, the last ones being the ones which create, modify or terminate a certain legal status, thus give birth to a new legal situation[16].

5.3. Case Law

In jurisprudence it was stipulated that „*the transmission* of the real right that constitutes the object of the legal act subject to registration [in the Real Estate Register] is produced, in the system regulated by the Decree-law no. 115/1938, only because of the *constitutive effect* of the registration."[17] In the same decision it is provisioned that „the constitutive effect (attributive) of the registration means, according to the same old law, the unconditional birth of the real right *(jus in re)*".

However, according to art. 17 from the Decree-law no. 115 from 27th April of 1938 on the unification of the dispositions according to the Land Registries, the real rights on the real estates were acquired only if between the one that gave and the one that received the right there was an agreement of will on the *constitution* or *the resettlement*, under a shown cause, and the constitution or the resettlement was registered in the Real Estate Register. The normative act does not mention „the constitutive effect of the registration", this phrase being indubitable a creation of the doctrine, taken over by the jurisprudence, as we could see.

In the mentioned decision there is a confusion of terms which is mostly manifested through the technology used. Thus, we signal the fact that the constitutive effect mentioned in the above decision also regards the translative effect, without deducting it distinctively from the first one. Practically, at the moment when the doctrine and the jurisprudence interpreted the provisions which mention the constitution and the resettlement of the real rights on estates reunited the constitutive and the translative effect into one phrase, that of *constitutive effect*, phrase used indifferently both in relation to the *constitution* of new rights, as well as in relation to *the transfer* of the preexistent rights.

6. The Effects of the Inheritance Partition

In the legislation previous to the Civil Code from 1864, the Calimach Code stipulated in art. 1092 that „the inheritance partition had a *buying* power". In the doctrine it was considered that the partition regulated in the Calimach Code had either a constitutive effect (which would have as a consequence a transfer of rights among the co-owners)[18], either attributive or translative[19].

According to the recent doctrine „[...] in the New Civil Code it was dropped the declarative effect of the partition in favour of the *constitutive* effect. The consequence is that the legal act of partition marks a *transfer* of rights among co-owners, which emphasises the character of disposition of this act", „[...] the partition has a *constitutive* effect, assuming a *transfer* of rights among co-owners" and „as a result of the constitutive effect of the partition, among the co-owners there is a mutual transfer of rights"[20]. Thus,

[12] Ibidem.

[13] See Gabriel Boroi, Carla-Alexandra Anghelescu, Curs de drept civil: partea generală (Course of Civil law: the General Part), 78, 79, 275, 279, et cetera.

[14] See Gabriel Boroi, Mirela Stancu, Drept procesual civil (Judicial Civil Law), (București: Hamangiu, 2016), 581, 1126.

[15] See Moise, „Scurte consideraţii despre partajul voluntar în sistemul Codului nostru civil" (Short consideration on the inheritance voluntary partition in the system our Civil code), 62.

[16] See Ioan Leș, Tratat de drept procesual civil (Treatise of Judicial Civil Law), (București: C.H. Beck, 2008), 603.

[17] High Court of Cassation and Justice of Romania, decision no. XXI of 12nd December 2005, published in the Official Journal of Romania, Part I, no. 225 from 13th March 2006.

[18] Mihaela Florentina Cojan, Proprietatea comună pe cote-părți în doctrină și jurisprudență (Joint ownership on quotas in doctrine and case law), (București: Universul Juridic, 2013), 194, n. 4.

[19] See Alexandresco, Explicaţiunea teoretică şi practică a dreptului civil român în comparaţiune cu legile vechi şi cu principalele legislaţiuni străine: Succesiunile ab intestat (Theoretical and Practical Explanations on Romanian Civil Law as Compared to the Old Laws and to the Main Foreign Laws), 781; Mirela Steluţa Croitoru, „Comentariu la art. 680" (Commentary on article 680), in Noul Cod civil: comentarii, doctrină, jurisprudență (The New Civil Code: commentaires, doctrine, case law), vol. I, (Bucharest: Hamangiu, 2012), 979; Nicolae Titulescu, Împărţeala moştenirilor (The Partition of Inheritances), (București: Leon Alcalay, 1907), 29.

[20] Valeriu Stoica, Drept civil. Drepturile reale principale (Civil law. Main Real Rights), (București: C.H. Beck, 2009), 282-293. See also Mihaela Florentina Cojan, Proprietatea comună pe cote-părți în doctrină și jurisprudență (Joint ownership on quotas in doctrine and case law),

according to this opinion, just because of the constitutive character of the partition the mutual transfer of rights among co-heirs would take place.

On the other hand, it is claimed that the partition itself *is not a translative act of property*, but the partition act is a *constitutive* one which „gives birth to a new legal situation, different from the previous one, its effects not being either translative of property, or declarative"[21]. As a result, the constitutive character of the partition would exclude the actual transfer of undivided quotas among co-heirs.

According to art. 557 from the Civil Code, *the right of ownership may be acquired*, under the law, *through* legal or testamentary *inheritance*. In addition, the real rights, when they come from the inheritance, are acquired *without registration in the Real Estate Register*, but, according to art. 887 from the Civil Code, the holder of the rights acquired like that could dispose of them through the Real Estate Register only after the registration has been made.

Consequently, if the deceased left two estates and two heirs, each heir who accepts the succession has an undivided right (for example, a quota of ½) on each of the two estates, the acceptance of the inheritance consolidating the rightful transmission of the inheritance at the date of the death.

If as a result of the partition, one heir receives an estate and the second heir receives the other estate, because there is a stipulation regarding the legal effects of the partition art. 680 from the Civil Code that each co-owner becomes *the exclusive owner* of the estate only if the partition act authenticated or the final court decision, as the case, were registered in the Real Estate Register, each heir would acquire the right of property on the other ½ of the quota from the moment of the registration in the Real Estate Register[22].

Even though the Civil Code does not stipulate the way in which the co-owner heir becomes „the exclusive owner", we consider that the exit of the quota on the estate assigned through partition from one heir's patrimony to the other heir will be done as a result of the transmission of the right of property as an effect of the partition act, so that the heir to which the real estate was assigned would be the successor in title of the deceased with a quota of ½; in what concerns the rest of the asset, he/she would acquire the undivided part from his/her co-heir, in the exchange of his/her own part of the other estate. Consequently, in the light of the civil law, the partition act can only be translative of rights.

However, art. 995 from the Civil Code of Procedure expressly stipulates that the partition decision has a *constitutive* effect. How should we interpret this constitutive effect? In the light of the civil law, according to which the constitutive legal act gives birth to a right which did not previously exist or according to the doctrine of the civil procedural law which considers to be constitutive a decision through which it is created a state of law different from the one already existing? This provision, *regarding the right of property on the inherited assets*, should only be interpreted in the sense that each co-owner becomes the *exclusive* owner of the assigned assets, meaning in the sense of creating a new legal situation, not in the sense that the right of property on the inherited assets assigned to an heir would have been *constituted* (as if it did not previously exist) through the partition decision.

The right of property may also be acquired, according to paragraph (1), final part from the art. 557 from the Civil Code, through *court order*, when it is *translative of property* by itself. Since the constitutive[23] or attributive[24] court orders give birth or transfer some rights and only these orders can be translative of property, as it is required in the art. 557 from the Civil Code, so they are part of the ways of acquiring the right of property[25], from the corroboration of art.557 from the Civil Code with art. 995 from the Civil Code of Procedure, we can only conclude that the partition decision is translative of rights, the translative effect being inscribed in the constitutive effect provisioned in the Civil Code of Procedure. However, the partition decision will not have translative effect, too, but exclusively constitutive effect regarding the balance payments or, as the case, the sums dued to the other co-owners as a result of the attribution of an asset to one of the co-partners, respectively, the ones dued to this ones as a result of the sale of the asset or of the assets subject to partition[26].

7. Conclusions

Given the fact that the Civil Code of Procedure is subsequent to the Civil Code, the effect of the partition is always constitutive. However in the matter of the succession partition the translative (attributive) effect is included in the constitutive effect because, at the opening of the inheritance, the heirs acquire their indeal quota based on the translative effect of rights, becoming exclusive owners, in the equivocal expression of the Civil Code, only through the constitutive effect of the partition.

In the end, we must mention that the distinction between the translative and the constitutive effect of the

(Bucureşti: Universul Juridic, 2013), 195; Doina Anghel, Partajul judiciar în reglementarea noilor coduri (The Judicial Partition in the New Codes), (Bucureşti: Hamangiu, 2015), 308 and 310.

[21] Chirică, Tratat de drept civil: succesiunile şi liberalităţile (Treatise on civil law: successions and liberalities), 623 and 614.

[22] For details see Doru Trăilă, Acţiunile civile în materie succesorală (Successional civil actions), (Bucureşti: C.H. Beck, 2015), 382-383.

[23] *Constitutif*: qui établit juridiquement un droit *(which establishes a legal right)* (Larousse).

[24] *Attributif*: qui confère un droit, qui le fait passer d'une tête sur une autre *(which confers a right, which makes it pass from one person to another)* (Larousse).

[25] See Chelaru, „Comentariu la art. 680 Cod civil" (Commentary on article 680 from the Civil code), 792.

[26] See also Boroi, Stancu, Drept procesual civil (Judicial Civil Law), 833.

partition is relevant not as much in the matter of the civil law, but especially in the matter of the tax law. The Fiscal Code (Law no. 227/2015), in art. 111, regarding the incomes from the transfer of the real estates from the personal patrimony made a distinction between the constructions of any kind with the related lands, as well as the lands of any kind without constructions, acquired *within a period of 3 years included,* on the one hand, and the ones acquired *on a date longer than 3 years,* on the other hand.

Following the recent changes of the Fiscal Code by Emergency Ordinance no. 3 from 6th January 2017 for the modification and completion of Law no. 227/2015, when transferring the right of property and of its dependent parts, through legal acts among living persons on the constructions of any kind and the related lands, as well as on the lands of any kind without constructions, the tax payers currently owe a tax which is not calculated differently depending on the moment of acquisition anymore, but by applying a flat of 3% to the income tax, the latter being established through the deduction of the transaction value of the non-taxable sum of 450.000 lei, so that only what surpasses this limit will be subject to tax.

Although the time of the acquisition of a quota from an inherited asset does not seem to have a practical relevance anymore, however, we do not exclude that in the future it might reacquire it, to the extent that there will appear legal norms whose application will need to determine the moment of the acquisition of the right of property by the heirs, and their interest will be to prove that the quota was acquired before the partition.

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THE REQUIRED FORM OF A PRE-CONTRACT ALLOWING FOR A COURT JUDGMENT TO STAND FOR A SALE CONTRACT

Delia Narcisa THEOHARI[*]

Abstract

A bilateral promissory agreement for sale needs no notarial deed to constitute, in case of non-fulfillment, grounds for the delivery of a judgment which takes the place of a sale contract, a private agreement being sufficient whereas the judgment itself represents the sale contract and both the substantive and formal conditions are therefore satisfied.

Keywords: *pre-contract, sale, judgment taking the place of a contract, formal requirements*

1. Introduction

This article provides an analysis of the form which a bilateral promissory agreement for sale should take so that, unless fulfilled, it allows for a judgment to be delivered and stand for of the sale contract. This analysis is important because it is a matter of non-unitary judicial practice due to the ambiguity of the legal regulation of the issue at debate.

1.1. The legal regulation

According to Article 1669 (1) Civil Code, if one of the parties to a bilateral promissory agreement for sale unreasonably refuses to conclude the promised contract, the other party may apply for the delivery of a judgment which would stand for a contract, provided that all the other validity conditions are fulfilled.

Furthermore, in accordance with Article 1.279 (3) Civil Code, if the promisor refuses to conclude the promised contract, the court, upon the request of the party that did perform its own obligations, the court may deliver a judgment to stand for a contract, where the nature of the contract allows that and the legal requirements for its validity are fulfilled.

1.2. Legal solutions adopted in judicial practice

By the civil sentence no. 267/2016 delivered by the Court of Blaj in the case no. 173/191/2016, the application of applicant A against respondents B for the delivery of a judgment to take place of the sale contract, was dismissed as unfounded. Among the grounds for its judgment, the first instance court basically held the following: "In accordance with the 1st sentence of Article 1270 (3) Civil Code and the final sentence of Article 1669 (1) Civil Code, the pre-contract subject to examination should have been concluded in notarial deed, given that it envisaged the conclusion of a contract for the transfer of a right in rem in immovable property. Article 1179 (2) Civil Code stipulates that, in so far as the law provides a certain form of the contract, that form should be respected subject to the sanction provided by the applicable law. Article 1244 Civil Code stipulates that, except other cases provided by law, any agreement for the transfer or constitution of rights in rem to be registered with the Real Estate Register should be concluded in the form of an authentic document, under penalty of absolute nullity. Therefore, the respective contract should fulfill all the validity conditions if a judgment to stand for a pre-contract is aimed at. Practically, the notarial deed is not a validity requirement for a pre-contract, but a requirement which, if fulfilled, allows for a judgment to stand for the contract to be obtained."

The Alba County Law Court, before which the appeal against the above-mentioned judgment was pending rule, referred the matter to the High Court of Cassation and Justice for preliminary ruling on certain points of law, based on Article 519-521 Code of Civil Procedure. In support of its referral, the court held the following: "The bilateral promissory agreement for sale is a contract based on which the parties undertake to conclude the sale contract in future, under the terms and with the content already established in the document proving the promise. The parties agree upon their commitment to contract, but they also pre-establish the basic content of the contract to be concluded (the nature, object and price of the contract). However, the two legal transactions cannot be intermixed. The bilateral promissory agreement for sale is not an alienation document and does not transfer any property rights, but generates personal obligations to do, respectively to conclude the promised sale contract. As for the form which a promise of sale should take, the Civil Code does not provide the notarial deed *ad validitatem*."

At the time of this writing, the High Court of Cassation and Justice had not given a decision on the above-mentioned issue.

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2. The form of a bilateral promissory agreement for sale

The opinion I share is that a bilateral promissory agreement for sale needs no notarial deed to constitute, in case of non-fulfillment, grounds for the delivery of a judgment which would stand for the sale contract, for the following specific reasons:

1. The law does not derogate from the principle of consensualism in the case of bilateral promissory agreements for sale and neither does it introduce any specific difference as regards the form required for such agreements to produce effects (for obtaining damages, respectively for the delivery of a judgment which would stand for the sale contract).

According to Article 1178 Civil Code, a contract can be merely concluded by the will agreement of the parties unless the law requires a certain formality for its valid conclusion.

The exceptions from the principle of consensualism, among which the notarial deed *ad validitatem*, are required to be expressly provided by law, as it results from the text specified.

No specific exception is established in respect of the form of a promise of sale and no derogation from the principle at issue is provided.

However, a sale contract for the transfer of a right in rem in immovable property should be concluded as an authentic document, the form being *ad validitatem* required by Article 1244 Civil Code, which thus regulates an exemption from the principle of consensualism.

Since the promise of sale and the sale itself are two distinct legal transactions, the exception established with regard to the form of the sale cannot also be extended to another legal transaction being not subject to it, because such exception must be applied strictly (*exceptio est strictissimae aplicationis*).

Moreover, no distinction can be made in the interpretation of the relevant legal texts regarding the required form of the promise of sale so that it could produce each separate legal effect, as no such differentiation is provided by law (*ubi lex non distinguit, nec nos distinguere debemus*).

Therefore, the opinion[1] according to which, in case of non-fulfillment of the promise to contract, it is sufficient that the agreement takes the form of a document under private signature for the beneficiary to obtain damages, but for the delivery of a judgment to stand for the contract it is mandatory that the promise is made in the form of an authentic document, finds no solid legal support to give the interpreter the right to differentiate.

Thus, according to Article 1669 (1) Civil Code, if one of the parties that concluded a bilateral promissory agreement for sale unreasonably refuses to conclude the promised contract, the other party may apply for the delivery of a judgment to stand for the contract, provided that all the other validity conditions are fulfilled.

At the same time, in accordance with Article 1.279 (3) Civil Code, if the promisor refuses to conclude the promised contract, the court, upon the request of the party that fulfilled its own obligations, may deliver a judgment to stand for the contract, where the nature of the contract allows that and the legal requirements for its validity are fulfilled.

From the interpretation of the correlation of the two legal texts it results that the court may deliver a judgment to stand for the sale contract, if at the time of such delivery the validity conditions of the sale are fulfilled.

The validity conditions for the sale of an immovable property refer to the consent, object, cause, capacity and form, but other special requirements expressly provided for certain types of sale could possibly exist.

The specified text uses the words "if all the other validity conditions are fulfilled" while in its content it mentions the "refusal" of one party to conclude the promised contract (the refusal being related to the condition of consent), as well as the right to obtain a judgment with the value of a contract (judgment which gives the form of the contract).

Therefore, the "other validity conditions" include the remaining requirements provided by law for the valid conclusion of a sale contract, with the exception of those which the text already refers to, namely the respondent's consent to sell and the form of the sale contract.

As a consequence, there was no need for the legislator to make any distinction as regards the substantive conditions and, respectively, the formal conditions of the sale, since the text subject to analysis contains the reference to the form which is given by the judgment itself, all the other conditions remained to be analyzed being substantive.

2. When the legislators wanted to impose the notarial deed of a promise to contract, they expressly regulated this requirement; *per a contrario*, in the other cases, such as the promise of sale, there was a certain intention of derogation from the principle of consensualism.

According to Article 1014 (1) Civil Code, under penalty of absolute nullity, the donation promise is subject to formalization in notarial deed.

Therefore, the Civil Code established the notarial deed *ad validitatem* only for donation promises, there being no specific regulation in the case of promises of sale.

Since both the sale of an immovable property and the donation constitute formal legal transactions and the legislator understood to regulate derogating formal requirements only for the donation promises, the

[1] D. Chirică, Is the authentic form mandatory for the conclusion of a bilateral promissory agreement for the sale-purchase of an immovable property, so that a judgment could be delivered to stand for of an authentic document? – a study published on www.juridice.ro.

argument raised by the relevant literature[2] - in the sense that, in the case of formal contracts, the validity of promises to contract is conditional on the fulfillment of the same formal requirements as the promised contract, as it would result from the provisions of Article 1014 (1) Civil Code – cannot be accepted, as these provisions, interpreted *per a contrario*, constitute an argument in favor of the opinion I am supporting.

3. Regulating the right to obtain a judgment that takes the place of a sale contract, the Civil Code essentially provided another means to conclude sales, different from a notarial authentic document, which makes irrelevant the fact that a certain judgment may or not be fully treated as an authentic document.

Since the Civil Code expressly allows for the delivery of a judgment which takes the place of a sale contract, while Article 888 of the same code lists, among other documents (together with the notarial authentic document), the final judgment as grounds for the right to register a title to property, it is useless to analyze if such judgments can or cannot be qualified as authentic documents.

The sale is equally valid and the right in rem may as well be registered with the Real Estate Register where the parties conclude a sale contract in a notarial deed or a judgment is delivered to stand for a contract.

Therefore, under the law, the judgment is sufficient in itself, whether it qualifies or not as an authentic document, to constitute a valid sale contract that can allow for the registration of the right in rem with the Real Estate Register.

Taking into account that the judgment takes the place of the contract, the judgment itself also constitutes the form established by law for the contract concluded in a specific manner.

4. The judgment taking the place of a sale contract is a transfer of rights, not s declaration of rights document and the legal action for which it was delivered is an injunction, not a declarator, so that the terms of the sale will be analyzed by reference to a time different from the time when the promise of sale was concluded.

This argument results from the fact that the rights and obligations of the parties, deriving from the sale contract, arise out of the judgment taking the place of the contract, as they were absent at the time of its delivery.

A sale contract is considered concluded at the time the judgment remains final, not at the expiry of the deadline established in the promise of sale for the conclusion of the contract.

The judgment taking the place of the sale contract constitutes the in-kind remedy for the enforcement of the obligation to do (to conclude the sale contract), arising out of the promise of sale.

Based on the above, the court before which the matter was brought for the delivery of a judgment to stand for the contract checks the validity of each of the two legal transactions (sale and promise of sale) by reference to the time of conclusion of each transaction, as follows:

a) the existence of the validity conditions of the sale by reference to the time when the judgment was delivered, on the one hand, and
b) the existence of the validity conditions of the promise of sale by reference to the time of its conclusion, on the other hand.

a) From the first category of conditions required to be fulfilled for the conclusion of the sale, the court checks the object, the cause of the sale in the applicant's view, the capacity of the parties, and possibly other special conditions established for the sale.

Within such examination, the court does not check:

- the respondent's consent to the sale, as it is this consent which is judicially substituted, the respondent expressing his refuse to conclude the sale;
- the cause of the sale in the respondent's view, as this and the consent are part of the complex phenomenon of legal agreement and they cannot be dissociated one from another in this particular case;
- the form of the sale, as it is the judgment the court is going to deliver that will give the form of the contract.

Even if the derived object of the sale (immovable property) is indicated in the promise of sale, it does not mean that the objects of the two legal transactions are identical. On the contrary, the object of the promise of sale refers to the future conclusion of the contract, for the sale of an immovable property, while the sale refers to the transfer of the ownership right over that property. The derived object of the sale constitutes only a fine-tuning of the object of the promise of sale.

If all the validity conditions of the sale were evaluated at the time the promise of sale is concluded, it would mean, for example, that the court can also deliver a judgment to stand for the sale contract in the case the property was removed from the civil registry and declared inalienable after the conclusion of the transaction, which cannot be admitted.

As regards the capacity of the parties, the court will evaluate, in a manner similar to that of a notary public, if the parties can sell, respectively purchase at the time of the sale conclusion, not at the time of the promise of sale.

This entire reasoning given for each separate condition is only reminded to show that the form of the sale can neither be related to the time the promise of sale is concluded.

The mere notarial deed of the pre-contract cannot substitute the notarial deed of the sale. If the parties had concluded the promise of sale in an notarial deed and the sale contract in the form of an authentic document under private signature, such a sale would also have

[2] D. Chirică, *op. cit.*

been null due to the lack of the form established by law *ad validitatem*.

In the case subject to analysis, the form of the sale is given by the judgment, whether or not the pre-contract was concluded in an notarial deed; this is similar to a conclusion of the sale by the parties before a notary public, in which case the legal form of the pre-contract has no relevance.

b) From the second category of conditions necessary for the conclusion of a promise of sale, the court examines all the requirements established by law for the conclusion thereof, in terms of consent, object, cause, capacity, form and possibly special conditions.

As for the form of the promise of sale, as indicated above, the law does not lay down any exceptions from the rule of consensualism.

As far as the respondent's consent requirement is concerned, the court may check the validity of the consent at the time the promise of sale was concluded, as it is substantively shown in the relevant literature3, as absolute nullity can be invoked by way of substantial law exception, whose appropriateness could lead to the unfounded rejection of the application for the delivery of a judgment to stand for the contract. The respondent is also entitled to invoke, besides the absolute nullity, the relative nullity arising from the existence of some vices of consent, either by means of a counterclaim or a nullity defense on the substance of the case.

5. The consent given at the time of the conclusion of a sale is different from the consent given upon the conclusion of the promise of sale, therefore one cannot hold that the failure to respect the notarial deed at the time of the conclusion of the promise of sale shall result in the invalidity of the consent to the sale[4].

At the time the pre-contract of sale is concluded, the parties express their consent to the future conclusion of a sale contract, but at the time of the sale conclusion the parties give their consent to the transfer of the ownership right over a property form one patrimony into another.

The existence and validity of the respondent's consent to the sale conclusion is not examined at the time of delivery of a judgment taking the place of a sale contract, as the respondent has already refused to conclude the contract, his consent to the sale being totally absent. Instead, the court will check the respondent's consent at the time the promise of sale was concluded, as representing his agreement for the future conclusion of a sale.

6. The reasons doctrinally referred to, for which the notarial deed *ad validitatem* is established by law for certain legal transactions do not subsist in the case of a pre-contract of sale.

Thus, the reasons for the establishment of the notarial deed *ad validitatem*, deduced in the legal doctrine, are intended to remind the parties of the special importance of certain legal transactions for their own patrimonies and to exercise a control of the society, by the state bodies, in respect of the civil law transactions whose importance exceeds the strict interests of a party.

However, these reasons do not maintain in the case of a pre-contract of sale, because:

- a pre-contract of sale creates just a claim, as no effect of property transfer being produced based on such pre-contract;
- if in the promise to sale document the parties established a confirmatory deposit as penalty for the refusal to conclude the sale contract, while the beneficiary of the promise claims a specific deposit, in which case the form of a document under private signature is sufficient for the promise, and if implicitly there is no warning from the notary public, the loss of the party that fails to respect the pre-contract is higher than in the case of a judgment delivered to stand for the contract, when the party refusing the conclusion thereof receives the full price of the immovable property in exchange to the property and could possibly be obliged to only pay the legal expenses;
- there is no requirement for a pre-contract to stipulate the risk of a judgment being delivered to stand for the contract in case the pre-contract is not respected, therefore even if the parties are not warned about such a risk (either orally by the notary public, or in the text of the document), the court will still be entitled to deliver a judgment, the lack of warning making no difference;
- the control of the society in terms of a sale contract is exercised through the courts.

7. The argument deduced from the claimed similarity between the case subject to analysis and the real contract would not be admitted as long as the real contract cannot be created without the transfer of a property and through a judgment no such condition would be substituted; instead, the form of the sale contract may be represented by the judgment itself which, according to law, not only takes the place of the contract, but is also able to allow for the registration of the ownership right with the Real Estate Register.

Since the transfer of property is assimilated to a formal requirement for the real contract and this requirement cannot be substituted through the judgment which takes the place of the contract, as in the case of real estate sales, it was normal for the legislator to lay down the obligation that such requirement be fulfilled at the time the judgment is delivered.

8. The amendment of Article 5 (1) of Law no. 17/2014 cannot constitute, in itself, an argument to unambiguously establish the intention of the legislator at the time the notarial deed requirement was removed from its text.

Article 5 (1) of Law no. 17/2014, as unamended, established a condition additional to those of the Code,

[3] R. Dincă, *Promise of sale an agricultural land located outside a built-up area*, in the Romanian Private Law Magazine no. 3/2015, p. 53.
[4] In this respect – D. Chirică, *op. cit*.

namely the notarial deed of pre-contracts for the sale of lands located outside a built-up area.

It cannot be considered with certainty that the amendment of this text in the sense of removing the notarial deed requirement is based on grounds related to the avoidance of tautology, whereas:

9. - the initial form of the text indicated Article 1669 Civil Code even in the provision, for which it seems that the text rather imposed a condition additional to those stipulated in the Code;
10. - in the absence of other arguments, the removal of the provision on the notarial deed cannot be justified on the assumption that the legislator initially breached the legislative technique rules, but rather that the article at issue imposed an additional condition which was then waived, as there was no reason for a derogation from the Code.

3. Conclusions

For all these specific reasons, I believe there is no need that a bilateral promissory agreement for sale takes an notarial deed in order to be able, in case of failure, to constitute grounds for the delivery of a judgment taking the place of the sale contract and that the form of a document under private signature is sufficient.

References:

- D. Chirică, "Is the notarial deed mandatory for the conclusion of a bilateral promissory agreement for the sale-purchase of an immovable property, so that a judgment could be delivered to stand for an authentic document?" - a study published on www.juridice.ro;
- R. Dincă, "Promise of sale an agricultural land located outside a built-up area", in the Romanian Private Law Magazine no. 3/2015, p. 53.

THE OBJECT OF LEASING OPERATIONS

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Abstract

The leasing operation according to article 1, paragraph (2) of Government Ordinance 51/1997 covers movable or immovable property by their nature or which become movable by destination and by the definition of the leasing operation that the legislator offers in the same law, the leasing operation appears to be reduced to signing a lease agreement. But as practice proves, and recognized by part of the legal doctrine, leasing operations cannot be reduced only to the conclusion of the lease agreement. If the lease agreement represents the materialization of the will of the parties (lender and user), it is fact only a stage (final stage) of several operations that precede and accompany the leasing operations along their development. It is recognized in the doctrine that within the leasing operations we have a sequence of operations and contracts without which the final act, namely the lease agreement would not exist. We are referring to the sale-purchase contract signed by the financier with the supplier of goods, the mandate contract of the financier concluded with the user and the actual funding contract, the last two coexisting in the wording of the lease agreement.

Through the study developed, we aimed to individualize concretely the specific subject of each of these legal operations, with the intention of consolidate the own identity of the lease agreement and of the leasing operations implicitly.

Keywords: *leasing, leasing operation, the purpose of the contract, the object of the obligation*

Romanian civil law doctrine uses phrases such as "object of the contract", "the object of the obligation", "the object of the benefit ", but without referring each time, to the legal meaning of each of them. So frequently we are giving the same interpretation both to the legal notion of *object of the contract* as well as to the *object of the obligation*. This confusion has been possible due to the legal definition given by the legislator in Article 962 of the old Civil Code, which by taking over the wording in Article 1126 of the French civil code specifies that "*the object of the contract is that which one party undertakes to give or one party undertakes to do or not do*[1]*."*

The current Civil Code, inspired by the new regulation of the Civil Code of Quebec[2] defines in Article 1225, paragraph 1 the concept of object of the contract as "the *legal operation, such as the sale, rental, lending and other such agreed by the Parties, as revealed by all rights and contractual obligations*" and Article 1226 defines by means of the legislature distinctly the object of the obligation, as the *services undertaken to be performed by the debtor* thereby eliminating any confusion, being offered a possible, clear rule.

Legal literature on the subject, states by means of the view expressed by most authors that "the subject of the civil legal act is itself the object of the civil legal relationship born of that legal act, conduct of the parties namely the actions and inactions to which they are entitled or which they must meet"[3] completed by the situation in which the conduct refers to a good, it is said that the good forms the derived object of the civil legal act. Therefore, it is considered that the object of the civil legal act coincides with the object of the civil legal relationship which was born (amended or extinguished) of that legal act[4].

Finding ourselves thus before a complex concept, in my opinion, it must be defined as accurately as possible, and then to distinguish clearly between the object of the contract, the object of the obligation and the object of the benefit, distinction imposed in terms of the codification of the European contract law which requires a unified legal terminology.

As prescribed by the new Civil Code, which provides in Article 1226, paragraph 1 that "*the object of the obligation is the benefit that the debtor undertakes to provide"* it lead us to conclude that the provisions contained in the subsequent norm or paragraph 2 of the same text, belong to the benefit and not to the object of obligation, this relation to benefit and not to the object being thus found in all the statutory provisions which underlie the establishment of the provisions inserted in the new Civil Code[5].

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[1] PhD Univ. Prof. Sache Neculaescu, Discussions on the concept of the object of the contract, Faculty of Law and Social-Political Sciences, "Valahia" University from Târgoviște.

[2] The text of Article 1412 CCQ provides that "the object of the contract is the legal operation envisaged by the parties at the time of its conclusion, as it results from all rights and obligations which the contract establishes.".

[3] E. Lupan, I. Sabău-Pop, Tratat de drept civil român (Treaty of Romanian Civil Law). Volume I. General Part, C.H.Beck Publishing House, Bucharest, 2006, p. 211.

[4] G.Boroi, C.A.Anghelescu, Curs de drept civil.Parte generala (Civil law course, General part)., 2nd edition revised and enlarged. Hamangiu Publishing House2012, p.164.

[5] The Civil Code of Quebec after which it provides in Article 1373 that the object of obligation is benefit that the debtor has against the creditor, which consists in doing or not do something, rules in paragraph 2 that "performance should be possible, determined or determinable; It should not be prohibited by law or contrary to public policy ".

Returning to the topic proposed for debate in this study, I am opportune to detail in a summary the leasing operations so we can individualize the object characteristic to each action.

Leasing is clearly a complex operation, which is performed in several stages that precede, accompany and succeed this operation, the lease agreement itself being just one of those stages. In this context, the doctrine argues that "the leasing operation" is a complex of legal relationships, which includes, besides the actual lease agreement, all other legal consequences springing from the conclusion of the contract.

The lease agreement is recognized universally to be an original contract, freestanding, built under several legal concrete operations which imply the existence of several parties, which due to the common economic aims are interrelated to each other, forming a unitary whole with an own, particular legal physiognomy.

Apodictically the "triangular" legal operation of the leasing involves the existence of three parts which interact in legal terms: the seller of the good (supplier), the buyer of the good (financier / lessor usually a leasing company) and the user (lessee) [6].

Therefore, this tripartite transaction involves a manufacturer or a supplier of goods, a financier / lessor, namely the leasing company and a lessee / user, be it a natural person or a legal person.

But as noted above, the lease agreement involves some ancillary contracts that participants conclude, and among them there are: the contract between the supplier and financier / lessor (sale and purchase or novation), the insurance contract of the property that is the object of the leasing, the mandate between the lessor / financer and the lessee / user (lease agreement).

Although according to some authors[7], it is alleged that a leasing operation can be mistaken for the conclusion of a lease agreement, the leasing operation cannot be reduced only to the conclusion of this contract. The two concepts cannot be mistaken for one another, because they do not have the same scope, the Romanian legislature, in fact, making a clear distinction between the normative provisions, between the leasing operation concept and the lease agreement[8].

The codification enacted by developing G.O. no. 51/1997 in an updated form, dissociates clearly in terms of terminology, the lease agreement, on the one hand and from the leasing operations, on the other hand[9].

Article 1 of the Ordinance defines leasing operations: "(1) This Ordinance shall apply to leasing operations whereby one party, called the lessor / financer, transmits for a fixed period the right to use an asset, whose owner he/she is to the other party, lessee / user, at his request, for a periodical payment called leasing rate, and at the end of the lease, the lessor / financer undertakes to respect the right of option of the lessee / user to buy the good, to extend the lease agreement without changing the nature of the leasing or to terminate the contractual relationship. The lessor / user may choose to purchase the property before the end of the lease, but not earlier than 12 months if the parties so agree and if they pay all obligations under the contract. "

From the definition given by the legislator we retain therefore, that the legal relationship which materializes and leads to completion of the leasing operations through a lease agreement consists of the transmission of the right of use of an asset over a specified period by its owner, in this case the lessor / financier, to the lessee/ user for a periodic payment, called leasing rate.

The object of this specific legal relationship appears to be the duty of the lessor / financer, to give for use to the lessee / user the immovable object as derivative benefit, legally provided that at the end of this period to respect the right of option of the lessee / user to purchase the asset, extend the lease agreement or return the property, which is the very essence of the entire operation.

From this perspective we can note as an additional argument brought to the purpose for which the legislator in the text of the normative act regulating leasing operations, uses the terminology adopted in the current form of GO 51/1997, respectively financier / lessor and user / lessee. As shown in the text of article 1, which defines the leasing operation in terms of the conduct that parties must have following the conclusion of the lease agreement, the object of contract is the granting to use, term which in our view defines the lease.

The ordinance specifies in Chapter III dedicated to the obligations incumbent to the parties participating in a leasing operation, namely in Article 9. that – *The lessor / financer undertakes: a) to observe the right of the lessee / user to choose the supplier of goods, according to its interests; b) to contract the good with the supplier designated by the lessee / user, under the terms expressly stated by it or, where appropriate, to receive the right to permanently use the computer program.* Under this codification the rule of conduct imposed is drawn, therefore the lessor / financer which is required to contract the good only with the supplier indicated by the lessor / user, under the conditions negotiated by him as the object of the obligation.

Given the duty imposed by the legal norm, the financier will not do anything but conclude with the supplier a contract for the sale and purchase of a

[6] G.Garlisteanu George si R.Bischin, Considerations on leasing operations– Revista de Stiinte Juridice.

[7] "*We believe, however, that the rigid dissociation of the leasing operation from the lease agreement is not always pertinent, as one cannot ignore the totality of acquired rights and obligations assumed even if only by the two parties (the financier and the user), before or after the conclusion of the lease agreement. These rights and obligations are interrelated, so that only their approach as a whole can lead to the solution according to the purpose of the conclusion"* Tita-Gabriel Niculescu - Leasing, C.H.Beck Publishing House, 2006, page 41.

[8] Carpenaru D.Stanciu, Tratat de drept comercial roman, Contractul de leasing (Treaty of Romanian Commercial Law. The Lease Agreement)– Universul Juridic Publishing House 2014,p.585.

[9] S. Popovici - Contractul de leasing (The Lease Agreement), Universul Juridic Publishing House 2010; p.56.

property, the object of the benefit in their own name but for the use of another, namely of the user which will show the data necessary for its individualization. This course leads us to the contract of mandate, which will subsist in the lease agreement and by means of which the user mandates the financier to purchase a specific property for its use (Article2009, Article2013 paragraph 2, Article 2014 Civil Code).

From the definition given by our legislator, the leasing operations develop certain features characteristic to the lease, but a lease affected by the condition of observing the right of option enjoyed by the lessee-user, namely at the end of the lease it has to express their option to purchase the asset, to return the asset or extend the lease agreement on the same terms.

In this regard, depending on the option of the lessee / user, we deduce that the completion of the lease agreement can operate under any of the three aspects, the lessor / financer being obliged to accept the option chosen by the lessee / user.

In case the user opts for returning the good to the rightful owner, the financier will accept the good unreservedly. In this situation I believe that given the perspective offered by the regulations of the new Civil Code, the leasing operation develops a conduct specific to the lease, namely the transfer of the right to use for a specified period, for a specified price (Article 1777 Civil Code) at the end of the period the good re-entering the possession of its rightful owner. As I stated above, I assume that this was also the basis for which the legislature considered it appropriate to change by means of law 284/2008 the name of parts from financier and user as they were called in GO 51/1997 original form, in the financier / lessor or user / lessee as reflected in the updated normative act.

The user is also provided the possibility to opt to extend the lease agreement so that it continue to benefit from a right to use the good for a further fixed period, the consideration of this new use being further the lease rate. The ordinance does not specify whether at the end of this new period of lease, the way in which the contract is concluded provides the same opportunity of option to the user, namely to acquire the good, return it or to continue the lease or if the residual value changes. But by means of the specification performed by the legislature, namely that the extension will operate under the same circumstances, we consider that the user will have the same opportunity this time, to choose between the three variants. The object in this case is certainly the use, the operation being repeated as in the original situation.

The last variant the user has is the option to purchase the good that was the derivative object of the contract, which will require the conclusion of a sale and purchase document between the two parties of the lease agreement. Their conduct will ultimately be reduced to the obligation of the financier which is this time subrogated to the seller, to convey ownership of the property for a price. The price is individualized by the specific rule regulating the leasing operations in the concept of residual value because the transfer of ownership will operate only upon payment, the obligation which is incumbent upon the user being therefore to pay this amount (Article 1650 Civil Code).

Conclusions

The complex nature of the leasing operations, both from an economic as well as from a legal perspective, prompted the assimilation of the lease agreement with various other contracts, sometimes the individuality being ignored.

But to determine the exact legal nature, the corresponding delimitations must be made in relation to the tenancy, credit, loan agreements, and from the sale and purchase agreement (in instalments or upon deadline), contracts the structure of which resembles that of the lease agreement, but which should not be mistaken for this.

It therefore remains to note the main feature of the leasing operation, which lies in its atypical, special character - in that it inserts in its fundamental elements legal features specific to the legal agreement, to the sale and purchase agreement and to the loan agreement, but in no case it must be regarded from their perspective, but it should be seen and accepted individuality, as a combination thereof. Only in the ensemble conferred by their interference we shall find ourselves under the incidence of a leasing operation.

For this, the lease agreement has been described in the research literature as a "sui generis" contract, the followers of this theory relying on its characteristics[10]:

- the lease is a manner of special financing is for the concession of use of the leasing object;
- the lease agreement is not especially regulated by the Civil Code;
- the lease agreement constitutes specific triangular relationship between the provider of the property that is the object of the lease agreement - financer of the leasing operation – the user of the property which is object of leasing operation.

Under the empire of the issues presented in conjunction with the definition of the lease agreement found in the research legal literature, I believe that the object of the obligation of the leasing operation is the full financing of an asset, and the object of performance are *immovables by their nature* or which *become movable by destination, under the civil circuit, except for the audio and video tape recordings, of theatre plays, of manuscripts, patents, copyrights and intangible property*, and regarding the agreement cause, we can say that this is the use.

Thus, I believe that *a lease operation is the operation whereby one party, called the lessor / financer, will provide funding for the purchase of a property, movable or immovable, in order to transmit*

[10] T. Molico, E. Wunder, Leasingul, un instrument modern de investiţii şi finanţare, Editura CECCAR, Bucureşti, 2003, pag. 60.

for a specified period the right to use it, which it owns, to the other party, lessee / user at its request, for a periodic payment, called leasing rate, and at the end of the lease period the lessor / financer undertakes to respect the right of option of the lessee / user to buy the property, to extend the lease agreement without changing the nature of leasing or to terminate the contractual relationship.

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IMMUNITY AND LENIENCY POLICY IN COMPETITION CASES

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Abstract

It is fully known that the premises for market economics resides on free competition. In other words, market player must make all the necessary efforts in order to obtain the desired results on their own, through business innovation and increased efficiency. In order to protect this, the competition primary and secondary legislation is carefully tailored to such needs, supporting and protecting the internal market from the companies' tendency to distort competition.
As such, competition law offers the companies' involved in anticompetitive agreements methods to either waive the entire fine or to diminish it considerably. The aim is to encourage companies to bring upfront anticompetitive agreements that aim to distort competition and free market, thus protecting the internal market. The competition law itself does not pursue to sanction players that acted in an anticompetitive manner, but to prevent such behavior, because prevention is more important than reducing the effects afterwards.
In the present paper we aim to make a radiography of the methods of eliminating or reducing a fine that a company have in our national law when it comes to anticompetitive agreements.

Keywords: *immunity, sanctions, leniency, anticompetitive agreements, recognition*

1. Introduction

In Romania, the Immunity and Leniency Policy in the competition are is still at beginning, as very few cases have seen the light. Even though the fines applied by the Competition Council are very high, are they are settled as a percentage of the company's turnover (between 0.5 and 10), the undertakings that engage themselves in anticompetitive practice still tend to walk past by this opportunity and let the faith (or other undertakings) decide whether getting fined or not.

The present study aims to bring a shed of light in the little-known procedure of Immunity and Leniency. By doing this, we hope that we can make aware undertakings, lawyers and counsels of the advantage this procedure brings so that they can take into account this possibility when discovering that they are part of an alleged anticompetitive agreement. The purpose of the competition regulation is not to "hunt" the undertaking that breach the law, but to ensure that there is a normal competitive environment that will benefit the final consumer. The competition authority acts on two directions: (a) prevention and (b) sanctioning, the latter being activated only when the harm done cannot be reverted. By allowing undertakings to disclose possible anticompetitive agreements for an immunity deal, the competition frame aims to drop a signal with respect to competition enforcement: if more and more companies will apply for immunity deals, more and more undertakings will be fined and fewer anticompetitive agreements or practices will take place. We are still talking about the principle of prevention, but in a long term.

Until now, the subject of Immunity and Leniency Policy in competition law cases remains in shadow, as very few papers have been published on this subject. If such, this institution raised a little bit of awareness if round tables or conference where specialist from the Romanian Competition Council were invited.

In order to do this exhaustive overview of the Immunity and Leniency Policy, we decided to start with a mere introduction of this institution of our national legislation, followed by a step-by-step explanation of the procedure that needs to be followed. Afterwards, we answered some questions that arose in the practice of other competition authorities and are related to our frame regulation that we think it might clarify a few of the potential discussions. Last but not least, we focused on the very fragile case-law we identified in Romania and detailed few comparative elements with other countries of the European Union that have a more developed Immunity and Leniency Policy than we do, with the hope that their practice can shape our future actions.

A. Immunity

1. Introduction & short historic

The immunity policy was developed with the purpose of discovering the secret agreements between economic operators, as well as to eliminate them, these coordinates being subsumed to immediate scope (*causa proxima*) of the competition legislation, that is the guarantee of a proper functioning of the markets and,

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subsequently, protecting the consumer through price reduction and quality improvement.

The purpose of the immunity policy is to encourage the acknowledgment of this anticompetitive agreements by the involved companies and inform the competition authorities. On this occasion, the companies will have a greater benefit than the one resulted after the effective sanctioning, *post factum*, once the "evil" has already produced.

In essence, the immunity policy is a favorable treatment offered by the Competition Council to the economic operators involved in anticompetitive agreements who decide to cooperate with the competition authority by providing them information and evidence, in order to discover the anticompetitive practice.

A very important instrument at European level, the immunity policy was first introduced in Romanian legislation in 2004[1]. In 2009, after Romania became part of the European Union, important amendments were brought to this secondary legislation in order to align it with the European legislation and therefore a new set of instructions were adopted ("**Immunity Guidelines**")[2]. In 2015, these Guidelines faced few amendments[3] so that they were updated to the latest European tendencies and case-law.

2. General conditions

In Romania, immunity is offered for both horizontal (*cartels*) as well as vertical agreements[4], such as price fixing, bid rigging, market allocation. Before the 2015 amendment, the parties that were involved in vertical agreements regarding territorial and/or client limitation, which offered absolute protection were also able to apply for immunity, but at the present such provisions have been eliminated.

Even though it is not expressly stated, by means of interpretation we get to the conclusion that the rewarding for economic operators which cooperate with the Competition Council, will only be granted only for the hardcore agreements from art. 5(1) of the Law no. 21/1996 ("**Competition Act**")[5] and/or art. 101(1) TFEU[6]. As we can clearly observe, the immunity benefit applies to anticompetitive agreements, which means that at least two parties need to be involved in order to have a valid scenario. Thus, an abuse of dominant position cannot be taken into consideration as it is a one-side manifestation from an economic operator and does not imply and agreement[7]. However, it is to be discussed whether when talking about collective dominance we can also take into consideration an immunity deal. Collective dominance, even though is not as common as single dominance, implies that two or more companies linked by economic purposes (*which implies an agreement*)[8], abuse their dominant position upon the market.

Of course, we also need to take into consideration pct. 3 of the Immunity Guidelines that refers to art. 5(2-3) of the Competition Act and art. 101(3) TFEU, situation where, with respect to this specific type of agreements, the immunity procedure is not applicable. *In concreto*, we are talking about those agreement that

[1] Guidelines of April 22, 2004 Regarding the Conditions and Applicability Criteria for the Immunity Policy According to Art. 56(2) of the Competition Act No. 21/1996, Approved by the Competition Council's President's Order Nr. 93 of April 22, 2004 for the Approval of the Guidelines Regarding Conditions and Applicability Criteria for the Immunity Policy According to Art. 56(2) of the Competition Act No. 21/1996, (13.05.2004).

[2] Guidelines of August 21, 2009 Regarding the Conditions and Applicability Criteria for the Immunity Policy, Approved by the Competition Council's President's Order Nr. 300 of August 21, 2009 for the Approval of the Guidelines Regarding Conditions and Applicability Criteria for the Immunity Policy According to Art. 51(2) of the Competition Act No. 21/1996, (07.09.2009).

[3] Guidelines of May 6, 2015 for the Amendment of the Guidelines Regarding the Conditions and Applicability Criteria for the Immunity Policy According to Art. 51(2) of the Competition Act No. 21/1996, Approved by the Competition Council's President's Order Nr. 300 of August 21, 2009 for the Approval of the Instructions Regarding Conditions and Applicability Criteria for the Immunity Policy According to Art. 51(2) of the Competition Act No. 21/1996, Approved by the Competition Council's President's Order Nr. 238 of May 6, 2015 for the Approval of the Guidelines of May 6, 2015 for the Amendment of the Guidelines Regarding the Conditions and Applicability Criteria for the Immunity Policy According to Art. 51(2) of the Competition Act No. 21/1996, Approved by the Competition Council's President's Order Nr. 300 of August 21, 2009 for the Approval of the Instructions Regarding Conditions and Applicability Criteria for the Immunity Policy According to Art. 51(2) of the Competition Act No. 21/1996, (09.06.2015).

[4] Art. 2 of Guidelines of August 21, 2009 Regarding the Conditions and Applicability Criteria for the Immunity Policy, Approved by the Competition Council's President's Order Nr. 300 of August 21, 2009 for the Approval of the Guidelines Regarding Conditions and Applicability Criteria for the Immunity Policy According to Art. 51(2) of the Competition Act No. 21/1996.

In this case, point 2 let. a)-b) from the Immunity Guidelines detail the notion of „hardcore restrictions", distinguishing between two categories:

- horizontal agreements and/or concerted practices, between 2 or more competitors, aimed to or having as an effect the coordination of the competition behavior on the market and/or influencing the relevant criteria of the competition frame by adopting practices like price fixing (buy-sell) or some commercial conditions, allocation of the productions and selling market shares, customer or market allocation, bid rigging, import/export restrictions or other anticompetitive acts against competitions; these are called generically cartels;
- vertical agreements and/or concerted practices, regarding the conditions in which the parties can buy, sell or resell certain products or services, that have as object the restraining of consumer's freedom to set it's sell/resell price.

[5] Competition Act No. 21 as of April 10, 1996 (*as Further Republished and Amended), (29.02.2016).

[6] Treaty on the Functioning of the European Union (*Consolidated Version), (26.10.2012).

[7] For further reference please see the following decision in which the Competition Council and the national court decided that in a case of dominance abuse an immunity deal cannot be applied: Case 5802/11.10.2011, Bucharest Court of Appeal, Section 7.

[8] For more details on the subject of collective dominance see Richard Whish and David Bailey, *Competition Law*, 7 ed. (New York: Oxford University Press, 2012).

are governed by the Block Exemption Regulation[9], where these agreements create sufficient advantages in order to compensate for the anticompetitive effects and therefore will not being considered as illegal.

Our national law provides 2 types of immunity that can be offered to companies involved in anticompetitive practices: (1) type A immunity and (2) type B immunity.

As a separated notice, we must outline that our national competition provision only sanction companies and not private individuals and therefore the immunity can only be granted to companies.

Immunity Guidelines provide a series of criteria that need to be fulfilled: (a) general ones, that are applicable for both fine immunity as well as fine reduction and (b) special ones, applicable for each procedure.

General criteria

With respect to general criteria that needs to be checked when applying either for immunity or for reduction, these are provided in pct. 19-20 of the Immunity Guidelines and are as follows:

a) real, continuous and prompt cooperation with the Competition Council throughout the entire investigation procedure, respective:

- providing the Competition Council all the necessary and relevant information and evidence the company has or may have regarding the infringement;
- remaining at the Competition Council's disposal to answer any kind of solicitation which might contribute to establishing the deeds;
- the prohibition to destroy, falsify or hide relevant information or evidence regarding the alleged infringement;
- the prohibition to disclose the existence of the immunity request or its content before the competition authority will transmit the investigation report to the parties, if the Competition Council did not state otherwise;

b) stopping the implication in the alleged infringement at the Competition Council's request;

c) not disclosing the company's intention to apply for a immunity deal or any elements of the request, with the exception of other competition authorities.

Immunity

As defined by law (*lato sensu*), immunity from fine represents the exemption to pay the fine for the companies that are part of an illegal agreement according to art. 5(1) of the Competition Act and/or art. 101 TFEU and decide to disclose their participation to the competition authority. Thus, the immunity deal will be applied to those agreements which have as their object or effect the prevention, restriction or distortion of competition within the national market or on a part of it[10]. This national infringements, as well the European ones, are "*by object infringements"*, which means that the effect of market competition distortion does not need to be demonstrated, as the mere agreement upon this kind of practices is sanctioned.

Art. 5(1) of the Competition Act exemplifies a series of anticompetitive practices and agreements which are the most common in practice:

a) directly or indirectly fix purchase or selling prices or any other trading conditions;
b) limit or control production, markets, technical development, or investment;
c) share markets or sources of supply;
d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Persons excepted from immunity deal

Concerning the economic operators excluded from immunity deal, the Immunity Guidelines[11] state that the initiator is eligible to qualify for immunity while for the undertaking that encouraged others to join or stay in the cartel immunity is '*off limits*'.

However, the ringleader may qualify for a fine reduction if it meets the relevant requirements set out in the Immunity Guidelines. Aside from compliance with the usual requirements set out above, in order to benefit from the immunity another important condition is that the ringleader must provide evidence that brings '*significant added value*' to the evidence the Competition Council already has.

It should be mentioned that this is a significant progress towards encouraging immunity deals, as before June 2015, neither the initiator of the anti-competitive conduct nor an undertaking that actively encouraged other undertakings to join or remain in the cartel would qualify for immunity.

3. Types of immunity

Our national law regulates, as already mentioned, two types of immunity: (1) type A immunity and (2) type B immunity. This classification is made up according to the moment of time the undertaking asks for immunity: before or after an investigation on behalf of the Competition Council was opened.

[9] *Commission Regulation (Eu) No 330/2010 of 20 April 2010 on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices*, (01.06.2010).
[10] Art. 5(1) *Competition Act No. 21 as of April 10, 1996 (*as Further Republished and Amended)*.
[11] Pct. 13.

Type A immunity

Regarding type A immunity (*i.e.* before an investigation is opened), asides the general criteria mentioned above, there are also special requirements that need to be taken into consideration by the undertaking in order to have an eligible application.

These conditions are set out in pct. 9 of the Immunity Guidelines and are, cumulatively, the following:

a) the undertaking is the first one to deliver information and provide evidence that, according to the Competition Council, can be used to open up an investigation and set up mock dawn raids;
b) at the moment the evidence is provided, the Competition Council did not have enough evidence to open un an investigation or to set up dawn raids;

Per a contrario, the undertaking cannot claim type A immunity if the Competition Council has already opened up an investigation or has sufficient evidence to open it up at the moment the request is made. This means that we must always remember that type A immunity takes into consideration the previous situation (*ex ante*) before opening up an investigation by the competition authority.

However, we consider that these conditions are arbitrary and rely only upon the Competition Council's will to grant the type A immunity as the meaning of "*significant information and evidence'* relies solely upon the competition authority's interpretation.

Type B immunity

With respect to type B immunity, pct. 11 from the Immunity Guidelines also provides us with the necessary conditions that the undertaking needs to comply with (and which are also cumulative):

a) the undertaking is the *first one* to provide information and evidence that will allow the Competition Council to identify the infringement in accordance to art. 5(1) of the Competition Act and/or art. 101 TFEU;
b) at the moment the evidence was provided, the Competition Council did not have sufficient elements to establish the infringement according to art. 5(1) of the Competition Act and/or art. 101 TFEU;
c) no other undertaking was granted conditional immunity (type A) related to the alleged infringement;
d) immunity's general requirements are met.

Type B immunity takes place after the investigation procedure was opened by the Competition Council (*ex post*), situation in which the competition authority is fully aware of the infringement but lacks sufficient evidence in order to sustain it. Thus, the undertaking needs to actively provide information and evidence that can accurately establish the infringement.

Both type A and type B immunity mean that the undertaking that qualifies for them is exempted from paying the fine. Therefore, it is very important to always keep in mind that this kind of full immunity is provided only to one undertaking. In other word, a type A or B immunity for the first claimant exclude the possibility of the subsequent undertaking to benefit from full immunity, but does not affect its chances of obtaining a fine reduction of between 30% and 50%12, as it will be presented in section B.

Procedure

For both kinds of immunity, the applicant must submit a statement in which it should describe as detailed as possible aspects like:

- a detailed description of the alleged infringement, including:
  - the purposes, activities and functioning mechanisms:
  - the products or services involved, geographic area, the duration of the infringement and estimated market volumes affected by the alleged anti-competitive practice;
  - meeting dates and places, the content and the participants at the discussions during the alleged infringement;
  - all relevant explanations regarding the evidence provided for supporting the request;
- name and address of the applicant and of all other undertakings participating or which have participated in the alleged anti-competitive conduct;
- names, positions, locations of the offices, and if necessary, the home addresses of the individuals who, to the applicant's knowledge, are or have been involved in the alleged infringement, including the individuals who have been involved in the name of the applicant;
- a specification that the undertaking has not done anything to constrain other undertakings to join or stay in the alleged anti-competitive arrangement;
- information on the competition authorities from or outside the European Union that have been contacted or that the applicant intends to contact in relation to the alleged anti-competitive practice.

Besides this, according to pct. 21 of the Immunity Guidelines, the applicant must provide the Competition Council, besides statements, all the information and evidence that are in its possession and are connected to the alleged infringement *or* to hypothetically first present the information it has and subsequently present a descriptive and detailed list of the evidence that are proposed to be revealed. If the information the application provided are meet the conditions set above, then the applicant will be granted conditional fine immunity.

Immunity marker

When seeking immunity, the undertaking has the possibility to contact the designated person of the

[12] According to pct. 17 of the Immunity Guidelines.

Leniency Module within the Competition Council (which we will detail below) either directly or via a legal representative by telephone, e-mail, post etc. It is advisable to have such preliminary contact in order for the applicant to know if immunity is still available or not (*for example if somebody else already applied for it*). If immunity is still available, the undertaking must submit (either by fax or mail) a formal or hypothetical application. On the other hand, if the immunity is not available, the applicant should request a fine reduction.

In this case, the normal question arises: but what happens when the undertaking knows about the infringements, does not have all the necessary information and evidence but can gather them?

As described before, there are two main procedures in which an undertaking can apply for a immunity deal:

a) when it has all the necessary information, the applicant can submit to the Leniency Module or directly the competition authority a statement with all the documents or
b) it can address the Leniency Module its intention, asking for a priority number.

Similar to the "*marker"* used by the European Commission[13], in Romania, starting with 2010, the Leniency Module has been implemented[14]. The main scope of the Leniency Module is to secure an interface between Competition Council and the undertaking that lodge immunity requests according to Immunity Guidelines. Thus, this module allows an undertaking to collaborate with the competition authority in order to identify and stop alleged infringements until all the necessary information for a completed application are gathered.

The Competition Council, after meeting with the applicant, may decide to grand the *marker* for a variable case by case period of time (depending on how much it considers that it will take the applicant to gather all the necessary information and evidence in that particular situation)[15]. From practice, the amount of time given is quite short, usually a couple of weeks. Of course, there are no deadlines for the marker application, which means that the competition authority has a sole discretion regarding the amount of time granted to the applicant and can therefore extend the first deadline. However, if the competition council authority decides not to extend the time and the application is not supplemented with the requested information, the application will be rejected. In this case, if the applicant will subsequently decide to submit a new request, it cannot apply for a marker or to submit a hypothetical request, but it must apply for the formal request where it will provide the competition authority all the necessary information and evidence it possesses.

In order to obtain a *marker*, the applicant must provide the competition authority the following information:

- its name and address;
- the parties involved to the alleged anticompetitive agreement;
- the affected product/s and geographic area;
- the type of the infringement;
- the estimated duration of the alleged anticompetitive conduct;
- the member states where evidence can be found;
- information regarding the existence of other immunity applications (or potential ones) regarding the same alleged anticompetitive practice.

In both cases, the competition authority grand the conditional immunity by a written decision addressed to the applicant and which is not made public until the end of the investigation. After the authority has assessed all the immunity conditions and found out that the applicant fulfill them, it will validate its initial decision. Afterwards, once the competition councils finalize the investigation, the sanctioning decision will be transmitted to the parties and published on the website.

Simplified procedure

The Immunity Guidelines also provide a simplified procedure for those undertakings that apply for immunity in more than one member state[16]. Afterwards, after it is established what competition authority will instrument the immunity case, the undertaking will supplement and submit to this authority the request with all the necessary documentation.

Practical questions

- Does the applicant need to formally admit the infringement?

According to the immunity guidelines, there are no specific provisions regarding the admittance of the infringement by the applicant. It is true that the applicant need to submit a statement containing a detailed description of the deed as well as the participants to it, but at no time does the law require to formally admit the infringement. We may say that the applicant informally recognizes it implications or that its participation is evident.

- Does the applicant need to stop the infringement?

The Immunity Guidelines only state that the applicant will cease its participation in the alleged anticompetitive deeds at the Competition Council's request. This means that, given the fact that the applicant acts like an informant, it may be possible to take part in the alleged agreement, in order to gather further information about the illegal deed until the

[13] Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, (08.12.2006).
[14] http://www.clementa.ro
[15] Pct. 27 of the Immunity Guidelines.
[16] Pct. 33-36 of the Immunity Guidelines.

competition authority considers it has sufficient evidence to start an investigation.

- Does the applicant need to compensate the victims?

As a general rule in our national legislation, there is not an express provision regarding the victim compensation by the parties of an anticompetitive deed. On the contrary, the Competition Act specifically provides that, when there are more participants in an anticompetitive practice, those that applied and where granted immunity will not be jointly liable with the rest of them. The victims need to open a separate claim in court where they can request a compensation as a result of the anticompetitive behavior, provided that they can prove their prejudice according to common provisions.

Domestic provisions are poor with respect to compensation, but further amendment will take place with the transposal of the Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for the infringement of the competition law provisions of the Member States and of the European Union[17]. The Directive should have been transposed by the end of 2016, but no actions have been taken into this direction, with the exception of some public consultation which took place of the draft project and were published on the Competition Council's website.

The main novelty of the above mentioned Directive in the immunity policy is the limitation of liability of the immunity recipient. Accordingly, the immunity recipient will be jointly and severally liable towards direct and indirect purchasers or providers. By exception, when the victim cannot obtain full compensation from the other infringers, the immunity recipient will also be held liable towards other injured parties.

- Can a whistle-blower be considered as an immunity applicant?

According to Competition Act, whistle-blower as those "individuals that provide the Competition Council, on their own initiative, information regarding possible breaches of Competition Law"[18].

As we mentioned in the preamble of this article, only companies are eligible for immunity deals in Romania and not individuals. Therefore, if the undertaking's employee decides to inform the Competition Council upon possible anticompetitive deeds of the company he works with, the undertaking that employs the whistle-blower will not benefit from it.

In this case, in the competition authority finds that he has sufficient evidence from the whistle-blower and decides to open up an investigation or carry out dawn raids, type A immunity is no longer available for the interested parties. However, in certain conditions, type B immunity can also be granted to applicants.

- Does the competition authority provide confidentiality assurance to the immunity applicants?

According to the Immunity Guidelines[19], any statement made by an undertaking to the Competition Council with respect to the immunity procedure is part of the case-file and cannot be used or made public for any other reasons than applying art. 5(1) of the Competition Act and/or art. 101(1) TFEU.

Access to statements is only granted to the involved parties, under the condition that they will make copies (either physical or through electronically methods) of these statements[20]. Furthermore, the Competition Council is obliged to assure, at the undertaking's request, the confidentiality upon its identity until the investigation report is transmitted to the involved parties.

Also, an undertaking that requests immunity but is denied due to prior application of another party will not receive any details from the Competition Council on the identity of the first applicant.

A problem that raised several debates in practice is the potential disclosure of leniency documents in court actions for damages initiated by individuals or companies harmed by the anti-competitive practice. This issue is now settled by the Directive on damages that expressly forbids national courts from requesting a party or a third party to disclose leniency statements in courts. The scope of such procedure is to encourage the undertakings to approach the competition authorities with immunity applications.

- What happens when the competition authority discovers additional anticompetitive practice than the ones submitted by the applicant (either through formal procedure or marker)?

The marker or the acceptance granted by the Competition Council only refers to the participants, anticompetitive deeds and duration indicated by the applicant. If, for example, the first participant applied for an infringement regarding price fixing, a second applicant may as well benefit from immunity if he brings evidence regarding territorial or client allocation, even if its related to the same parties. In this case, the first participant may apply for a fine reduction for the other discovered deeds.

- What happens if a second applicant comes with better information?

The marker or the immunity deal is not revoked if a second participant comes with better information that the first one which already secured an immunity deal.

- Will the applicant be forced to submit client attorney documents?

[17] Directive 2014/104/Eu of 26 November 2014 on Certain Rules Governing Actions for Damages under National Law for the Infringement of the Competition Law Provisions of the Member States and of the European Union., (05.12.2014).
[18] Art. 35 par. (1) of the Competition Act.
[19] Pct. 44.
[20] Pct. 45 of the Immunity Guidelines.

Competition Act expressly recognizes the confidentiality between lawyer and client, mentioning that the following types of documents cannot be used as evidence during the investigation carried out by the Competition Council: the communications between undertaking/association and their lawyers (only lawyers, not in-house counsel), made exclusively with the purpose of exercising the right of defense (before or after the investigation started).

Furthermore, according to the national provisions with govern the activity carried out by lawyers, any communication between the lawyer and the client, irrespective of its support, is confidential.

The Immunity Guidelines only require the applicant to submit the competition authority with the relevant information and evidence for establishing an anticompetitive practice. Moreover, the entire procedure is voluntarily and seen as a benefit for the participants. In the light of these aspects, it is up to the participant whether he will decide to provide the Competition Council with confidential documents that are protected by the client – attorney privilege.

- Can the immunity be revoked?

Although not a common practice, the Competition Council may decide to revoke the conditional immunity at any time until it decides to close the investigation. Some of the reasons for such actions is that the immunity was no longer available or the applicant failed to comply with one or more of the requirements for being granted the immunity deal.

In case this happens, the competition authority will inform the applicant in writing about its decision. Formally, the immunity will be granted of refuse by the Competition Council through the sanction decision issued at the end of the investigation.

If the immunity application was reject, the applicant can challenge the decision in court at the Bucharest Court of Appeal in 30 days from the date it received the sanctioning decision.

B. Leniency

In case the undertaking does not qualify for the immunity deal, it can apply for the leniency program where it can benefit from a considerable reduction of fine.

Undertakings eligible for such reductions are those that can provide evidence of a '*significant added value*' in addition to those already available to the competition authority. In additions, the undertaking must comply with the general conditions for the immunity applicants. It is very important that, when submitting a request to the competition authority, the undertaking specifically mentions that the information and evidence provided are for fine reduction and not for immunity. As a general rule, it does not mean than an applicant that was rejected for an immunity deal will be automatically granted a fine reduction. For this, a specifically separated request must be made.

In this case, the reduction in sanctions is at the Competition Council's discretion, the Immunity Guidelines offering only variable limits between under 20% and maximum 50% percent of the fine that would normally be applied. Applicants that comply with the conditions will benefit from the following reductions (*taking into consideration the moment of time the undertaking provided the competition authority information that brought `significant added value`*): between 30% and 50% for the first undertaking[21], between 20% and 30% for the second undertaking that applies and maxim 20% for all the other undertakings.

In order to determine the reduction level in accordance to the limits previously set out, the Competition Council will take into consideration the time moment the evidence and information were submitted as well the added value they brought[22]. Furthermore, the evidence that allow the establishing of additional facts that increase the gravity or duration of the infringement will be rewarded in the future through their elimination from the fine amount for the undertaking that provided that information.

In case the Competition Council reaches the preliminary conclusions that the evidence and information provided by the undertaking really do bring the significant added value, it will inform the undertaking in writing, no later than the date on which the investigation report is transmitted to the parties.

C. Competition Council's practice

Until the present time, even though at the European level the Immunity Policy is widely used, in Romania is does not the embrace the same success. Up so far, only two cases took advantage of the immunity policy, gaining full immunity:

1. during the investigation of the taxi transport services in Timisoara County[23] *and*

[21] By the definition of "*significant supplementary contribution*", the law means, according to pct. 16 of the Immunity Guidelines, the way of measure in which the probative elements, unknown until that moment, that are offered by an undertaking, consolidates, through their own, the Competition Council's ability to demonstrate the existence of the alleged agreement. In this evaluation, the Competition Council considers that, in general, the written probative elements from the period the alleged facts took place have a higher contribution than the ones from a subsequent period. Probative elements that are directly linked to the facts will be considered to be more important than the ones indirectly linked to the facts. Similarly, there will be taken into consideration the implementation to corroborate the elements brought with other sources, so that the respective elements can be successfully administrated during the investigation. Thus, the conclusive elements will be considered as having a significant supplementary contribution than the probative elements such as statements, which require the verification and corroboration with other sources if they are contested.

[22] Pct. 17 of the Immunity Guidelines.

[23] Competition Council's decision no. 61/2010, which can be accessed at http://www.consiliulconcurentei.ro/uploads/docs /items/id7082/decizie_taxi_timis-publicare.pdf.

2. where companies where fined for a bid rigging in the bid organized by S.N.G.N. ROMGAZ S.A[24].

In the first case, the first company who brought significant evidence and disclosed the anticompetitive agreement to the Competition Council, Radio Taxi, received full immunity. The second company that brought significant evidence received a fine reduction of 50%.

In the second case, the fines were of 2.9 mil EUR. It was the first investigation opened as a result of an immunity request. The company obtained full immunity for cooperation with the Competition Council.

D. Elements of comparative law

It is well known that, in what concerns competition rules, they are similar to most member states of the European Union, as according to art. 3 of the Treaty on the Functioning of the European Union, the establishing of the competition rules necessary for the functioning of the internal market is the exclusive competence of European Union. This means that EU provides the framework for competitive activity in order to ensure that there is no distortion or restriction of competition in the market by applying the same rules to all companies operating on the internal market. Obviously, it follows that, in subsidiary, each state aligns its regulations with the requirements of the European level. For these reasons, we believe that a brief overview focused on the main points of difference between Romanian legislation and other states rules should be made, which is why we relate to France, Germany and Great Britain, countries with a consistent practice in competition law.

In line with our laws is also German and French legislation where the first applicant to qualify for leniency will be granted full immunity from fines provided they comply with the obligation to fully and continuously cooperate with the authority. Since 2006, the French Competition Authority has granted full immunity in nine of the ten decisions in which it applied its leniency program.

In what concerns the UK, rules are slightly different. First of all, it should be mentioned that there are several authorities with responsibilities in competition law. The first and most important is the Competition and Markets Authority (CMA). In parallel with the CMA, separate regulatory bodies hold concurrent powers to enforce UK law prohibitions against anti-competitive agreements. These regulatory bodies include the Financial Conduct Authority (FCA), the UK financial services regulator, as well as agencies with oversight of the energy markets (Ofgem) and water and sewerage providers (Ofwat). Unlike the other two jurisdictions mentioned above, in the UK there are two immunity regimes operated by the CMA: (i) a civil regime for undertakings under the Competition Act 1998 and (ii) a criminal regime for individuals under the Enterprise Act 2002. Both regimes operate side by side in circumstances where an undertaking seeks complete immunity from civil fines and criminal immunity for its current and former personnel. We also find here type A and type B immunity, according to the moment of time the undertaking asks for immunity: before or after an investigation on behalf of the CMA was opened.

An interesting fact regarding granting immunity after an investigation begins we found in France, where the competition authority will publish a press release after each dawn-raid it carries out in order to allow undertakings that were not visited to be informed that an investigation is underway in their sector and to apply for leniency. This way, the precautionary principle that characterizes competition law is emphasized, giving operators the opportunity to report certain forbidden behaviors before being subjects of inspections carried out by the authority. Such a mechanism is rightful if we consider that, in other countries, there is a general practice for companies to apply for leniency.

In Germany on the other side, the leniency program sets out different eligibility requirements for leniency depending on whether the application is made before or after the competent authority (FCO) has gathered sufficient evidence to obtain a search warrant. In practice, the relevant point in time for the distinction is often the beginning of the dawn raid. The first applicant who submits information that enables the FCO to obtain a search warrant will automatically be granted immunity provided that he complies with the obligation to cooperate going forward.

Moreover, while in Romania, France and Germany an explicitly admission of a violation of law is not required to qualify for leniency, as it results when the undertaking provides a corporate statement which includes a detailed description of the organization of the alleged arrangement. Therefore, in fact, the applicant acknowledges a violation of law. In the UK recognition is part of the admission requirement. Also, in the context of criminal offence, we are dealing with an individual applicant who must admit participation in the criminal offence. So, in this case, law incriminates individuals, rather than companies who enter into certain anticompetitive agreements.

The primary intention was to create a deterrent to cartel activity by threatening imprisonment (for a maximum of five years) for executives whose unlawful activities had previously carried only the threat of civil action against their company.

Related to the question whether an applicant can qualify or not for leniency if one of its employees reports the conduct to the authority first, the situation appears to be resolved by the fact that this procedure applies to undertakings. So, among the conditions that have to be fulfilled to successfully apply for immunity,

[24] Competition Council's decision no. 7/2015, which can be accessed at http://www.consiliulconcurentei.ro/uploads/docs /items/id10044/decizie_7_din_2015_foraj_vers_publicare_site.pdf.

the employee must be mandated by the undertaking to be considered as its representative and to qualify the undertaking.

However, an application made by an individual explicitly only in his own name or without authorization to represent a company will not cover the company. In this scenario, type A immunity will no longer be available for the company if the competition authority finds the information provided by the whistle-blower to be sufficient in order to open an investigation or carry out dawn raids. Type B immunity will still be available provided that the undertaking meets the requirements for accessing it. In the UK the CMA wishes to increase the pressure on undertakings to report collusive conduct by offering an individual who comes forward with information about cartels a £100,000 reward.

Last but not least, under the Romanian Competition Law the leniency program covers only companies or business associations, while in German or French legal system the authority can fine not only companies, but also individuals who have represented or supervised the company, for their respective participation in a cartel. If a person authorized to represent an undertaking files an application for leniency, the authority rates this also made on behalf of the individuals participating in the cartel as current or former employees of the company.

Another difference noticed is that, unlike the competition rules in Romania, in France, England and Germany is regulated a settlement process that allows early settlement of civil liability for companies in cartel cases, vertical agreements or other fine proceedings. This settlement process is distinct from the aforementioned leniency policy.

Conclusions

As we can see from the present papers, the Immunity and Leniency Policy has a very complex procedure, doubled by strong confidentiality principles. Moreover, not all the evidence can be considered in an Immunity or Leniency case, as they need to be significant and to bring the so-called added value for the competition authority.

The fact that there are only two cases of Immunity deals in Romanian until now might raise a big concern towards the applicability, understanding and nevertheless awareness of such procedure. At the very first glance, the conclusions we came up with is that undertakings prefer to take the risk and face a possible fine, considering that the chance to be sanctioned is lower than the one for getting away. This brings a serious damage to the normal competition environment as the undertaking still do not find the Immunity and Leniency as a "deal" to disclose possible anticompetitive agreement and bring balance in the competition market.

As further research, we bare the hope that more and more cases are to come in the near future and thus see how this policy will evolve at national level.

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THE LACK OF REGULATION IN THE ROMANIAN CIVIL CODE OF THE LEGAL SOLUTIONS OF PRINCIPLE IN THE FIELD OF REAL RIGHTS

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Abstract

Romanian Civil code – Law no. 287/2009, entered into force at 1st of October 2011 – thoroughly regulates the matter of real estate rights. Unfortunately, the legislator had chosen that in some situations not to regulate a certain principle solution, useful for the determinate purposes of the subjects in their civil relations. In these cases, the Romania Civil code sends to the Court, which has to decide from case to case.

In the present study, we identified all the situations where the Romanian Civil code mentions such references and we proposed – de lege feredenda – some landmarks which the legislator could take into account in order to fix this lack of regulation.

Keywords: *Romanian Civil code, real estate rights, lack of regulation*

1. Introduction

As any other regulation included in a code, the regulation introduced by Law no. 287/2009 – the Romanian Civil Code[1] (hereinafter abbreviated RCC) – aims to legislatively cover all civil legal relations. As outlined in doctrine, codification 'implies intensive activity performed by the legislator, which means thoroughly revising the entire legislative material in order to remove obsolete and outdated rules (including customs), to fill in the gaps, to innovate legislatively (by introducing new rules, required by the evolution of social relations), to logically order the legislative material and to use modern means of legislative technique (by choosing the regulation manner and the external form of regulation; by using appropriate means of conceptualization)[2].

These important features characterizing the codification process of the rules governing civil legal relations were largely respected by the legislator when drafting Law no. 287/2009. Overall, the operative part of this statute – considering the specific meaning of the term as established by art. 44 of Law no. 24/2000 on the rules referring to the legislative technique for drafting new legislation[3] – meets the needs which led to the replacement of the previous regulation (which had been applied continuously since December 1865).

Nevertheless, on a detailed analysis of the solutions in the legal subject area of overall regulation of real rights (Book III – 'On property', art. 535-952 RCC), one notices that the legislator chose a debatable solution: in many cases, the rules which are provided for simply make reference to the courts for them to concretely determine how to resolve the dispute, in which, hypothetically, subjects of civil legal relations are involved.

Such an option is, in principle, open to criticism for at least two reasons:

a) By regulating such cross-referred rules, the legislator does not usually set indicative criteria for courts, so that the delivery of justice could be facilitated. Naturally, such criteria should have existed even in the substantive regulation of the issues specific to RCC and thus to be considered by the subjects of the civil legal relations in order to prevent the approach of taking recourse to the courts.

b) The legislator disregarded the particular situation existing in Romania involving the workload of the courts (especially those which deal with civil lawsuits). Excessively overloading the role of courts – a permanent reality after 1989 – should have constituted for the legislator a signal which should have led its activity towards finding appropriate solutions, in that taking recourse to the courts should have represented an extraordinary measure (without thus laying down obstacles that might unlawfully restrict free access to justice, enshrined in art. 21 of the Romanian Constitution).

In this study, we attempt to present the rules of the legal subject area governing real rights which comprise solutions of (necessary) recourse to the activity of courts. In addition to this, we put forward our own proposals to amend the texts in RCC in order to establish indicative legal benchmarks, so that the civil law subjects involved the respective legal mechanisms would be able to consider them in order to avoid going through a civil lawsuit.

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[1] Republished in the *Official Gazette of Romania*, Part I, no. 505 of July 15, 2011, as amended and supplemented.

[2] See N. Popa, *Teoria generală a dreptului* (The General Theory of Law), Ediția 5, Editura C.H. Beck, Bucharest, 2014, p. 188.

[3] Republished in the *Official Gazette of Romania*, Part I, no. 260 of April 21, 2010, as amended and supplemented.

2. Identifying the situations in which the legislator refers to court without laying down indicative rules which may be considered by the subjects of the employment agreements

2.1. Regarding accession

a) According to art. 587 para. (2) and (3) RCC, if the work was done by a third party in bad faith, the neighboring land owner can decide whether to request removing the work off the ground, by obliging the contractor to pay damages, if any, or to request registration of the neighbors' right of co-ownership in the land book. In determining the shares, the value of the land owned by the neighbor, as well as the value of half the contribution of the contractor shall be taken into account. In case of disagreement between the parties, *the court shall determine the contribution of each party to the resulting immovable property, and the shares in the right of ownership, respectively.*

Such a rule of reference could have been easily avoided if the legislator had laid down the obligation for the people involved in the legal situation hereto to recourse to a certified court expert specialized in civil and industrial engineering, mutually agreed, to determine each party's contribution to the resulting immovable property. Depending on this value, the shares in the right of ownership could have been properly established.

Even in the current regulation, in the process envisaged by the application of art. 587 para. (3) RCC, a certified court expert is to establish the value of the respective contribution, whereas the court shall only confirm the result of the evaluation.

b) According to art. 592 para. (1) RCC, whenever the owner chooses to force the contractor to buy the immovable property, in the absence of the parties' agreement, *the owner may request the court to establish a price and to issue a judgment which shall substitute the sales contract.*

Similarly with the situation referred to in subparagraph a) the recourse to court could have been avoided by laying down the obligation for the persons involved in this legal situation to use the services provided by an expert evaluator and, subsequently, to sign the sales contract (which, in such circumstances, would have become a forced agreement).

c) Art. 595 provides for the following: 'Whenever, under a provision of this section, the court is vested to determine the extent of indemnity or compensation, it will take into account the property price estimate calculated at the date of the judgment hereof.'

The property price estimate calculated at the date of the judgment is a landmark that is established by the expert evaluator, as court mediation might be missing.

2.2. Regarding the inviolability clause

Art. 672 para. (2) CCR provides that *the buyer of an asset may be authorized by the court to dispose of the respective asset if the interest that justified the inviolability clause has disappeared or if a higher interest requires it.*

Recourse to court could have been avoided if the obligation for the buyer-vendor to explicitly justify the conveyancing document had been laid down, if the interest which justified the inviolability clause had been eliminated or if a higher interest that would have required the selling operation had been manifest.

2.3. Regarding the manifestation of the legal limits of the right of ownership

Art. 630 RCC provides for the following:

'(1) If, by exercising his/her right, the owner causes inconvenience higher than normal in neighborly relations, the court may, on grounds of fairness, require of him/her to pay damages to the aggrieved party, as well as to re-establish the earlier situation when possible.

(2) If the damage caused were minor in relation to the necessity or usefulness of carrying harmful activity by the owner, the court may approve the conduct of that activity. But the aggrieved party will be entitled to damages.

(3) If the damage is imminent or very likely, the court may approve, by way of presiding judge's order, the measures necessary to prevent damage.'

Exceeding the limits specific to manifesting the normal neighborhood inconveniences between two immovable properties involves court intervention, in all the three cases regulated by the three paragraphs of art. 630. Except for the regulation hypothesis in para. (3), which is justified (but which is legislatively covered by art. 997 et seq. of the Code of Civil Procedure, referring to the special procedure of presiding judge's order), the other two situations might have been regulated especially by considering the manifestation of obligation of the respective subjects to reach agreement on settling the dispute between them; we believe that it is such a solution that would be consistent with the requirements expressed by the principle of equity.

2.4. Regarding the status of co-ownership

a) Upon co-owners' signing the administration contract or the deeds of disposition for the property being owned in shares, according to art. 641 para. (3) RCC, the co-owner or the interested co-owners '*can ask the court to substitute the agreement of the co-owner who was unable to express his/her will or who is abusively opposing to draft a administration contract essential to maintain the usefulness or the value of the asset.'*

This solution is excessive, completely unjustified. The law could provide that, in such a situation, the co-owner or the interested co-owners could nevertheless sign the administration contract, even if the co-owner

who is (objectively) unable to express his/her will or who abusively opposes to draft such a contract does not agree, on condition that the drafter(s) of the contract mention(s) the occasion which has given rise to its conclusion without the participation of all co-owners.

b) Given the situation of forced co-ownership, with reference to the common parts of the buildings with several floors or apartments, art. 657 para. (2) RCC provides that, in case the extent of damage caused to a part of the common property amounts to less than half the value of the property, *'co-owners shall contribute to rebuilding the common parts, proportionally to their shares. If one or more co-owners refuse or are unable to participate in rebuilding, they are obliged to waive their shares in their right of ownership to the other co-owners. The price is determined by the parties or, in case of disagreement, by the court.'*

The price might have been established – if the law had laid down this obligation for co-owners – by an expert evaluator, without the need for court intervention.

2.5. Regarding the usufruct

Art. 747 RCC provided for the following on the extinction of usufruct in case of abuse of use:

'(1) The usufruct may be terminated at the request of the bare owner when the beneficial owner abuses the use of property, causes damage to it or lets it deteriorate.

(2) The creditors of the beneficial owner may start a lawsuit to preserve their rights; they may commit to repair the damage and provide guarantees for the future.

(3) According to circumstances, the court may decide either the extinction of the usufruct or the takeover of the use of property by the bare owner, who is obliged to pay the beneficial owner an annuity during the duration of the usufruct. When the property is immovable, in order to guarantee the annuity, the court may order the registration of a mortgage in the land book.'

The intervention of the court, corresponding to the situations highlighted in para. (3) of art. 747 RCC might be legally replaced by the bare owner's conduct, which should be expressed in an appropriate and direct manner. The bare owner – justifying in advance the abuse of use ascribable to the beneficial user and being authorized by law – could directly take over the use of property. Similarly, if in such a situation, the beneficial owner could – without the need for court intervention – to require registration of a mortgage in the land book.

2.6. Regarding easements

Art. 772 RCC provides for the following on redeeming the right of way:

'(1) The right of way shall be redeemed by the owner of the servient tenement if there is a manifest disproportion between the usefulness assigned to the dominant tenement and the inconveniency or the depreciation caused to the servient tenement.

(2) In case of disagreement between the parties, the court may substitute the consent of the dominant tenement's owner. When determining the redemption price, the court shall take into account the age of easement and the change in value of the two tenements.'

The law could establish the right of the servient tenement's owner to directly benefit from the right of way, given the hypothesis regulated in para. (1) of art. 772 RCC. In such a situation, a hypothesis on the manifestation of a forced contract should also be regulated, the price being set by an expert evaluator.

2.7. Regarding the institution of managing somebody else's assets

a) To ensure the maintenance of the destination of the assets under administration, according to art. 797 RCC, the trustee 'is obliged to continue the manner of use or operation of the fruit bearing assess without changing their destination, unless he/she is authorized by the recipient or, in case of preventing it, by court.'

If the necessity to change the manner of use or operation of the fruit bearing assets and their destination is objectively justified, the trustee could benefit from the legal permission to make the required changes, emphasizing the fact that the recipient is objectively unable to authorize this change.

The same situation occurs when authorizing deeds of disposition. In this respect, art. 799 para. (1) RCC provides for the following:

'When administration concentrates on a determined individual asset, the trustee shall be able to onerously dispose of the asset or to encumber it with a collateral, when deemed necessary to preserve the value of the asset, to pay off debts or to maintain manner of use appropriate for the intended destination of the asset, only with the recipient's authorization or in case the latter is hindered or has not yet been determined, with the court's authorization.'

Para. (3) thereof provides for the following: '*When the administration concentrates on all the assets, the trustee can dispose of a determined individual asset or to encumber it with collateral whenever deemed necessary for the proper administration of the universality. In other cases, prior permission of the recipient or, where appropriate, of the court, is necessary*.'

The solution we propose is the same as the one for maintaining the destination of the administered assets.

b) The legal regime of full administration assumes in reference to the prohibition of acquiring rights in respect of the administered assets, the manifestation of an exception, in that the trustee shall be able to sign the documents concerning the administered assets

or to acquire, otherwise than by inheritance, any type of rights on the respective assets or against the recipient, *'on the recipient's express mandate or, in case the latter is hindered or has not yet been determined, on the court's mandate.'*

At least when the trustee justifies the manifestation of an objective impediment that hinders the recipient to give him/her the mandate, the law might establish the possibility of drafting the documents deemed necessary in the case, without the need for court intervention.

c) With respect to full administration regime, art. 812 RCC, which focuses on mitigating the trustee's liability, provides for the following: *'In determining the trustee's liability limits, as well as the damages that he/she owes, the court shall be able to reduce the amount, given the circumstances related to assuming administration or the free nature of the trustee's service.'*

This regulation is unnecessary because it is a sovereign attribute of the court, regardless of any express legal permission given in a particular situation, to determine the extent of liability of a person proportional to the damage, which may be evidenced by the person entitled to repair it.

d) Regarding the obligation of the trustee to perform inventory and to provide securities, art. 818 and art. 819 RCC provide for the following:

- art. 818:

'(1) The trustee is not required to perform the inventory, to underwrite an insurance policy or provide other security for proper performance of his duties, in the absence of a provision in the articles of incorporation, of a subsequent agreement of the parties, of a legal order to the contrary or of a court order passed on demand of the recipient or any other interested person.

(2) If such an obligation was established as the trustee's duty by law or by court order, the trustee shall be able to request the court, for good reasons, to be dispensed with its fulfillment.'

- art. 819:

'(1) In dealing with the requests under art. 818, the court shall take into account the value of the goods, the situation of the parties, as well as other circumstances.

(2) The court shall not accept the request for establishing that it is the trustee's duty to deal with the inventory, the securities or the insurance, if, in this manner, a provision to the contrary included in the articles of incorporation or a subsequent agreement of the parties were violated.'

If the trustee could come up with good reasons to be exempted from fulfilling the obligation to perform the inventory, to underwrite an insurance policy or to provide other security for proper performance of his duties, legally, one might establish that carrying out administration without assuming such obligations might be done on the trustee's own initiative.

In this context of analysis, we underline the fact that art. 819 para. (2) RCC is meaningless.

e) In the case of adopting decisions in special circumstances, the regulation on collective administration and delegation lays down that trustees shall be able to individually draft preservation deeds [art. 826 para. (1) RCC]. By exception, according to para. (2) and (3) of the same article:

'(2) If decisions cannot be validly taken because of constant opposition of some trustees, the other documents related to managing other person's assets shall be drafted in case of emergency, by court authorization.

(3) To the extent that misunderstandings between trustees persist and administration is seriously affected, the court may order, at the request of any interested person, one or more of the following measures:

a) to establish a simplified mechanism for the adoption of decisions;

b) to distribute the tasks among the trustees;

c) to impart a casting vote, in case of a tie, to one of the trustees;

d) to replace the trustee or, where appropriate, the trustees to whom it is ascribable the given situation.'

The authorization provided for by art. 826 para. (2) for the court to determine is not necessary. As for the measures provided for by para. (3), they should be initiated and established by the recipient.

f) With regard to blue chip investments art. 833 RCC provides for the following:

(1) The trustee may deposit the sums of money entrusted to a credit or insurance institution or to an undertaking for collective investment, to the extent that the deposit is redeemable on demand or at notice within 30 days.

(2) The trustee shall be also able to make deposits for longer periods to the extent that they are fully guaranteed by the Romanian Bank Deposit Guarantee Fund or, where appropriate, by the Romanian Policyholders Guarantee Fund.

(3) If the guarantee provided for by para. (2) is unavailable, the trustee shall not be able to make deposits for longer periods, unless the court authorizes it and in accordance with the rules laid down by the court.'

In such a situation, authorization should also be first expressed by the recipient, excluding – in principle – the intervention of the court.

g) The annual trustees' report includes the right of the recipient to conduct an audit of the administration. According to art. 843 para. (4) RCC, *'If the trustee opposes auditing, the interested party may request the court to appoint an independent expert to check the report.'*

The appointment of the expert should be done – at least initially – directly by the recipient.

h) Regarding administration, RCC provides for the hypothesis of legal discharge of administration. In this respect, art. 851 provides for the following:

'(1) If any of the recipients does not accept the report, the trustee can ask the court to approve it.'

(2) Whenever deemed necessary, the court shall order for a specialized expertise to be performed.'

The expertise provided for by para. (2) art. 851 RCC could be carried out without it being manifest in resolving a lawsuit.

i) At the end of this paragraph, we left the references in art. 844 and 846 RCC, respectively, from which one could infer that the law may also give the court both the opportunity to establish the distribution of powers between the trustees (when the administration is carried out by two or more trustees) and the opportunity to order the replacement of the trustee.

2.8. Regarding the regulation of the land book

a) Changing the immovable property registered in the land book – art. 879 para. (3) RCC provides for the following: 'Annexation or detachment of encumbered immovable property shall only be done with the consent of the holders of those encumbrances. The refusal of the encumbrance holders should not be abusive, as it may be censored by the court.'

Going to court in this situation might be avoided if the law provided for the right of the owner to perform the operation of changing the immovable property – annexation or detachment – without the consent of the encumbrance holder, who, abusively, refuses to give his/her consent, on condition that the conduct of the encumbrance holder is put in writing.

b) The date of taking effect of the registration in the land book – art. 890 para. (3) RCC provides for the following: 'If more applications were received on the same day by post or courier, the mortgage rights shall have the same rank, and other rights shall gain equal rank only temporarily, followed by the court's decision, at the request of any interested person, on the rank and, if necessary, on the deletion of invalid registration.'

We believe it is imperative that the legislator would establish one or more criteria for delineating the ranks for the guarantee rights (other than mortgage).

c) Rectifying the registrations in the land book – according to art. 908 para. (3) RCC, 'When the right registered in the land book is to be rectified, its holder is obliged to hand over the entitled party, together with the consent engrossed in duly certified notarial form, enabling the performance of the rectification, and the necessary documents, as, otherwise, the interested person shall be able to request the court to order registration in the land book. In the latter case, the decision of the court shall substitute the registration consent of the party, who is obliged to submit the documents necessary for the rectification.'

In such circumstances, the law could lay down that the operation necessary to register the rectification might not need court intervention.

3. Conclusions

In all the aforementioned cases, we believe it is both possible and necessary for the legislator to intervene in order to establish legislative solutions which should not make reference to court. Only in this way the role and purpose of the regulations contained in the Romanian Civil Code would be fully manifest.

This approach would not involve depriving of or limiting the possibility of the subjects of civil legal relations to take recourse to court whenever substantive rights or legitimate interests would require this.

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IMPLEMENTING THE CONSTITUTIONAL COURT'S RECENT DECISIONS REGARDING CERTAIN PROVISIONS STIPULATED FOR CREDIT AGREEMENTS AND CREDIT CONVERSION

Gabriel VASII[*]

Abstract

The article aims to analyse the practical consequences of the Constitutional Court's recent decisions in respect to the provisions of Law no. 77 / 2016 for credit conversion and of Law amending Government Ordinance no. 50/2010 (credit conversion). The analysis shall be made from the bank's perspective and from the consumer's point of view.

Keywords: *unfair terms, Constitutional Court, credit agreements, credit compensation*

1. Introduction

With this analysis, we aim to present a theme recently appeared in Romanian legal society, namely the changes in the legal framework applicable to the commercial relationship between the consumers and the banking institution. The analysis shall be performed both from the perspective of Law no. 193/2000 and from the point of view of the applicability of Law no. 77/2016 for the return of the asset in exchange for the receivable, published in the Official Gazette no. 330/28.04.2016 ("Law no. 77/2016"). The novelty of the aspects which are to be presented resides in the amendments brought by the Constitutional Court's Decision no. 623/2016[1] regarding the unconstitutionality exception of articles 1 par. 3), article 3, article 4, article 5 par.2) articles 6-8 par. 1), 3) and 5), article 10 and article 11 of Law no. 77/2016 and well as of Law no. 77/2016 itself ("Decision no. 623/2016").

This paper sets out a challenge to analyse the manner of application and the implementation of the dispositions of Law no. 77/2016, pursuant to the modifications brought by Decision no. 623/2016, both from a scholar's perspective and from a practical approach of the procedure for returning the asset in exchange for the receivable, as established by Law no. 77/2016.

2. Review of the main dispositions of Law no. 77/2016

Law no. 77/2016 entered into force on 13 May 2016. This legal norm appeared as a solution for certain retail borrowers who can now opt between paying their loan or using a legal mechanism of transferring the title to the immovable assets which were given as collateral for securing the obligations under such loan agreements to the lenders or to the assignees of the corresponding receivables (jointly referred to as "Creditor").

Law no. 77/2016 applies to credit agreements. Romanian doctrine[2] has criticised the general definition given by the legislator to the agreement during 2009 – 2011, considering that the agreement should be defined through its most general and representative characteristics and should emphasis that the agreement is a special, complex type of legal act, deriving from the parties' will, motivation, interests, finality and purpose.

Recent Romanian doctrine[3] has defined the agreement as being a legal understanding between the parties, meaning a qualified form of the parties' will and consent, which ensured the party acting in good faith that it shall benefit from the state's coercitive force.

This definition applies also to loan agreements concluded between banks, as credit institutions, and individuals, as consumers.

To entail the application of the Law, the following criteria must be cumulatively met, in compliance with article 4 par. 1) of the Law:

a) the Creditor is a credit institution, a non-banking financial institution or an assignee of receivables originated by such credit or financial institutions.
b) the loan agreements are concluded between retail borrowers and consumers, as defined by Government Ordinance no. 21/1992 for consumer protection and by Law no. 193/2000 regarding unfair contractual terms within the agreements between professionals and consumers,
c) the retail borrowers have not been charged by way of a final court decision for criminal offences in relation to that loan;
d) the loan agreements are secured with at least

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[1] Published in the Official Gazette no. 53 / 18.01.2017.
[2] Liviu Stănciulescu, Vasile Nemeș, Dreptul contractelor civile și comerciale în reglementarea Noului Cod Civil, Ed. Hamangiu, 2013, p. 11.
[3] Liviu Stănciulescu, Dreptul contractelor civile. Doctrină și Jurisprudență, Ed. Hamangiu, Ed. 3, 2017, p. 37.

one mortgage on a residential property. The Law applies even if there are other collaterals besides the mortgage on a residential property;

e) at the date of granting the loan, the principal amount did not exceed EUR 250,000 or the equivalent amount in another currency (based on the exchange rate calculated by the National Bank of Romania for the date when the loan agreement was signed);

The following type of loans are excluded from the application of Law no. 77/2016:

a) loans granted under the "Prima Casa" governmental program;
b) loans (including mortgage loans) secured with collaterals which do not have a residential purpose, e.g. commercial properties, office buildings, land (even if the land may be used for residential purposes but does not have any residential buildings on it);
c) loans which have (at the date of extending the loan) a principal exceeding the threshold of EUR 250,000 (or the equivalent in any other currency);
d) corporate loans, even if such loans are secured with residential properties.

In order to avoid producing a disruption in the balance of legal relationships between parties, Law no. 77/2016 shall apply both to ongoing loan agreements at the date of its entry intro force and to loan agreements which are envisaged to be concluded after this date. Proof of the fact that the Law is oriented to protect consumers is its application to cases when the collateral has already been sold within the enforcement procedure, but only to the extent there are other enforcement proceedings (related to the same loan) which are ongoing against the debtor.

The steps for implementing Law no. 77/2016's mechanism are the following:

- at the debtor's, guarantor's or collateral provider's initiative, a notice is sent to the creditor, informing the latter of the debtor's, guarantor's or collateral provider's intent to return the ownership over the mortgaged property for the full settlement of the debt,
- certain formalities must be observed for sending the Notice, which can be transmitted either through an attorney, or a notary public or a bailiff.
- the Notice must convey two alternative days and a precise timing in which the legal or conventional representative of the credit institution presents himself to the notary public appointed by the debtor, guarantor or collateral provider for the conclusion of the deed for transferring ownership over the mortgaged property and discharge of debt. By debt, Law no. 77/2016 refers to any principal, interest or delay penalties deriving from the loan. The date proposed by the Debtor for the notary's appointment cannot be sooner than 30 days from the date of the Notice.

Legal doctrine[4] stated that the right to settle the bank receivable and the correlative debt, as stipulated through articles 3-5 of Law no. 77/2016 appears to be a truly potestative right, since it empowers a person to unilaterally amend, settle or recreate a pre-existent legal situation. However, the same author reaches the conclusion that this right cannot be qualified as a potestative right since it would grant excessive powers to the consumer. Further on, the same author concludes that Law no. 77/2016 does not stipulate a specific case of hardship, but that the legislator's intent is to make this legal norm compatible to important values and principles in line with our Constitution and internal legislation, with European Union laws and with the guidelines of the European Convention for Human Rights[5].

The primary effect of this mechanism regulated by Law no. 77/2016 is the immediate suspension of any payment obligation of the Debtor to the Creditor together with any legal and administrative proceedings initiated by the Creditor against the Debtor (including guarantors and collateral providers) or its assets, as of the date when the notice is served to the creditor.

Although Law no. 77/2016 carved the way for a higher protection of the debtor, it has also provided a safety mechanism for the creditor, as well, by stipulating the possibility for the latter to challenge the debtor's request to return the asset, within 10 days as of the receipt of the notice, if the creditor deems that the conditions provided by article no. 4 of Law no. 77/2016.

Such a challenge should be judged by the relevant local court (i.e. the local court in the jurisdiction where the Debtor has its domicile) with urgency. Any court decision is subject to appeal which may be filed within 15 working days from the date when the first court decision is communicated. The appeal must be judged with extreme urgency, as well.

In case the Creditor's challenge is successful, the parties will return to their original legal positions prior to the issuance of the notice, meaning that the debtor's obligation to continue to pay the outstanding loan amount is not suspended any more and is due. However, Law no. 77/2016 does not expressly mention when the payments towards the bank are to be resumed.

If no challenge against the debtor's request is filed or if such challenge is finally rejected by the court, the creditor must continue the settlement procedure, as requested by the debtor. To this end, the creditor must present himself before the notary public appointed by the debtor within 10 days as of the final rejection of his challenge, as per article 7 par. 6) of Law no. 77/2016. Further on, the creditor and the debtor will sign a notarial deed which will evidence the transfer of title over all relevant collaterals, from the debtor to the Creditor. Upon such transfer of title, all the debtor's obligations to the dreditor will be deemed settled.

[4] Valeriu Stoica s.a., Legea dării în plată, Ed. Hamangiu, 2016, p. 10.
[5] Valeriu Stoica s.a., Legea dării în plată, Ed. Hamangiu, 2016, p. 29.

Law no. 77/2016 has foreseen a method for supporting the debtor in case the creditor fails to comply with its obligations after a final ruling is rendered. In this situation, the debtor may file a court claim requesting the court to release him of its debt and to acknowledge the ownership title over the collaterals to the creditor.

Upon the conclusion of the notarial deed or upon a final court decision being rendered, in each case for the transfer of title over the collaterals, from the debtor to the creditor, the debtor's (re)payment obligations to the creditor will be deemed settled in full.

3. Unconstitutionality grounds against Law no. 77/2016

Starting from the contractual relationship between credit institutions and consumers, legitimated through credit agreements, the legislator intervened through Law no. 77/2016 in order to relieve the already accumulated tension between these parties. Law no. 77/2016 was born under the auspices of the world economic crises which led debtors to the impossibility to settle their payment obligations deriving from the credit agreements[6]. Law no. 77/2016 entered into force after 16 years as of the promulgation of Law no. 193/2000 for unfair clauses in credit agreements with consumers, giving rise to a new wave of litigations against the manner in which Law no. 77/2016 has understood to rebalance the risks pertaining to credit agreements and the devaluation of immovable properties.

The constitutionality of Law no. 77/2016 has been contested through the exceptions filed against article 1 par.3), article 3, article 4, article 5 par. 2), articles 6-8 par. 1), 3) and 5), article 10 and article 11, as well as the exceptions filed against the law itself.

The main arguments in support of the unconstitutionality of Law no. 77/2016 may be comprised as follows:

- critics based on the fact that Law no. 77/2016 has been adopted as an ordinary law, instead of an organic law. This opinion is based on the fact that the general legal regime of ownership over lands is governed by the Romanian Constitution, which is an organic law. Therefore, there are no grounds to amend the general regime set through an organic law by using an ordinary law, whose purpose is to regulate other areas.
- Law no. 77/2016 triggers the insecurity of the civil circuit since it may lead to the retroactive the amendment of credit agreements that have been concluded under laws in force at the moment of their conclusion and which are subject to their applicability, based on the principle tempus regit actum. The authors of this argument also believed that the bank's access to an economic activity and its freedom of commerce is severely affected since the bank loses its receivable right gained through the credit agreement. In addition, the bank's position would also be affected if the mortgaged asset is transferred in its patrimony along with the guarantees and encumbrances constituted by other creditors, thus becoming a guarantor for the debtor itself, instead of remaining a creditor.
- the dispositions of Law no. 77/2016 have been criticised also from the point of view of the limited conditions in which the bank may proceed to contest the debtor's request to return the asset, since there are no mentions regarding the bank's possibility to analyse the current status of the returned asset, the debtor's fault for diminishing the value of the mortgaged asset or the debtor's actual status of necessity which makes him eligible for such a procedure. The authors of this argument also invoked the fact that the bank has extremely limited possibilities to rebalance it's contractual risks.
- Law no. 77/2016 has been criticised also for being imprecise, since it stipulates a derogation from the provisions of the Romanian Civil Code, without mentioning which are the legal dispositions subject to this exception,
- the authors of the unconstitutionallity exception also express their disapproval of the fact that Law no. 77/2016 is not exactly correlated to other legal norms, although the provisions of the Law expressly mention this correlation.
- there is an inadvertency between the purpose of Law no. 77/2016, which is said to be the safeguard of debtors overcoming a difficult financial situation and the provisions of the law itself, which do not emphasise its application only to debtors in a difficult financial situation, thus creating the possibility for debtors to benefit from the Law' provisions regardless of their economic status.
- Law no. 77/2016 is deemed unconstitutional based on its retroactive effect, which determins a change in the nature of the credit agreement itself which becomes a leasing agreement. In support of this thesis, the authors claim that for past situations in which the immovable asset had been sold within the enforcement procedure in order to cover the debt and the bank continued the enforcement procedure for the rest of the amount, the legislator has created a new effect, namely that of the settlement of the debt as of perfecting the sale-purchase of the collateral at the request of the debtor, as per article 8 of Law no. 77/2016. Since at the moment when the collateral was sold, this legal situation did not create the right for the debtor to request the settlement of the obligation, it would be unconstitutional for a new law, subsequent to the sell-purchase of the collateral, to be able to retroactively change the effects of the past situation and give birth to the debtor's right to request the settlement.
- another relevant argument for the unconstitutionality of Law no. 77/2016 is that it replaces the bank's receivable with a ownership right

[6] For details, see Valeriu Stoica – "O lectură constituțională, dincoace și dincolo de Legea dării în plată" – Article published on the website - https://juridice.ro/essentials/836/o-lectura-constitutionala-dincoace-si-dincolo-de-legea-darii-in-plata.

against the bank's will, which leads to a decrease of the bank's patrimony if the value of the immovable asset is lower than the value of the due loan.

− the authors of the unconstitutionaly exception believed that Law no. 77/2016 establishes an unwarrantable interference with the bank's hypothec right, in the sense that if the bank decides to enforce the hypothec right, the bank must takeover the asset. In this case, if the bank's hypothec is higher than other creditor's hypothects, the bank's hypothec shall remain without effect as a consequence of taking over the asset but the next creditor's hypothec shall increase and therefore, their right to settle their receivable shall become actual and their creditor shall become the bank itself.

− Law no. 77/2016 has been criticised also due to the lack of preliminary impact studies prior to its adoption, which leads to a lack of consideration for the rights of other parties involved in the credit process.

− last but not least, the authors of the unconstitutionality exception invoked the negative notice of Central European Bank on the provisions of Law no. 77/2016, since the measures established through the latter lack proportionality because it does not mention the just and equitable compensation applicable to the creditor in such a situation. The authors believed that Law no. 77/2016 would have been proportional if the legislator had correlated the settlement measure with the dispositions of Law no. 151/2015 for the insovency of the individual, therefore if the settlement measure would have been limited to social cases or to credit agreements currently under litigation. In lack of a proportionality between the settlement procedure stipulated by Law no. 77/2016 and the cases in which the legislator allows its application, the guarantees for the economic liberty of creditors and of free trade are severly violated.

4. The Constitutional Court's grounds regarding the arguments supporting the unconstitutionality of Law no. 77/2016

Within Decision no. 623/2016, the Constitutional Court[7] analyses and motivates both arguments related to extrinsic unconstitutionality grounds, as well as intrinsec unconstitutionality grounds:

1. ***Extrinsic unconstitutionality grounds*** are related to Law no. 77/2016 itself and refer to the fact that this law has been adopted as an ordinary law instead of an organic law. The Court believed this reason is not grounded since Law no. 77/2016 refers to limited situations which do not entail the geeral regime of ownership. More precisely, the Court considered that Law no. 77/2016 refers to a manner of execution of certain obligations comprised in credit agreements in case of hardship. Even if one of the effects of Law no. 77/2016 is the transfer of ownership, this circumstance does not represent a regulatory framework for the general regime of ownership in Romania. În acest sens, a se vedea
2. In respect to arguments for the ***instrinsec unconstitutionality*** of Law no. 77/2016, the Court acknowledges that the critics refer to the lack of clarity and precision of the law, in the sense that it does not mention who shall bear the enforcement expenses and does not clearly specify what agreements are to be considered credit agreement, it does not specify whether the Civil Code is applicable for the return of the asset, it does not accomodate the purpose of the legal norm with its content. The Court rejected this type of arguments, since it deemed that they mostly refer to the interpretation and application of Law no. 77/2016 by the common court of law and their analysis exceeds the competences of the Constitutional Court.

5. The Constitutional Court's grounds regarding the arguments supporting the unconstitutionality of Law no. 77/2016

The Constitutionality Court begins its analysis from the purpose of Law no. 77/2016, as mentioned in its preamble, by referring to the intention of the legislator to promote equity by dividing the contractual risks between the creditor and the debtor, in the current social context after the economic crisis. As opposed to this new theory, in relation to contracts the principle pacta sunt servanda is the one governing the relationship between the parties, who are the ones who establish the extent of their obligations and must observe such extent.

3.1. The compatibility between the mandatory force of the agreement and the provisions of Law no. 77/2016, considered instrusive by the authors of the unconstitutionality exceptions

Therefore, the main issue the Court must clarify first and foremost is the compatibility of the principle pacta sunt servanda, which regulates the parties' autonomy of will with the provisions of Law no. 77/2016.

In order to proceed to this analysis, the Court establishes that the principle pacta sunt servanda reflects the mandatory force of an agreement, entered into by the parties through their true and autonomous will. Since the agreement is mandatory for the party, so is its execution. Therefore, if the parties intend to bring any changes to the initial obligations construed within their agreement, they must express their will in order to do so.

[7] For details, see Mihnea Săraru și Alina Ciocoiu – "Ce efecte mai poate produce "Legea darii in plata" ca urmare a Deciziei Curtii Constitutionale nr. 623 din 25 octombrie 2016?" – Article published on http://www.hotnews.ro/stiri-dosare_juridice_rezolvarea_disputelor-21391551-efecte-mai-poate-produce-legea-darii-plata-urmare-deciziei-curtii-constitutionale-623-din-25-octombrie-2016.htm.

However, in practice, there are certain situations which the parties cannot foresee at the initial moment of entering into the agreement and which can lead to a change in the parties' possibility to execute the undertaken obligations.

Based on this situation, the Court proceeded to analyse whether the provisions of Law no. 77/2016 accommodate or interfere with the parties' autonomous will.

3.2. The applicability of hardship

The Court recognizes the applicability of hardship under the Civil Code of 1864, as an expression of article 970, which stated that conventions were mandatory between the parties if concluded in good faith and their effects were limited not only to what the parties expressly mentioned but also to all the consequences attached to the obligation based on equity, habit or law. Some authors[8] have reached the conclusion that hardship may not be applied in relation to Law no. 77/2016.

The hardship represents an exeption from the mandatory force of the agreement, namely from pacta sunt servanda, and is stipulated in the New Romanian Civil Code under art. 1271. In recent doctrine[9], the hardship has been defined as the impossibility of the party/parties occurred at the moment of the conclusion of the agreement that a prejudice may happen due to the serious imbalance between the contractual performances during the execution of the agreement, usually produced as a consequence of economic changes.

The agreement itself comprises a risk assumed by the contracting parties and a supplementary risk, which the parties did not foresee and which exceeds their reasonable predictability. In such circumstances, the hardship covers the supplementary unforeseen risk, opening the way for the parties to adapt the agreement if its social utility is still justified.

It was pointed out in doctrine[10] that the hardship clause may be triggered not only in synallagmatic continuing agreements, but also in uno ictu agreements, insofar as the circumstance trigerring the contractual imbalance is generated after the agreement is concluded, but prior to the moment when the contractual obligations should have been executed.

3.3. Good faith and equity in the context of fundamental changes of the conditions in which the agreement is executed

The Court analysed the relevance of good faith and equity in the execution of an agreement, and deemed that the legitimacy of an agreement is maintained as long as it is the result of the existance of the two principles of mandatory force and execution in good faith, which are interdependantly connected. Therefore, equity and good faith provide a solid ground for invoking hardship. In the Court's opinion, by taking into consideration the element of good faith, the role of the common law judge is extended and therefore, the security of the relationships between the parties is not harmed, since the court's intervention is limited to the acknowledgement of the specific conditions of contractual hardship.

4. The Constitutional Court's conclusion

By corroborating the above with the legislator's intent to balance the contractual risks, the Constitutional Court deemed that through Law no. 77/2016 the legislator wanted to introduce the applicability of the hardship in credit agreements.

However, the Court pointed out that it is the common court of law's prerogative to verify whether the conditions of the hardship.

Within its analysis, the Court established that Law no. 77/2016 does not represent a case of retroactive application of legal dispositions, since the credit agreements have been concluded under the dispositions of the Civil Code of 1854, which allowed the use of hardship clauses and did not deem that hardships interferes with the principle of autonomy of will.

5. Applicability of Decision 623/2016 in the legal procedure of solving complaints conducted in the cases on the dockets of the courts

As previously mentioned, the new legal framework regulated by Law 77/2016 has been determined by the idea of fairness and sharing of contractual risks in the performance of loan agreements under those circumstances that occurred further to the economic crisis, when debtors were no longer able to perform their obligations undertaken in loan agreements.

However, this allowed debtors to suspend, based on a simple notice, according to Article 5 of Law No. 77/2016, the creditor’s right to have recourse against the debtor, the codebtors, as well as personal guarantors or mortgagors and, implicitly, to have its debts under loan agreements extinguished, along with their accessories, with no additional costs, by giving in payment the immovable asset mortgaged in favour of the creditor.

In all this unfavourable mechanism, creditors were forced to unwillingly become the owner of an immovable asset the market value of which is in most cases much below the value of the loan contracted by

[8] For details, see Marieta Avram – “Mai există darea în plată forțată după Decizia Curții Constituționale nr. 623/2016?” – Article published on - https://juridice.ro/essentials/760/mai-exista-darea-in-plata-fortata-dupa-decizia-curtii-constitutionale-nr-6232016.

[9] Liviu Stănciulescu, Dreptul contractelor civile. Doctrină și jurisprudență, Ed. Hamangiu, Ed. 3, 2017, p. 102.

[10] Gabriel Boroi, Liviu Stănciulescu, Instituții de drept civil în reglementarea Noului Cod Civil, Ed. Hamangiu, 2012, p. 151.

the debtor, which automatically resulted in the filing, pursuant to Article 7(1), of the challenge in court of the procedure regulated by this law.

Further to the filing of challenges with the courts of law, a series of cases are being tried, large part of which have been stayed until the issuance of Decision 623/2016.

Please note that the courts currently grant other motions concerning the plea of unconstitutionality of the provisions of Law 77/2016, which motions will lead to an analysis by the Constitutional Court of the constitutionality or non-constitutionality of the articles mentioned in such motions. It is highly probable that the Constitutional Court will dismiss such new motions in consideration of the fact that they made an analysis concerning the constitutionality by Decision 623/2016.

From the considerations of Decision No. 623/2016 it results that, from a procedural perspective, the court approached for solving a challenge to the notice for giving in payment will check in against Decision 623/2016 the cumulative fulfilment of the admissibility conditions: (i) the proof of completing the prior notification procedure, (ii) Fulfilment of the requirements under Article 4 of Law No. 77/2016 and (iii) Fulfilment of the hardship conditions, existence of a risk that none of the parties could reasonably foresee in the context of the application of Article 7, or Article 8 or Article 9 of the law.

Decision No. 623/2016 clearly provides that it is impossible to reduce the role of the court of law merely to checking the fulfilment of the requirements under Article 4(1) of Law 77/2016.

The court may grant the creditor's challenge either because one or another of the five admissibility conditions is not fulfilled, or because one or another of the substantial hardship conditions is not fulfilled.

In order to decide if the debtor was in a hardship situation, the court will review the situation in its entirety, in consideration of several criteria, mentioned in Decision 623/2016 of the Court:

1. the co-contractors' economic/legal capacity and expertise,
2. the value of the considerations determined by the agreement,
3. the risk already materialized and borne by the agreement and
4. the new economic conditions that alter the parties' will, as well as the social use of the loan agreement.

Therefore, the courts will check if the hardship conditions are fulfilled and will consequently order that the agreement should be adapted or terminated[11]. In this respect, there needs to be a distinction between two categories of substantial hardship conditions: the objective and subjective ones. All the objective and subjective hardship conditions must be fulfilled simultaneously.

Objective requirements are the exceptional cause that determine the alteration of the circumstances existing upon the execution of the agreement, resulting in the unbalance of the relation between the parties' considerations, so that the performance thereof would become excessively burdensome.

The subjective condition concerns the debtor's good faith, the debtor's conduct, if the latter is unable to pay for reasons unimputable to him or if, on the contrary, an ill-will refusal to pay is involved.

To conclude, challenges to notifications for giving in payment may be supported by the non-fulfilment of the hardship conditions since the fact that the agreement becomes more burdensome is practically circumscribed to an inherent risk of the loan agreement and in order for hardship to occur the situations that generated excessive burden had to be more drastic, as well as in consideration of the fact that, if, however, the court upholds the fulfilment thereof, the agreement must be adapted.

If it upholds that all the procedural and substantial hardship conditions are fulfilled, the judge may order either the adaptation, or the termination of the agreement, depending on the circumstances of each case.

The application of these two rulings is included in the grounds of Decision No. 623/2016: "Adaptation takes place when the social usefulness of the agreement may be maintained, while termination occurs when in case new conditions occur, the agreement loses its social usefulness. Consequently, the Court upholds that the parties are firstly under the obligation to renegotiate the agreement, and, secondly, the renegotiation should be effective in consideration of the new reality."

The termination, or, as applicable, the adaptation of the agreement, lie with the judge, who may rely on Directive 17/2014, the only legislative act that provides for a renegotiation of the agreement and a potential adaptation when the variation of the aggregate amount to be reimbursed increases from the amount that it would have reimbursed in consideration of the exchange rate applicable at the execution date of the agreement.

6. Conclusions

We believe that Decision 623/2016 of the Constitutional Court is a general one that sets forth the principle for application of Law 77, which means that it lies with the courts of law to continue the interpretation process started by the Constitutional Court, in order to analyse *in concreto* how the provisions of Law 77/2016 will be applied, in consideration of the hardship theory.

Relying on Decision 623/2016, the courts will apply a theory of hardship in connection to the other principles of the Civil Code of 1864, with balance and just measure, at the same time observing the giving in payment concept.

[11] For details, see Radu Rizoiu – "Paradoxul călătorului în timp a fost evitat… la timp: Condițiile (constituționale ale) dării în plată" – Article published on https://juridice.ro/essentials/722/paradoxul-calatorului-in-timp-a-fost-evitat-la-timp-conditiile-constitutionale-ale-darii-in-plata.

Decision 623/2016 of the Constitutional Court, however, has not fully clarified the problem resulting from the legal practice, it will also face the difficult issue of prescription of the right to request the ascertainment of the fulfilment of the hardship conditions and the application of the solutions for termination or adaptation of the loan agreement. Also, the correlation between the special procedure regulated by such law and the general law procedure gives rise to numerous issues. Such aspects will be clarified by the legal practice.

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THE SELLER'S OBLIGATION TO DELIVER THE GOODS ACCORDING TO CISG

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Abstract

This article aims to analyze the seller's obligations under the Convention on International Sale of Goods (CISG) and in particular the obligation to deliver the goods showing the main issues that arise in an international sale.
We also wish to point the major innovations or improvements brought by the CISG in comparison to the European civil codes regulation and to conclude if the CSIG managed to revolutionize the tradition view on this issue.

Keywords: *sales contract, obligation to deliver, seller, buyer, CSIG*

1. Introduction

According to the art. 1603 of the French Civil Code, the seller has two distinct obligations: that of *delivering* and that of *warranting* the thing which he sales [*... deux obligations principales, celle de délivrer et celle de garantir la chose qu'il vend*].

Delivery was defined by the art.1604 as the transferring the thing sold into "the power and possession of the purchaser" [*la délivrance est le transport de la chose vendue en la puissance et possession de l'acheteur*] meanwhile the warranty took into account "the peaceable possession of the thing sold" and the absence of defects [*la garantie que le vendeur doit à l'acquéreur a deux objets : le premier est la possession paisible de la chose vendue ; le second, les défauts cachés de cette chose ou les vices rédhibitoires*][1].

The definition and the key words of the Napoleonic Code were followed by some European civil codes of the XIXth century as the Spanish, Italian or the Romanian one (e.g. the art. 1461 of the *codigo civil* stated that "el vendedor *está obligado a la entrega y saneamiento* de la cosa objeto de la venta" while the art.1462 stated that "se entenderá entregada la cosa vendida cuando se ponga *en poder y posesión* del comprador").

An obvious difference seemed to be the regulation provided by the Austrian Civil Code of 1812 [*Allgemeines Bürgerliches Gesetzbuch* or ABGB].

These rules which are placed in different sections of the code retain more importance for the delivery – the material action determines the ownership transfer – but don't make a obvious distinction between the two purposes of the "warranty".

Therefore, according to the § 1047 "Tauschende sind vermöge des Vertrages verpflichtet, die vertauschten Sachen der Verabredung gemäß mit ihren Bestandteilen und mit allem Zugehör zu rechter Zeit, am gehörigen Ort und in eben dem Zustande, in welchem sie sich bei Schließung des Vertrages befunden haben, zum freien Besitze zu übergeben und zu übernehmen".

The article §922 states that "Wer einem anderen eine Sache gegen Entgelt überlässt, leistet Gewähr, dass sie dem Vertrag entspricht. Er haftet also dafür, dass die Sache die bedungenen oder gewöhnlich vorausgesetzten Eigenschaften hat, dass sie seiner Beschreibung, einer Probe oder einem Muster entspricht und dass sie der Natur des Geschäftes oder der getroffenen Verabredung gemäß verwendet werden kann" while §923 that "Wer also der Sache Eigenschaften beylegt, die sie nicht hat, und die ausdrücklich oder vermöge der Natur des Geschäftes stillschweigend bedungen worden sind; wer ungewöhnliche Mängel, oder Lasten derselben verschweigt; wer eine nicht mehr vorhandene, oder eine fremde Sache als die seinige veräußert; wer fälschlich vorgibt, daß die Sache zu einem bestimmten Gebrauche tauglich; oder daß sie auch von den gewöhnlichen Mängeln und Lasten frey sey; der hat, wenn das Widerspiel hervorkommt, dafür zu haften".

The new German Civil Code [*Bürgerliches Gesetzbuch* or *BGB*] retained also the importance of the *traditio* but did not consider the "warranty" as a typical obligation in the frame of § 433 (1) (Vertragstypische Pflichten beim Kaufvertrag): "Durch den Kaufvertrag wird der Verkäufer einer Sache verpflichtet, dem Käufer die Sache zu übergeben und das Eigentum an der Sache zu verschaffen. Der Verkäufer hat dem Käufer die Sache frei von Sach – und Rechtsmängeln zu verschaffen".

In the other way, beyond providing the general definition, the *codice civile* of 1942 states that "le obbligazioni principali del venditore sono:

1) quella di consegnare la cosa al compratore;

.....

3) quella di *garantire* il compratore dall'evizione e dai vizi della cosa (art. 1476)".

In other words, the obligation of "warranty" seemed to play a complementary role to the delivery, supposed to be fulfilled immediately after the conclusion of the contract as a general rule.

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[1] See art. 1625.

Obviously, the mechanism of the sale contract, as it was proposed by most European Civil Codes, was obsolete (or at least not proper) in regulating an international sales contract.

As we know, most of the international sales are referring to goods that will be acquired or produced by the seller.

Both cases suppose that the buyer is not able to consider or inspect the goods.

The absence of the goods when the parties are negotiating doesn't mean that the buyer has no control over the quality of the goods he wants to acquire. If the seller is the manufacturer the buyer can inspect the goods that are made in order to honor the previous requests or use a sample in order to set up the quality of the goods.

Thus, changing the traditional view which dealt the sale contract as an agreement concluded by the parties in the presence of the goods became a challenge for the authors of the CISG.

Therefore, this case, as a general rule, had to be change in accordance with the necessities of international trade.

2. The new regulation of CSIG

2.1. A new vision seems to emerge from the content of the articles 30 to 44 of CSIG.

First of all, article 30 outlines the seller's major duties: The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

On one hand, it must be mentioned that the sale agreement has priority in relation with the regulation of the CSIG. That's why the provisions of the convention will have only a supplementary task, to offer rules when the parties forgot to provide and to help to solve problems[2].

On the other hand, as we can see, this article seems to impose more duties to the seller as the Napoleonic Code does[3].

Of course, the seller's primary obligation is to deliver the goods[4] but additionally he must deliver also any kind of documents needed by the commercial partners.

For example, if the parties concluded a sale on CIF Incoterms 2000, the seller has to deliver to the buyer an insurance policy or other evidence of insurance cover[5], the usual transport document[6] and obviously an invoice[7].

All these documents are usually necessary in order to make the payments by documentary credits.

If the seller doesn't hand over the above mentioned documents the buyer cannot fulfill his obligation to pay the goods.

In fact, the CSIG expressly states that the seller can consider the tender of these documents as a condition of obtaining payment when it provides that the seller may make such payment a condition for handing over the goods or documents[8].

Therefore, as the records prove, the article 30 of CSIG considers the handing over the documents as a secondary obligation of the seller[9].

More, to these two obligations it must be added the last duty stated by the above mentioned articles: transferring the property in the goods, as required by the contract and CSIG.

This obligation constitutes a major advance in regulating the sale contract.

The rules for the transfer of the ownership greatly differ from country to country; in many states the property in specific goods is transferred at the moment of the conclusion of the contract but there are also domestic laws that state the transfer at the moment of the delivery.

Even the CSIG regulation is not concerned with the effect which the contract may have on the property in the goods sold[10] but at least it recognize that sale contract supposes also the transferring the property not only the possession of the good, and more it placed that distinct obligation obviously on the seller.

Of course, having no international regulation regarding the way that the property will be transferred every case will be regulated by the law applicable pursuant the private international law of the forum[11].

2.2. According to the article 33 of CSIG, because the contractual arrangements have priority, the seller must deliver the goods on the specific date if a date is fixed by or determinable from the contract.

If the parties agreed a period of time in order to deliver the goods and that period is fixed by or determinable from the contract, the seller will have to deliver at any time within that period unless circumstances indicate that the buyer is to choose a date.

When the parties have not established the time to deliver the seller will have to deliver within a reasonable time after the conclusion of the contract.

[2] Enderlein and Maskow, 127; Honnold, 48.
[3] See again art.1603.
[4] *Secretariat Commmentary*, Art. 29 para 1. See Schlechtriem and Butler, 106
[5] See clause A 3 (b). See also Huber and Mullis, 126.
[6] See clause A 8.
[7] See clause A 1.
[8] Art. 58 para 1. See also Huber and Mullis, 126.
[9] *Secretariat Commmentary*, Art. 32 para 34.
[10] Art. 4 lit. b).
[11] See Huber and Mullis, 129.

This rule will be taken into account and will be applied even when the parties have agreed to deliver the goods as soon as possible[12].

2.3. Regarding the place of delivery, the main rules are contained in the article 31 of CSIG[13].

It is important to know where is the place of delivery not only to check if the seller has fulfilled his obligation but also to know where and when the risk is transferred to the buyer because article 67 of CSIG states that if the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place.

On the other hand, if the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale.

Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

We must mention that there is an essential difference between the place of delivery, which is the place where the duty of the seller finally ends and the place of destination where the goods are transported to.

In fact, the place of destination is a concept which will be used in relation with the examination of the goods.

According to the article 38 par. 1 of CSIG the buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

When the sales contract involves carriage of goods, examination may be deferred until after the goods have arrived at their destination.

If the goods are redirected in transit or redispatched by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispatch, examination may be deferred until after the goods have arrived at the new direction.

On the other hand, article 31 of CSIG states that if the seller is not bound to deliver the goods at any other particular place there are three options available in order to fulfill his obligation.

Of course, the parties can agree on the place of delivery and often they do by referring to customary delivery clauses as Incoterms (the 2000 or 2010 version).

All these terms determines the place of delivery which can be at the seller's factory (Ex works), in a named port of shipment (FOB), in a named port of destination (CIF, DES, DEQ), or in a named point of destination, often in the buyer's country.

As we mention above, if there is no place agreed by the parties, the seller's obligation to deliver consists mainly in handing the goods over to the first carrier for transmission to the buyer if the contract involves carriage of goods.

Being characteristic for an international sale this case has become the first hypothesis to take into account.

Of course, as an exception, if the contract relates to specific goods or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew where the goods were at, or were to be manufactured or produced at a particular place, the seller's obligation to deliver fulfills by placing the goods at the buyer's disposal at that place.

In any other cases, the seller will place the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

2.4. As we know in international trade the buyer is not able often to consider or inspect the goods.

What will happen if the seller placed goods that failed to conform to the requirements of the agreement?

Shall we consider that the seller have not fulfilled the obligation to hand over the goods?

It seems that the regulation of the CSIG was not influenced by the distinction acknowledged in several national laws between delivery of goods of different kind or aliud pro alio and defects or lack of qualities.

In fact, as one commentator emphasizes the supplier has delivered the goods if he has handed over or placed at the purchaser's disposal goods which meet the general description of the contract even those goods do not conform in respect of quantity or quality[14].

In jurisprudence, one court concluded that the delivery of goods different than the ones agreed upon (i.e. unprepared instead of prepared planks) is not a case of non-performance (non delivery) but has to be considered as a lack of conformity[15].

2.5. Finally, article 35 par. 1 of CSIG describes the seller's liability as having to conform with the contract: The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

But if the parties haven't agreed on a way to establish the quality how can we know if there is breach of contract in the case of aliud pro alio or when the buyer pretends that there are lack of qualities?

In this specific case, the regulation of the CSIG seems to be another major improvement.

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[12] Enderlein and Maskow, 137.
[13] See Schlechtriem and Butler, 108.
[14] Bianca, Conformity of the Goods and Third Party Claims, *Commentary on the International Sales Law*, 269.
[15] Oberster Gerichtshof (Austria), 29.06.1999, http://www.unilex.info/case.cfm?id=419.

The second paragraph of the article 35 contains four determinative standards to be used when the parties have not agreed otherwise.

According to the first one, the goods are conform to the contract if they are fit for the purposes for which goods of the same description would ordinarily be used.

If that rule cannot be applied the seller must deliver goods which are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement.

According to the third criterion the goods are conform to the contract if they possess the qualities of goods which the seller has held out to the buyer as a sample or model.

Finally, according to the last criterion the goods must be contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

Of course, similarly to many European civil codes regulation we must retain that the seller will not be liable under the second paragraph of the article 35 for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

As we can see, there is no mention of any kind of warranty as a complementary obligation to duty to deliver the goods.

Notwithstanding, that does not mean, in our opinion, that the CSIG regulate the obligation of delivery as an unique obligation, that of deliver goods which are conform with the contract.

On the contrary, article 35 par. 1 of CSIG seems to be the legal ground for the potential buyer's allegations if there is a breach of contract[16] while the article 30 will be the ground only when the seller have failed to deliver the goods to the buyer[17].

3.Conclusions

The Convention on International Sale of Goods has replaced successfully the regulation of the civil or commercial continental codes.

The uniform rules provided by the Convention are more adequate to the international commercial relations as compared to domestic laws.

They are more flexible and regulate more specific cases as civil continental codes generally do.

Notwithstanding, the Convention has failed in regulating the delivery of the goods which conform to the contract as an unique obligation of the seller.

Therefore, if the delivered goods do not conform to the contract and that hypothesis constitutes a fundamental breach, **the legal basis for the buyer's allegations will be the article 35 par. 1 CSIG and not the article 30**.

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[16] See Audiencia Provincial de Palencia (Spain), 26.09.2005, http://www.unilex.info/case.cfm?id=1109.
[17] See Bundesgericht (Switzerland), 17.12.2009, http://www.unilex.info/case.cfm?id=1578.

THE FUTURE OF HUMAN RIGHTS TOWARDS A WORLD COURT OF HUMAN RIGHTS: REASONS FOR THE ESTABLISHMENT

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Abstract

The founding of the United Nations in 1945, with the promotion of universal observance of human rights as a principle objective under its Charter, launched an era of international human rights institution-building and standard-setting. Despite the existence of a considerable number of human rights treaties elaborated on the international and regional level, one of the main challenges is the large implementation gap between the "high aspirations and the sobering realities on the ground". On the one hand, many national systems do not provide access to effective domestic protection systems for human rights; on the other hand, the UN system still lacks an effective judicial mechanism responsible for the implementation of these rights. Even where States have given their consent to be bound by a human rights treaty, there are failures in compliance. Non-enforcement is a major failure of the United Nations human rights treaty system. However, the promise of universal human rights protection is not likely to be fulfilled unless and until victims of human rights violations are able to have access to effective remedies at both the national and international levels.

The World Court of Human Rights should be a permanent court established by a multilateral treaty under the auspices of the United Nations. The Court would exercise jurisdiction not only in respect of States but also in respect of a wide range of other actors, jointly referred to as 'Entities' in the Draft Statute. They would include intergovernmental organizations, transnational corporations, and other non-state actors.

The article will try to answer three questions. First, whether a World Court for Human Rights would be desirable. Second, whether there is a need for such a court and third, whether there is a reasonable chance of actually realizing the plan, taking into account the most important challenges of the 21st century.

Keywords: *human rights, human rights treaties, judicial mechanism, effective remedies, world court of human rights.*

Introduction

Traditional international law was defined as the law governing relations between nation-states exclusively. This meant that only states were subjects of and had legal rights under international law[1]. The traditional definition was expanded somewhat after World War I to include various newly-created intergovernmental organizations which acknowledged to have some very limited rights under international law as well as the protection of human rights became an issue of concern to the international community[2]. Individual human beings were not deemed to have international legal rights as such; they were said to be objects rather than subjects of international law.

The horrors perpetrated during the Second World War motivated the international community to ensure that such atrocities would never be repeated and provided the impetus for the modern movement to establish an international system of binding human rights protection. Consequently, the international human rights as an idea that every nation has an obligation under international law to respect the human rights of its citizens, and that other nations and the international community have a right, and responsibility, under international law to protest and take other appropriate action as permitted by international law if States do not comply with their obligations in this respect is new, emerging for the most part only since 1945 and the establishment of the United Nations. Thus, the international human rights law consists of a body of international rules, procedures and institutions developed to implement this concept and to promote respect for human rights in all countries on a worldwide basis[3].

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[1] The fundamental principle underlying the 'law of the nations' is that of sovereignty. According to that principle, a sovereign state has complete freedom to deal with its own nations and territory as it wishes. That meant that, in general, international law imposed obligations, accorded rights, and provided remedies only to states not to individuals. There were exceptions to this rule of non-intervention. See Thomas Buergental, *International Human Rights* (1994), 2-3. See also Harsch Lauterpacht, *International Law and Human Rights* (1950); Theodor Meron, *Human Rights in International Law* (1984); James Nickel, *Making Sense of Human Rights* (1987); Jack Donnelly, *Universal Human Rights in Theory and Practice* (1989); Louis Henkin, *Age of Rights* (1990).

[2] Under the League of Nations, established at the end of the First World War, attempts were made to develop an international legal framework, along with international monitoring mechanisms, to protect minorities.

[3] One of the initial questions is what is meant by human rights. There are many theories and definitions about the meaning of term 'human rights', which could be divided mainly into two groups. According to the first, that human rights are those rights to which human beings are entitled to and which they can claim against state authority simply because they are human, and second, is that human rights are those social and political guarantees necessary to protect individuals from the standard threats to human dignity posed by the modern state and modern markets. See Theodor Meron, Human Rights in International Law, (Vol.1, 1984), 75-100; John Austin, The Province of Jurisprudence Determined and the Uses of Jurisprudence (1954); Isaiah Berlin, Two Concepts of Liberty (1958); and Freaderick Engels, The origin of the Family, Private Property and the State (1972). From my point of view independently of the above mentioned opinion of the meaning of what

The Universal Declaration of Human Rights (UDHR), adopted in 1948, elaborated upon and systematized for the first time the idea of 'human rights' derived from the United Nations (UN) Charter. The UDHR enumerated a variety of civil, political, economic, social and cultural rights[4], that were subsequently separated and incorporated into two binding treaties – the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[5]. The UDHR and the two Covenants together form the minimum standard of international human rights protection, known as the International Bill of Rights. Several other international human rights conventions followed[6], which focused on more specific thematic concerns (such as racial discrimination) or on the protection of vulnerable groups (such as women, children, migrant workers, or disabled persons), and which substantively complement and expand upon particular rights guaranteed in the International Bill of Rights[7].

The primary aims of the treaty system are to:

- encourage a culture of human rights;
- focus the human rights system on standards and obligations;
- engage all states in the treaty system ;
- interpret the treaties through reporting and communications;
- identify benchmarks through general comments and recommendations;
- provide an accurate, pragmatic, quality end product in the form of concluding observations for each state;
- provide a remedial forum for individual complaints;
- encourage a serious national process of review and reform through partnerships at the national level; and
- mainstream human rights in the UN system and mobilize the UN community to assist with implementation and the dissemination of the message of rights and obligations.

The nine treaties are associated with nine treaty bodies which have the task of monitoring the implementation of treaty obligations[8].

Each State party has an obligation to take steps to ensure that everyone in the State can enjoy the rights set out in the treaty. The treaty body helps them to do this by monitoring implementation and recommending further action[9]. Although each treaty is a separate legal instrument, which States may or may not choose to accept. The extent to which the treaties and the treaty bodies can function together as a system depends on two factors: first, States need to accept all the core international human rights treaties systematically and put their provisions into operation (universal and effective ratification); and, second, the treaty bodies need to coordinate their activities so as to present a

human rights mean, I completely agree with I. Brownlie's opinion that 'Human rights have always existed alongside with human beings. They existed independently from, and before, the State. Alien and even stateless persons must not be deprived of them. Belonging to diverse kinds of communities and societies-ranging from family, club, corporation, to State and international community, the human rights of man must be protected everywhere in this social hierarchy, just as copyright is protected domestically and internationally'. He added: 'A State or States are not capable of creating human rights by law or by convention; they can only confirm their existence and give them protection. The role of the State is no more then declaratory. It is exactly the some as the International Court of Justice'. See Ian Brownlie, Basic Documents on Human Rights (1992), 580-81.

[4] One of the most important clauses of the UN Declaration of Human Rights concerning human rights, maybe of key importance which provide a foundation for, an impetus to further improvement in the protection of human rights is Article 55, which states that 'the United Nations shall promote: a) higher standards of living, full employment, and conditions of economic and social progress and development... c) universal respect for, and observance of, human rights and fundamental freedoms for all... 'Article 56 provides: 'All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55. See A Compilation of International Instruments, Vol. I , United Nations 1994; and Elena Andreevska, *The National Minorities in the Balkans Under the UN and European System of Protection of Human and Minorities Rights* (1998), 1-18.

[5] See UN General Assembly resolution 2200A (XXI) of 16 December 1966.

[6] the Convention on the Elimination of all forms of Racial Discrimination (CERD), UN General Assembly resolution 2106 (XX) of 21 December 1965; the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), UN General assembly resolution 34/180 of 18 December 1979; the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), UN General Assembly resolution 39/46 of 10 December 1984; the Convention on the Rights of the Child (CRC), UN General Assembly resolution 44/25 of 20 November 1989; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), UN General Assembly resolution 45/158 of 18 December 1990; Convention on the Rights of Persons with Disabilities (CRPD), UN General Assembly resolution 56/158 of 19 December 2001;and the International Convention for the Protection of all Persons from Enforced Disappearance (CED), UN General Assembly resolution 47/133 of 18 December 1992.

[7] The treaty body system of the United Nations Is a product of the Cold War, which only allowed for the lowest common denominator between the East, West and South. Western countries had introduced a strong division between civil and political rights on the one hand, and economic, social and cultural rights on the other, and permitted a complaint system only with respect to the former category.

[8] These are: the Committee on the Elimination of Racial Discrimination (CERD); the Human Rights Committee (HRC);the Committee on Economic, Social and Cultural Rights (CESCR); the Committee on the Elimination of Discrimination Against Women (CEDAW); the Committee Against Torture (CAT); the Committee on the Rights of the Child (CRC); the Committee on Migrant Workers (CMW); the Committee on the Rights of Persons with Disabilities (CRPD); and the Committee on Enforced Disappearance (CED). In addition, there is the CAT Subcommittee on the Prevention of Torture (SPT), which is mandated to carry out state visits under the Optional Protocol to the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment. Prior to 2008, CEDAW met in New York and was serviced by the UN Division for the Advancement of Women. The treaty bodies are composed of members who are elected by the states parties to each treaty (or through the UN Economic and Social Council (ECOSOC) in the case of CESCR). In principle, treaty members are elected as experts who are to perform their functions in an independent capacity.

[9] It should be noted that the Committee on Economic, Social and Cultural Rights is not technically a treaty body, since it was not established directly under the terms of the Covenant but was created by Economic and Social Council resolution 1985/17.

consistent and systematic approach to monitoring the implementation of human rights at the national level[10].

The practice of individual and inter-State communications before the UN treaty bodies is indeed not very encouraging. Despite the fact that Article11of the CERD[11] even provides for a mandatory inter-State communication procedure which had entered into force already in1970, not one of the169 States Parties to CERD has so far availed itself of this opportunity *vis a' vis* any of the other States Parties where systematic racial discrimination and ethnic cleansing had even led to genocide. The same holds true for the optional inter-State communications procedures under the CCPR[12] and the CAT[13]. While the full-time European Court of Human Rights presently decides by a binding judgment on some1000 individual complaints per year (in relation to 46 States Parties to the ECHR, all UN treaty bodies competent to deal with individual communications together have handed down only little more than 500 non-binding decisions on the merits ('final views') within almost 30 years in relation to more than 100 States Parties![14] Although the Human Rights Committee has done its utmost to interpret its powers under the first Optional Protocol to the CCPR1966[15] in a broad manner and renders highly professional quasi-judicial decisions on the merits, this procedure seems to be very little known in the world, and/or the billions of human beings in all regions of the world entitled to lodge complaints with the UN treaty bodies have little confidence in this procedure. The Petitions Team in the Office of the UN High Commissioner for Human Rights in Geneva is a small and grossly understaffed unit which cannot be compared to the Registry of the European Court of Human Rights in Strasbourg. No political body in the United Nations feels responsibility to supervise the implementation of the treaty bodies' decisions by States Parties which has led to the absurd situation that the treaty bodies themselves have developed their own follow-up procedures. No wonder that many States Parties simply ignore the decision of treaty bodies, and even Western State increasingly argue that they are not bound by the decisions of the Human Rights Committee[16].

There is no doubt that non-enforcement is a major failure of the United Nations human rights treaty system. The treaty bodies themselves are usually left with the task of overseeing the implementation of their own findings[17]. This situation is in stark contrast with the unconditional binding force of judicial decisions in national jurisdictions, or with the role of intergovernmental organs in the non-selective supervision of the implementation of rulings by regional human rights courts, such as the European Court of Human Rights within the Council of Europe framework.

The establishment of the Human Rights Council seems to be the right moment to start seriously thinking about the creation of a World Court of Human Rights (hereinafter referred to as WCHR) as its independent counter-part[18] Similar to the International Criminal Court, the Court would be based on a new treaty, the Statute of the WCHR[19]. There is no doubt, the establishment of a WCHR, is a response to many of the most important challenges of the 21st century.

1. Establishment of the WCHR: Jurisdiction, Admissibility and Applicable Law

After the end of the Cold War, some of the institutional visions of the 1940s[20] have been taken up.

[10] In contrast to the UN, the Council of Europe and the Organization of American States had already during the Cold War established fully independent human rights courts with the power to render final and binding judgments on both individual and inter-State complaints (the European Court of Human Rights was established in 1959 pursuant to Section IV, European Convention of Human Rights , and the Inter-American Court of Human Rights was established in 1979 by the American Convention on Human Rights). See 1969(ACHR), OAS No. 36. In addition, the Organization of African Unity (now the African Union) decided in 1998 to established an African Court on Human and Peoples' Rights). See 1998, 6 IHRR 891 (1999). In other words, all three world regions where a regional organization for the protection of human rights exists decided to entrust the decision on human rights complaints to a regional human rights court. Only the Asian region lacks a human rights court, but this has to do with general lack of a regional organization and human rights system.

[11] UN Doc. 660 UNTS196.

[12] UN Doc. 999 UNTS 171.

[13] UN Doc. 1465 UNTS85.

[14] Manfred Nowak, Introduction to the International Human Rights Regime (2003) 100.

[15] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147,16 December 2005, A/RES/60/147;13 IHRR 907 (2006).

[16] See the cases of Perterer v Austria (1015/01), CCPR/C/81/D/1015/2001 (2004), as to which see E.U. Network of Independent Experts on Fundamental Rights, Report on the Situation of Fundamental Rights in Austria in 2004, submitted to the Network by Manfred Nowak and Alexander Lubich, 3 January 2005, CDR-CDF/AT/2004, available at: http://cridho.cpdr.ucl.ac.be, at 82^4; and Derksen and Bakker v the Netherlands (976/01), CCPR/C/80/D/976/ 2001 (2004), as to which see Nowak,'Diskriminatie van buiten echt geboren wezen onder de anw Nederland botst metVN-Mensenrechtencomite', (2005) 30 NJCM Bulletin186 (text in English) 186.

[17] Philip Alston, Effective functioning of bodies established pursuant to United Nations Human Rights Instruments, Final report on enhancing the long-term effectiveness of the United Nations human rights treaty system, UN Doc. E/CN.4/1997/74.

[18] General Assembly resolution 60/251,15 March 2006, A/RES/60/251. This resolution was adopted by a vote of170 in favour, four against (Israel, Marshall Islands, Palau and United States), with three abstentions (Belarus, Iran and Venezuela). See also Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body, HRI/MC/2006/2,22 March 2006, and UN Doc. 993 UNTS 3.

[19] See Manfred Nowak, "The Need for a World Court of Human Rights", Law Review, 7.1. Oxford University Press (2007): 251-255.

[20] When the Working Group on Implementation of the UN Commission on Human Rights in 1947 recommended the establishment of an International Court of Human Rights as "final guarantor of human rights" with the power "to give judgments against violators of human rights", it left open whether the proposed court should give "judgment only against States, or whether employers or other individuals might be adjudged violators of human rights". See UN Doc E/600, p. 58.

Already during the Vienna World Conference on Human Rights in 1993[21], the establishment of the Office of a UN High Commissioner for Human Rights[22] has been agreed upon and the first High Commissioner took up his post in Geneva in April 1994[23]. At about the same time, the UN Security Council had established two ad hoc criminal tribunals for the former Yugoslavia[24] and Rwanda[25] which in 1998 led to the adoption of the Rome Stature for an International Criminal Court (ICC)[26]. Despite the massive resistance of the United States, the Rome Statute entered into force in 2002 and the Court started to function one year later in The Hague[27].

A number of human rights proponents continued to argue that international human rights standards required an international mechanism for effective enforcement and implementation. The first question, then, is whether it would be a good thing to have a world court for human rights. The answer tends to be an affirmative one, at least if the person who answers is someone who believes in human rights, the supremacy of law, and the possibility of conflict-solving through the judicial process[28].

The International Commission of Jurists (ICJ) made the establishment of a WCHR one of its central advocacy objectives at the First World Conference on Human Rights held in Tehran in 1968[29], a global event at which the question was addressed. During the lead-up to the Tehran Conference, ICJ Secretary-General and future Nobel Peace Prize winner Sean MacBride[30] addressed the question in numerous public speeches, seminars and conferences, including at the UNESCO International NGO Conference on Human Rights in Paris in September of 1968[31]. In his public advocacy, Sean Macbride insisted that while the elaboration of binding treaties was critical, the treaties must be subject to judicial enforcement in order to represent an effective contribution to international justice[32].

There is no doubt that we live in a geocentric world of nation-states, preoccupied mainly by "national" problems of the economy, society and politics. No matter where we live, for most of us the "nation" is the center of our political universe – the immovable point around which revolve other nations and, supposedly, the rest of the world. Our attachment to our nation is not merely legal; it is profoundly emotional. In the usual "international" context, the individual is nowhere to be found[33].

For a higher authority to come into being, therefore, a new compact is needed, a global civic contract that transcends the national paradigm. The good news is that such a contract already exists, both naturally and legally[34].

The WCHR, for example, was established in France by a General assembly of World Citizen in 1972.35 A provisional statute for the court was subsequently drafted, and still later the World Judicial

[21] See Vienna Declaration and Program of Action, adopted by the World Conference of Human Rights, in Vienna on 25 June 1993, available at http://www.ohchr.org/Documents/ProfessionalInterest/vienna.pdf.

[22] Ibid, p. 11, para. 16.

[23] UN General Assembly resolution 48/141 of 20 December 1993.

[24] See UN Security Council resolutions 808 (1993); 713 (1991); 827 (1993); and 1166 (1998).

[25] See UN Security Council resolution 10141 (2010).

[26] On the basis of the deliberations recorded in the records of the Conference (A/CONF.183/SR.1 to SR.9) and of the Committee of the Whole (A/CONF.183/C.1/SR.1 to SR.42) and the reports of the Committee of the Whole (A/CONF.183/8) and of the Drafting Committee (A/CONF.183/C.1/L.64, L.65/Rev.1, L.66 and Add.1, L.67/Rev.1, L.68/Rev.2, L.82-L.88 and 91), the Conference drew up the Rome Statute of the International Criminal Court. See also U.N. Doc. A/CONF.183/10.

[27] Until today, the Rome Statute has been ratified by 108 States from all regions of the world.

[28] On the other hand, many governments might not regard a world court for human rights as desirable at all. Time has, therefore, come for a new initiative to reform the human rights system of the United Nations. See the 2005 World Summit Outcome, UN Doc. A/Res/60/1 of 24 October 2005.

[29] UN Conference on Human Rights, Tehran, April 22 to May 13, 1968, Proclamation of Tehran. 63 Am. J. Int'l L. 674 1969. Para. 4

[30] Sean MacBride was a renowned international politician and human rights defender. To list a few of his accomplishments, he was the Minister for External Affairs in Ireland from 1948-1951, Vice-President of the OECD (then called the OEEC) from 1948-1951, President of the Committee of Ministers of the Council of Europe in 1950, Secretary-General to the ICJ from 1963-1971, a founding member and Chairman of Amnesty International from 1961-1975, and recipient of the Nobel Peace Prize in 1974, the Lenin Peace Prize in 1975-1976, and the UNESCO Silver Medal for Service in 1980

[31] See 1968 International Year for Human Rights, The UNESCO COURIER Journal 1968 (21st year), pp. 27-29, available at http://unesdoc.unesco.org/images/0007/000782/078234eo.pdf. See also, Records of the General Conference Fifteenth Session, Paris 1968, available at http://unesdoc.unesco.org/images/0011/001140/114047E.pdf.

[32] MacBride, Sean. "The Strengthening of International Machinery for the Protection of Human Rights", Nobel Symposium VII: The International Protection of Human Rights. Oslo (1967): 16- 17

[33]The accumulated power of nation-states does not make them the only legitimate participants in global decision-making. In a world threatened by war and injustice, "responsible citizenship" can only mean a powerful assertion of humanity's ultimate sovereignty. As Thomas Paine explained it, "individual human beings, each in his or her own personal and sovereign right, enter into a compact with each other to produce any government." Available at muckraker-gg.blogspot.com/2015/12/the-emergence-of-world-citizenship.html.

[34] The World Government of World Citizens, which was established in 1953, is both an extension of the individual and an expression of humanity as a whole. It grows from your sovereignty and mine as world citizens, and from our commitment to each other's protection and survival. It is a horizontal network based on natural rights and the human rights affirmed by both national constitutions and international agreements like the Universal Declaration of Human Rights. It is also "vertical" as the political expression of a world community by those who recognize only the geographic limits of the planet itself. See Greg Guma, A Global Contract: The Case for World Citizenship, Global Research, January 02, 2014Maverick Media, available at http://www.globalresearch.ca/a-global-contract-the-case-for -world-citizenship/5363382.

[35] The World Government of World Citizens is the political representation of the sovereign citizen of the world dynamically , intrinsically allied with sovereign humanity, to provide a global political service institution for the installation and maintenance of the world peace. It has been founded on September 4, 1953. See The Ellsworth Declaration available at http://www.worldservice.org/ells.html.

Commission was set up to handle preliminary complaints filed by world citizens[36].

In December 2008, the drive for a WCHR gained renewed momentum when the Foreign Minister of Switzerland, Micheline Calmy-Rey, declared it as one of eight projects constituting a new Swiss Agenda for Human Rights, which was launched in commemoration of the 60th anniversary of the Universal Declaration of Human Rights (UDHR). The Swiss Federal Department of Foreign Affairs established a Panel of Eminent Persons, co-chaired by Mary Robinson and Paulo Sérgio Pinheiro, to implement the new Agenda[37]. The experts combined their efforts to produce a consolidated draft proposed statute, which was published in 2010[38].

The WCHR Project is a collaborative effort of judges, lawyers, academics, practitioners, and nonprofit groups dedicated to the theory and practice of court-based protections of human rights. The goal of the project is to design a court that implements, affirms, and promotes unequivocal respect for human rights globally. The Court also would provide areas of human rights protection that are currently underserved by existing public law structures, such as the International Court of Justice (ICJ) and the International Criminal Court (ICC), and existing regional courts of human rights. The Design Team represents major legal systems around the world and provides a balance of gender, race, ethnicity, and culture. Over the past several years, Chief Justices of the World, lawyers, academics, and practitioners have worked together to clarify the need for the court, draft its Statute, and identify its guiding bodies of law. The Statute was presented at the plenary session of the 15th annual World Judiciary Summit, in Lucknow India, in December 2014. A draft copy of the Statute can also be found on the WCHR' website:[39]

The WCHR is an international treaty, the WCHR shall nevertheless become a permanent institution that brought into relationship with the United Nations. The WCHR shall have the power to decide in a final and binding manner on all complaints about alleged human rights violations; its judgments shall be enforced by domestic law enforcement bodies. An important principle modelled after the ICC statute is the complimentary nature of the WCHR's jurisdiction in relation to the jurisdiction of national human rights courts. The WCHR shall be brought in relationship with the United Nations by way of an agreement; its expenses shall be borne by the regular budget of the United Nations rather than by contributions of States Parties. The statute proposes The Hague as the seat of the WCHR, since centralizing international courts in one place will contribute to their exchange of ideas and cooperation[40].

A WCHR would be designed first and foremost to provide access to justice and effective redress to victims of human rights violations throughout the world. Individuals alleging violations would have recourse to an international judicial mechanism, composed of independent and impartial judges of the highest standard of competence, to bring complaints against States that are parties to the WCHR's Statute.

While victims of human rights violations seeking a remedy would, in the first instance, be expected to make use of their own States' national procedures and mechanisms, the WCHR would be available to them where the national mechanisms are unavailable, ineffective, or have failed to deliver justice.

The precise jurisdictional scope and structure of the WCHR will ultimately have to be negotiated by States. However, certain identifiable features will be essential for a credible and effective judicial mechanism. The WCHR would be a permanent standing institution established through a multilateral treaty under the auspices of the United Nations. It would be composed of highly qualified and independent fulltime judges elected by the States parties. It would have the power to take final and legally binding decisions on applications of alleged human rights violations committed by States parties, in breach of their international human rights obligations[41].

The WCHR shall be established by the Member Nation States, and the Member National Judiciaries, through their accession to the Treaty of Lucknow, as follows[42].

The Statute of a WCHR would be unlikely to contain any fresh enumeration of substantive human rights standards. Rather, the WCHR would assume jurisdiction for rights contained in the existing

[36] World citizens, whose exercise of human rights can contravene "national laws," need a new kind of court, one both grounded on the legal defense of global rights and accessible to all. As the first Chief Justice of the World Court, Dr. Luis Kutner explained upon accepting the post, "The international community has come to realize that human rights are not an issue to be left solely to the national jurisdiction of individual states. These rights obviously need protection at a higher level within the framework of international law."Written with Garry Davis for Passport to Freedom: Guide for World Citizens, available at http://muckraker-gg.blogspot.mk/2015/12/the-emergence-of-world-citizenship.html.

[37] The Geneva Academy of International Humanitarian Law and Human Rights Law (Geneva Academy) also is involved in such efforts, being responsible for organizing and coordinating the initiative. See also http://www.udhr60.ch/research.html.

[38] Julia Kozma, Manfred Nowak and Martin Scheinin, A World Court of Human Rights - Consolidated Statute and Commentary (2010).

[39] Available at www.worldcourtofhumanrights.net/wchr-statute-current-draft.

[40] The composition of the Court and the election of the judges are regulated. Judges shall be nominated by States Parties; different than with respect to the UN Treaty Bodies, where a pluralistic composition is advantageous, it is necessary that all judges of the Court are jurists and are working on a fulltime professional basis.

[41] Towards the World Court of Human Rights: Question and Answers, Support paper to the 2011 Report of the Panel on Human Dignity, International Commission of Justice, p. 6. The 15th annual meeting, in Lucknow, Indija, held December 12-16, 2014, at the conclusion of the Conference, the World Chief Justices issued a unanimous Resolution which provide that, "The Heads of States/Government of all countries be urged . . . to hold a high level meeting to deliberate on the measures required for creating . . . a World Court of Human Rights. . ." The full text of the Chief Justices' Resolution can be found at the following link: http://www.cmseducation.org/article51/resolutions.htm.

[42] Statute of the WCHR (The Treaty of Lucknow), Article 1 A. See also Article 1 B,C,D,E,F.G.

universal human rights treaties[43], including the International Covenant on Civil and Political Rights and its Second Optional Protocol; the International Covenant on Economic, Social and Cultural Rights; Slavery Convention; Protocol Amending the Slavery Convention; Convention on the Prevention and Punishment of the Crime of Genocide; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child and its First and Second Optional Protocols; the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; the Convention on the Rights of Persons with Disabilities; and the International Convention for the Protection of All Persons from Enforced Disappearance[44].

2. Organization of the Court and Obligations of States Parties and of Non-State Actors

The Statute of the WCHR will be an international treaty[45]. The WCHR shall nevertheless become a permanent institution that brought into relationship with the United Nations[46]. The ratification of or accession to this Statute by a State shall be treated by the Secretary- General of the United Nations[47]. The WCHR shall have the power to decide in a final and binding manner on all complaints about alleged human rights violations; its judgments shall be enforced by domestic law enforcement bodies[48]. An important principle modelled after the ICC statute is the complimentary nature of the WCHR's jurisdiction in relation to the jurisdiction of national human rights courts[49].

The WCHR shall be composed of a body of 21 independent Justices[50], nationals of the States Parties to the Statute, elected in the individual capacity. All judges shell serve as a full –time members of the Court[51]. The WCHR shall be composed of the following organs: Plenary Court[52]; Chambers and Committees[53]; Presidency[54]; and Registry[55].

Besides the States and jointly called 'Entities' in the Draft Statute, could accept the jurisdiction of the WCHR. The term 'Entity' refers to any inter-governmental organization or non-State actor, including any business corporation, which has recognized the jurisdiction of the WCHR in accordance with Article 51[56]. This would constitute a welcome opportunity to solve the difficult problem of holding at least some types of non-State actors accountable in relation to international human rights law. One may think, first of all, of inter-governmental organizations, such as the United Nations and its specialized agencies; the European Union; the World Bank and other financial institutions, the World Trade Organization; and the North Atlantic Treaty Organization (NATO).57 Similarly, NATO forces involved in peace-keeping, peace-building or peace-enforcement missions might be held accountable for possible violations of international human rights standards. The same holds true for any other inter-governmental organization willing to ratify the Statute of the WCHR. Secondly, transnational corporations which adopt voluntary codes of conduct with references to human rights standards in

[43] See Article 5 of the Statute.

[44] In deciding its cases, the Court shall apply the following substantive law: human rights conventions and declarations of which one or more of the parties is a member; human rights custom, and generally accepted practice; general principles of human rights law; human rights judicial decisions; and the teachings and writings of preeminent human rights experts. This provision shall not limit the power of the Court to decide a case under principles of equity, if the parties consent. See Article 20.

[45] Hence, ratifying States will be the primary category subject to the jurisdiction of the WCHR. In line with the traditional rules of public international law, no State will become party to the Statute and subject to the WCHR's general jurisdiction, without its explicit consent.

[46] The WCHR shall be brought in relationship with the United Nations by way of an agreement; its expenses shall be borne by the regular budget of the United Nations rather than by contributions of States Parties.

[47] Article 7(3) of the Statute

[48] See part 1 at the Statute, available at http://www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Scheinin/ConsolidatedWorldCourtStatute.pdf.

[49] Ibid. Part 2.

[50] See Articles 20 (1) of the Statute.

[51] The Justices shall serve in their personal capacities, and not as the representatives of the Nation States of which they are citizens. No two Justices may be nationals of the same Nation State. See Ibid.

[52] See Article 26 of the Statute.

[53] See Article 27 of the Statute.

[54] See Article 29 of the Statute

[55] Ibid. Article 20 (2) of the Statute. See also Article 30 of the Statute.

[56] Article 4(1) of the Statute. The 'Entities', for example include: International organizations constituted through a treaty between States, or between States and international organizations; Transnational corporations, i.e. business corporations that conduct a considerable part of the production or service operations in a country or in countries other than the home State of the corporation as a legal person; international non-governmental organizations, i.e. associations or other types of legal persons that are not operating for economic profit and conduct a considerable part of their activities in a country or in countries other than the home State of the organization as a legal person; Autonomous communities within a State or within a group of States and exercising a degree of public power on the basis of the customary law of the group in question or official delegation of powers by the State or States.

[57] The United Nations, for example, does exercise jurisdiction in the context of interim administrations, such as those established in relation to Kosovo (See Security Council resolution 1244, 10 June1999, S/RES/1999/1244), and East Timor (See Security Council resolution 1272, 22 October 1999, S/RES/1999/1272, replaced by United Nations Mission of Support in East Timor, Security Council resolution 1410,17 May 2002, S/RES/2002/1410), which may lead to human rights violations by military, police and other components.

the framework of their corporate social responsibilities (CSR) and which become members of the Global Compact of the United Nations[58] might be invited and encouraged to accept the binding jurisdiction of the WCHR in relation to selected human rights in the sphere of their respective influence, such as the prohibition of forced or child labour; the right to form and join trade unions; the right to collective bargaining; and the prohibition of discrimination. The WCHR would not only be in a position to decide in a binding judgment whether or not a business corporation subject to its jurisdiction has violated any human right of an employee, a client or any other person affected, but it might also provide proper reparation to the victim concerned. In principle, any non-State actor might be interested, for various reasons including upholding ethical standards, marketing, corporate identity or a genuine interest in strengthening human rights, to recognize the jurisdiction of the WCHR.

A second extension of the Court's jurisdiction is provided for by Article 7(2) which allows both States that are not parties to the Statute, and Entities that have not generally accepted the jurisdiction of the WCHR, to accept that jurisdiction on an *ad hoc* basis in respect of a particular case (complaint) submitted to the WCHR[59]. All forms of exercise of jurisdiction described so far result in a legally binding judgment of the WCHR[60]. The States Parties undertake to directly enforce the judgments of the WCHR by the respective bodies[61].

The judgment of the Plenary Court shall be final, but the judgment of a Chamber shall become final only if the parties declare that they will not request that the case be referred to the Plenary Court or three months after the date of the judgment, if reference of the case to the Plenary Court has not been requested[62].

The right to a judicial remedy for human rights violations[63] must include the right of the victim to receive adequate reparation by the same court that decides about the alleged human rights violation[64]. It is not efficient for an international court to only decide about the violation and leave it to the duty-bearer to decide which type of reparation, if any, it wishes to afford to the victim for the harm suffered. It is also not efficient to expect from the victim, who has already exhausted all domestic remedies before going through the cumbersome process of international human rights litigation, to start again, on the basis of the judgment by an international court, tort litigation before domestic courts[65].

Finally, it is important to be emphasized that any judgment of the WCHR shall be transmitted to the UN High Commissioner for Human Rights[66] who shall supervise its execution[67].

Conclusion

Rights mean essentially nothing if there is no way to enforce them. United Nations charter-based and committee-based human rights systems are extremely valuable, but they are "intergovernmental" systems. They are not court-like in their nature, or in their operation. Just as nations states need an International Court of Justice to resolve their treaty disputes, victims of human rights violations need a WCHR[68] to which they can turn when governments either violate their rights, or act indifferently in the face of preventable suffering or discrimination. The United Nations' intergovernmental human rights bodies cannot do it alone, and the right to judicial access is fundamental.

All proposals for a substantive reform of the UN treaty monitoring system, including the "consolidation" of existing treaty bodies, are faced with the considerable challenge of amending UN human rights treaties. Similar to the ICC, the WCHR would be based on a new treaty, the Statute of the WCHR. As other human rights treaties, this Statute should be drafted by the Human Rights Council[69] and adopted by the

[58] Information on the Global Compact initiative can be found at www.unglobalcompact.org.

[59] This model of *ad hoc* acceptance of jurisdiction is also applicable when a State or Entity has accepted the jurisdiction of the Court but excluded a particular human rights treaty, and now a complaint is submitted in respect of an issue not governed by the existing acceptance of jurisdiction.

[60] See Article 18(1) of the Statute.

[61] The Court may only deal with any individual complaint if the complaint has been submitted to the highest competent domestic court and the applicant is not satisfied with judgment of this court. This admissibility requirement does not apply if, in the view of the Court, the relevant domestic remedy is not available or effective. See Article 9 (1) (2) of the Statute. See also Articles10, 11, 12, 13 and 14 of the Statute.

[62] See Article 28 (1) (2) of the Statute.

[63] In 2005, the UN General Assembly adopted the "UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law". See UN General Assembly Res. 60/147 of 16 December 2005.

[64] See Article 17(2) of the Statute.

[65] Since the jurisdiction of the World Court also extends to non-State actors, including business corporations, reparation orders shall also be made to non-State actors.

66 The Human Rights Council is the symbol of UN human rights reform relating to the Charter based system. It is the main political body of the United Nations dealing with human rights, composed of State representatives.

67 See Article 18 (4)(5) of the Statute.

68 The proposed Statute of the World Court of Human Rights (The Treaty of Lucknow) is drafted through an international collaboration of judges, lawyers and scholars, and the Chief Justices of the World unanimously pass a Resolution endorsing the creation of the Court as an avenue of recourse for the voiceless. 2015 and 2016 – Information about the World Court of Human Rights has been broadly disseminated, widespread public awareness of the need has been promoted, grass roots support has been built, and an Advisory Board has been formed.

[69] As a subordinate body of the General Assembly, it enjoys a higher status than the former Commission on Human Rights, and it meets on a much more regular basis than its predecessor. The most prominent new procedure is the "Universal Periodic Review" (UPR) of all UN member States. The Council thereby has to assess the human rights performance of States on the basis of governmental, non-governmental and expert

General Assembly. The WCHR would only gradually take over one of the functions of the treaty monitoring bodies, namely examining individual and inter-State complaints. This has at the same time the positive effect that the existing treaty bodies could devote more time and resources to their main function, the examination of State reports, which would contribute to reducing the considerable backlogs and delays in the State reporting procedure[70].

Through the adoption of human rights treaties over the past seven decades, the available remedies have expanded…in theory. Human rights standards are more widely known, better understood, and more universally accepted. The paradox is that the countries with the highest incidences of human rights violations often have governments with the least interest in fixing the problem. They also often have the least independent judiciaries. This is one factor in the emergence of the regional courts of human rights. The European Court of Human Rights is the closest regional example of what the World Court of Human Rights would be at a global level. Africa and the Americas have regional human rights systems as well, but they are somewhat more intergovernmental in nature. Asia, sadly, with 60% of the world's population, and with more than its share of human rights problems, has no regional human rights system. Each of these regional human rights systems has evolved from a fundamental societal need, and the time has come to make the system procedurally and substantively uniform, and universally available[71].

A WCHR would provide a major contribution to ensuring the right of victims of human rights violations to an effective remedy and to an adequate reparation for the harms suffered. It would also offer the opportunity to address a number of unsolved contemporary human rights problems, such as the accountability of non-State actors. The creation of the WCHR can be achieved in a smooth manner without any treaty amendment and without abolishing the present treaty monitoring bodies. It is a purely voluntary measure as States would decide freely whether or not to ratify the Statute of the WCHR and for which rights they were willing to recognize the binding jurisdiction of the WCHR. Finally, the WCHR should become the major counter-part of the Human Rights Council within the treaty system, and by supervising the execution of the binding judgments of the WCHR, the universal periodic review mechanism of the Human Rights Council would fulfil a meaningful and important function based on a strict division of labour between the two major future political and expert bodies of the United Nations in the field of human rights[72].

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[70] Swiss Initiative to Commemorate the 60th Anniversary of the UDHR Protecting Dignity: An Agenda for Human Rights, Austria (2009), pp. 19-27, available at http://bim.lbg.ac.at/sites/files/bim/World%20Court%20of%20Human%20Rights_BIM_0.pdf.

[71] The case for support, An invitation to Philanthropists and Justice Leaders: Join US in Establishing the World Court of Human Rights., available at http://www.worldcourtofhumanrights.net/project-overview.

[72] Manfred Nowak, The Need for a World Court of Human Rights (2007), available at https://academic.oup.com/hrlr/article-abstract/7/1/251/645636/The-Need-for-a-World-Court-of-Human-Rights.

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REASONS CONCERNING THE RESTRICTION OF SOME RIGHTS IN COMPLIANCE WITH THE PROVISIONS OF ART. 53 OF CONSTITUTION

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Abstract

An essential dimension of the lawful state is represented by the consecration and guaranteeing of the fundamental rights and liberties, the ensuring of the optimum conditions for their exercising. The state authorities have the negative obligation to restrain from any arbitrary or excessive requirement that may restrict or condition the exercise of the constitutional right. In order to be legitimate and constitutional, any restriction of the exercise of the fundamental rights and liberties through the measures prescribed by the state's authorities, needs to have the character of exemption, not to affect the substance of the law and to fulfill all conditions stipulated by article 53 of Constitution. In relation to these premises we analyze in this study the constitutional institution of restraining some rights' exercising and the relevant aspects of jurisprudence. The observance of the principle of proportionality is one of the constitutional requirements in order that such a restrictive measure be legitimate. The main particularities of the principle of proportionality applied in the matter of restraining some rights' exercising are analyzed with reference to the jurisprudence of the Constitutional Court and the European Court of Human's Rights.

Keywords: *Lawful state/fundamental rights and liberties/restriction of the exercise of the fundamental rights/principle of proportionality/constitutional requirements*

Introduction

A Romanian author emphasized that freedom has a meaning provided the limit exists, as to manifest itself, it must depend on something, to circumscribe itself to certain coordinates. "Human freedom is construed in a bundle of limits that are the very condition of its exercise"[1].

Consecration and guaranteeing of human rights through domestic and international regulations does not exclude their limiting. Moreover, the existence of such unconditional, theoretical rights can not be accepted in a democratic constitutional system. The lack of the exercising limits and conditions prescribed by law, constitutions or international legal instruments can lead to arbitrariness or abuse of law, because it would not allow the differentiation of illegal behavior from the legal one. This idea is expressed by Article 4 of the French Declaration of Rights of Man and Citizen: "the exercising of each man's natural rights has no limits, others than those which provide every member of society the possibility to exercise those rights." Also, the legal doctrine noted that in the relationships between the rights holders „one's freedom begins where stops the other one's freedom, since the condition inherent to the person is its relationship with others"[2].

The social order and stability implies tolerance and mutual respect among the subjects participating to social relations. The exercising of fundamental rights and freedoms must not conflict with the order existing in social life: the coexistence of freedoms and social protection are the two commandments underlying the limits enacted by positive law"[3]. The difficulty lies in finding the most suitable solutions that would balance the individual interests and public interest while guaranteeing the fundamental rights and freedoms in situations in which could be limited or restricted their exercising.

In the relationship between the rights and freedoms, on one hand, and society on the other hand, two extreme attitudes have been outlined: sacrificing of rights and freedoms in the interests of social order, or the preeminence of rights and freedoms, even if thus are sacrificed the interests and order social[4]. None of these solutions is justified by the imperatives of authentic democracy and the requirement to achieve a balance and social harmony. The Constitutional regulations, to be effective, must achieve a balance between citizens and public authorities, then between public authorities and of course, citizens. It must also ensure protection to the individual against the arbitrary interference of State in the exercise of its rights and freedoms[5]. Therefore, the limits imposed to the fundamental rights and freedoms must be appropriate to a legitimate purpose, it can be: protection of society, social, economic and political order, of lawful order, or protection of the

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[1] Gabriel Liiceanu, *Despre limită*, "About the limit", Humanitas Publishing House, Bucharest, 1994, pg. 11.
[2] Ion Deleanu, *Instituţii şi proceduri constituţionale, "Constitutional Institutions and Proceedings", Servo-Sat Publishing House, Arad*, 1998 vol. I, pg. 269-270.
[3] Jean Rivero, *Les Libertés publiques*, P.U.F., (Ed.1973), pg. 106.
[4] Ion Deleanu, *quoted works*, vol. I, pg. 205.
[5] Ioan Muraru, *Protecţia constituţională a libertăţilor de opinie*", "Constitutional Protection of the Right to Opinion" Lumina Lex Publishing House, Bucharest, *1999*, pg. 16-17.

rights of others. The limits must not deprive of contents the rights themselves, but must ensure the exercise thereof in such situations.

The existence of certain limits on the exercise of fundamental rights is justified through constitutional protection or the protection through important international legal instruments or state human values. However, it is not acceptable that in the name of these values, the state authorities to limit discretionary and abusively the exercise of rights which in turn are constitutionally guaranteed. In this case one might come to destroying democracy under the pretext of defending it.

The principle of proportionality, understood as the appropriate relationship between the measures restricting the exercise of human rights and freedoms, the factual situation and the legitimate aim pursued represents a criterion for determining these limits, avoiding the excess power, but also a guarantee of the constitutional rights consecrated[6].

Paper Content

In doctrine, the legal instruments and jurisprudence, the limits of the fundamental rights and freedoms were differentiated by several criteria.

A first distinction is between the limit and limitation of fundamental rights[7]. Thus, the limit is a content item of the law and is necessary for its exercise. In contrast, the limitation (restriction) limits the exercise of a right by measures taken by the competent state authorities in view of a legitimate aim.

Another author[8] believes that there are limits imposed on the fundamental rights and freedoms in order to facilitate their implementation, and on the other hand, limits aiming at "the protection of society, its socio-economic and political and legal order"[9]. The limits deriving from such a purpose may be absolute, imposed by the demands of social life, in all circumstances for the protection of the essential values of the state and society, and on the other hand may be relative, those that do not apply in a general and permanent manner, but only to some of the rights and freedoms, or only in a certain time or in a determined situation, or only to certain subjects[10].

In our view we can distinguish: a) Conditions for the exercise of rights and freedoms that are found even in their legal and constitutional definition contents; b) restrictions, exemptions,

suspension, loss of rights, which have an exception and temporary nature, being measures taken by the state authorities to protect or achieve a legitimate aim.

State interference in the exercise of the fundamental rights and freedoms can be realized in principle by restricting and suspending certain rights or by derogations. These modalities are regulated in constitutions and international legal instruments. Avoiding any misuse of state authorities and guaranteeing of the rights and fundamental freedoms in such situations requires constitutional regulation, but also in the international legal instruments of the conditions justifying such measures' enacting.

There are constitutions governing the institution of certain rights' restriction in certain circumstances[11], the possibility of suspending certain rights or freedoms[12] or in cases that due to the abusive exercising of a right, its exercise is being lost[13].

Romania Constitution imposes conditions on the exercise of certain rights or freedoms. Thus, the freedom of movement is exercised under the conditions established by law (Article 25, para. (1)). Physical person may dispose of oneself, if not violating the rights and freedoms of others, public order or morals (Article 26, para. (2)); a person's right to access information of public interest can not be restricted, but should not be prejudicial to the protection of young people or national security. (Art. 31 paragraph (3)); the right to strike can only be exercised under law, which sets its limits (article 43, par. (2)); the content and limits of ownership right are determined by law (Article 44 para. (1)); the freedom of expression may not harm the dignity, honor, privacy of person or the right to own image (article 30, par. (6)); meetings may be organized and held only peacefully, without any kind of arms (39).

The restriction of certain rights or freedoms is governed by Article 53 of the Constitution. These are provisions of principle, which refer to the measures taken by state through law or government ordinance that represents interference with the exercise of constitutionally guaranteed rights. In order not to affect the substance of the right, such measures are temporary and also, in order to be constitutional, must comply cumulatively with the conditions provided by article 53. There are also constitutional provisions which restrict the exercise of some rights, the restrictions having a permanent character. The restrictions are usually specific to the legal content of the law constitutionally consecrated. Thus, the exercise of individual freedom may be restricted by search, detention or arrest (Article 23). Inviolability of home

[6] For developments see: Andreescu Marius, Principiul proporţionalităţii în dreptul constituţional,"Principle of proportionality in the Constitutional Right", CH.Beck Publishing House, Bucharest, 2007.

[7] Doina Micu, *Garantarea drepturilor omului, "Guaranteeing the Human Rights", All Beck Publishing House, Bucharest, 1998,* pg. 141.

[8] Ion Deleanu, *quoted works*, vol. I, pg. 205.

[9] Ibidem pg. 205.

[10] Ibidem pg. 205. See Jean Rivero, *quoted works*, pg. 171-175.

[11] On this meaning to remember provisions of art.18 of Portugal Constitution; art. 19, paragraph 1 and 2 of German Constitution and provisions of article 53 of România Constitution.

[12] Art. 55 of Spain Constitution.

[13] Art. 18 of German Constitution.

may be restricted under the terms of article 27, par. (2). The provisions of article 36, par. (2), prohibit to certain categories of persons the right to vote. The provisions of article 40, par. (3) prohibit such professional categories the right to join political parties.

There are differences between restrictions and derogations, and on the other hand, that can cover the exercise of rights and fundamental freedoms.

Restrictions are measures considered needed in a democratic society, inflicted in order to achieve public interest or to protect the rights and freedoms of others. In this respect, the provisions of article 18 of the Convention states that: "... restrictions... can not be applied unless on the purpose for which they were intended."

With all specific aspects, arising from Constitution or international legal instruments, can be identified common conditions for the legitimacy of restrictions: be prescribed by law, be necessary in a democratic society, not be discriminatory, be appropriate at least to one of purposes provided by law and justifying circumstance. Compliance with these conditions must be achieved cumulatively. In this way the fundamental rights are guaranteed and is removed the arbitrary interference of state authorities in their pursuit.

Exemptions are wider restrictions of rights and fundamental freedoms and can be decided by States in emergencies. Restrictions may aim, in principle, any fundamental right, as opposed to derogatory measures that may concern only some human rights guaranteed by the international legal instruments.

From the international legal instruments, to which I referred, results that the derogations, in order not to be arbitrary, must meet the following conditions: must be applied only in exceptional circumstances; be strictly appropriate to the facts; be compatible with other obligations that States members adjusted to the international law; not be discriminatory; the states that make use of the right of derogation to announce the relevant international fora.

There are also absolutely guaranteed rights (absolute rights) in that no restrictions or derogations are being allowed. Obviously, we are referring to the right to life; the right not to be subjected to torture or to any kind of inhuman or degrading treatment or punishment.

The principle of proportionality is a guarantee in all circumstances when the exercise of a right or fundamental freedom is subjected to a condition, restriction, suspension or exemption. The principle of proportionality, applied in this matter has into consideration the achieving of a fair balance between individual interests and the public interest or private interests which corresponds to the fundamental subjective rights, consecrated and guaranteed constitutionally.

Regarding the Romanian constitutional provisions related to the restriction of fundamental rights and freedoms in the literature in specialty, a distinction is made between the common circumstances to restrict the exercising of certain rights that form the subject for the regulation of provisions of article 53 of the Constitution, and secondly the special circumstances, specific to certain rights and freedoms. The common restriction circumstances are of temporal nature, are essentially fortuitous, while the special circumstances are permanent[14]. The quoted author stresses that such circumstances should be expressly recognized as "not being the product of conventionalism"[15].

Although these circumstances are common, they can justify the restriction having into consideration the nature of the right or freedom. Thus, no circumstances can justify the restriction of the right to life or the right not to be tortured.

Romania Constitution uses a simple and efficient method for regulating the restriction of exercising certain rights and freedoms (common circumstances) by provisions in one single article. The provisions of Article 53 allow the restriction of certain rights and freedoms, but only conditioned[16]. The issue of interpretation and application of the provisions of Article 53 is particularly complex because the restrictions can aim the exercise of any right or fundamental freedom consecrated and guaranteed by the Constitution, except those regarded as absolute. The complexity is due to the diversity of concrete situations justifying the restriction of certain rights.

The rules imposed by the provisions of Article 53 have the value of a constitutional principle, because they are applicable to all fundamental rights and freedoms of citizens.

In the version prior to revision of Constitution, the provisions of article 49 indicated that the restraints can be achieved only by law, if necessary, according to the following purposes: "protection of national security, public order, health or morals, rights and freedoms of citizens, the conduct of criminal investigation, preventing of consequences of a natural disaster, or of any extremely severe catastrophe." At the same time, the restriction should not affect the existence of the right or freedom and must be proportional to the situation that caused it.

Through the Law amending the Constitution on September 18, 2003, were modified the provisions of Article 49, and by the republication of Constitution was given a new numbering of the Articles, Article 49 becoming Article 53. The initial rules in place for the restriction of some rights exercising have been

[14] Ion Deleanu, *quoted works*, vol. II, pg. 123; See decision no.13/ 1999 of Constitutional Court, published in the Official Gazette no.178/1999.

[15] Ibidem, *quoted works*, vol. II, pg. 123.

[16] Ioan Muraru, Simina Elena Tănăsescu, Drept constituţional şi instituţii politice, "Constitutional Right and Political Institutions, All Beck Publishing House, Bucharest, 2003, vol. I, pg. 174-176.

maintained but two more conditions have been added: the restriction must be "necessary in a democratic society" and another condition is that the restrictive measure be applied "nondiscriminatory". In this way, the Romanian Constitution perceived in this matter the most important rules in the international legal instruments in the matter and capitalized C.E.D.O jurisprudence.

If making a comparative analysis between the Romanian constitutional provisions and those contained in certain international legal instruments governing the conditions for the restriction of certain rights and freedoms exercising, some differences can be found. For our study is of interest that the provisions of Article 53. (2) of Constitution expressly consecrates proportionality as a condition that must be met in case of restriction of certain rights exercising, while in most international legal instruments this condition results implicitly out of the regulations content and is deduced by way of interpretation, by the jurisprudence of international courts.

To identify the peculiarities of the principle of proportionality, applied in this matter, it is useful to highlight some aspects of doctrine and jurisprudence on the interpretation and application of Article 53 of the Constitution.

The doctrine asserted that, in case the legislator restricts the exercise of certain rights without indicating expressly the constitutional background, it "does not remove the obligation of a verification within the procedure for monitoring the legitimacy of the constitutional law, if the measure thus established constitutes a limitation of a right"17. In recitals of Decision No. 4/1992 of Constitutional Court results that under the assumption that the legal provision subjected to a control, constitutes a limitation of a constitutional right, it is legitimate only in cases falling within the limiting situations expressly provided by Article 53 of Constitution[18].

The Constitutional Court held that the provisions of Article 53, have into consideration the fundamental rights and freedoms contained in Chapter II, Section I of Constitution, and no other rights[19]. Our Constitutional Court, interpreting the provisions of Article 53 in relation to the provisions of article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the distinction was made between the loss and restriction of a right. The last situation is envisaged by the provisions of Article 53. "The Court finds that the invoking of provisions of article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms has no bearing in the cause because these provisions apply to deprivation of liberty and not to restriction of freedom"[20].

At the same time, our Constitutional Court decided that the restriction of a right must be temporary, being instituted only for the time period the causes that led it are acting, which are limitative consecrated by para (1) of Article 53 of the Constitution[21].

Whenever the restriction of a right exercising is realized in order to defend the rights of citizens, restrictive measures are legitimate only in consideration of a particular law, as without this restriction, that right would be affected[22]. The restrictions brought upon the right exercising should not bring touch to the substance of this right. The Constitutional Court has established that through the law can be disposed certain restrictions of ownership, but they should not bring touch to this very right substance. These restrictions can be established in regard to the object of the right or other attributes of law, for the protection of the rights of persons or the general social and economic interests[23].

Constitutional Court jurisprudence distinguishes the restriction of certain rights related to the circumstances in which the legislator conditions the exercise of a right. In this regard it was decided that the seniority requirements established by article 19 of Law No.51 / 1995[24] on the legal profession, are seeking to enforce the right of defense in terms of competence, professional responsibility and practice experience, related to hierarchical level of the courts and to the complexity of the cases, so it is natural that they involve certain conditions, which cannot be regarded as affecting the right to work, but as measures to protect both the interests of the litigant and lawyer's[25].

Also, the exemption by law of certain categories of citizens of the benefit of rights granted to others, who are in a different situation, does not represent a limitation on the exercise of these rights. Therefore the provisions of Article 53 of Constitution are not applicable[26].

Proportionality is a condition of constitutionality of the measures ordered by law or by ordinances, through which is restricted the exercise of some fundamental rights and freedoms, condition expressly stipulated by provisions of article 53, par. (2) of Constitution. The Analysis of the particularities of this principle must be carried out systematically in the

[17] Ioan Muraru, *Restrângerea exerciţiului unor drepturi sau libertăţi*, "Restraining the exercise of some rights or freedoms", in Constitutional studies, Actami Publishing House, Bucharest, 1995, pg. 199.
[18] Decision no. 4/1992, published in the Official Gazette no. 192/1992.
[19] Decision no. 19/1999, published in C.D.H., 1999, pg. 308.
[20] Decision no. 239/2001, published in the Official Gazette no. 838/2001.
[21] Decision no. 83/1999, published in C.D.H., 1999, pg. 582.
[22] Decision no. 139/1994, published in C.D.H., 1994, pg. 84.
[23] Decision no. 19/1993, published in C.D.H., 1992-1993; Decision no. 147/1997, published in C.D.H., 1998.
[24] Republished in the Official Gazette no. 113/2001.
[25] Decision no. 256/1997, published in the Official Gazette no. 134/1998.
[26] Decision no. 115/1999, published in the Official Gazette no. 522/1999.

context of the Article 53. Express consecration of a particular aspect of principle of proportionality, through the provisions of article 53, par. (2) changes the proportionality, from a rule of moral or opportunity into a law's constitutionality condition, while the Constitutional Court has the power to check the compliance with this principle.

Restriction of certain rights or freedoms by law represents a requirement of the state in the exercising of those rights and freedoms, justified by achieving a legitimate aim. To avoid arbitrariness or excess of power by state authorities that adopt such measures, it is necessary to exist guarantees provided by the state, which need to be adequate to the constitutional purpose pursued, namely for the protection of the fundamental rights and freedoms in the concrete situations in which prejudice might be brought to them. The principle of proportionality is thus a constitutional guarantee that allows sanctioning by the constitutional court of the arbitrary interferences of Parliament or Government in those rights exercising[27].

Therefore, the measures taken by the State through which is restricted the exercise of fundamental rights or freedoms, in order not to be abusive must be not only legal, i.e. disposed by law, or by a normative act equivalent as legal force to the law, but also legitimate (fair) that is necessary in a democratic, non-discriminatory society, proportionate to the situation causing them and not affect the substance of the law. The proportionality and necessity in a democratic society are criteria of evaluation, both for the legislator as for the judge, of the legitimacy of the restriction of certain rights and freedoms.

In the doctrine was pointed out that whenever the legislator brings a limitation in the exercise of a right or freedom, shall state expressly in the wording of that disposition, the provision, under constitutional article 53[28]. This statement aims implicitly the respecting of the principle of proportionality and corresponds to the principle of supremacy of Constitution: "The law is an enactment act, in the meaning that the legislator's will necessarily finds limits in the supremacy of Constitution, as a fundamental law of state and society"[29]. In such cases, the assessment made by the legislator or constitutional judge, is based on a proportional reasoning. The restriction of certain rights exercising is justified by the existence of diverse interests and in some cases, even contradictory. On one hand, the subjective interest of the fundamental rights holders, and on the other hand, the public interest or the need to guarantee the fundamental rights of other persons. In such circumstances, one of the interests backgrounds its constitutional legitimacy on a provision and the other one, on another constitutional provision. The proportional reasoning involves the comparing of interests, so as the limiting of the exercise of a right or fundamental freedom does not exceed what is strictly necessary to satisfy the public interest or the rights of others.

The principle of proportionality, applicable in the matter of restriction of certain rights, is concretely determined by the meaning of the elements being compared, pending on which can be established whether the respective measure is either appropriate or not to the situation and intended purpose. Proportionality of the restrictive measures must be assessed in relation to a well-defined legitimate aim, whose significance is given where applicable, by the doctrine, statute or case law. The restrictive measure violates the condition of proportionality if the purpose for which it was prepared is generic, and does not indicate a particular right or fundamental freedom as legitimate aim[30].

The purposes justifying the restriction of certain rights and related to which is appreciated the respecting of the principle of proportionality are expressly and limitating provided by article 53, par. (1) of Constitution. Their meaning is important to determine the proportionality of the restrictive measures.

Thus, by "national security", a newly introduced expression following the revision of Constitution, which replaces the term "national security" means "the existing state of legality, balance and social, economic and political stability and development of the Romanian national state, as a sovereign, unitary, independent and indivisible, for the maintenance of public order and the climate for unrestrained exercise of rights, freedoms and fundamental duties of citizens, according to democratic principles and norms settled by the Constitution"[31].

"Public order" is the set of rules that ensures the safety of society, public welfare, social harmony, respect for law and for the legitimate decisions of public authorities.

"Public health" means health protection of whole population or part thereof.

"Public Morals" is all precepts of conduct, dependent on individual conscience and values of the community to which he belongs.

Ensuring the respecting of citizens' "rights and freedoms" is a requirement mainly due to the fact that the person belongs to a social collectivity, aspect implying the fact that the rights and freedoms of others require the same protection as their own rights and freedoms.

The "Criminal Instruction" is a component of lawful order and implies the succession of acts and

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[27] Ioan Muraru, *Protecţia constituţională a libertăţilor de opinie*, "Constitutional Protection of the liberties of opinion, quoted works, pg. 22-23.
[28] Ioan Muraru, quoted works, pg. 200-201.
[29] Ibidem, pg. 201.
[30] See Decision no. 139/1994 published in the Official Gazette no. 353/1994, Decision no. 75/1994, published in the Official Gazette no. 190/1994 and Decision no. 21/2000, published in the Official Gazette no. 159/2000.
[31] Dispositions of art.1 of Law no. 51/1991 regarding the national safety of România, published in the Official Gazette no. 163/1991.

deeds that form the criminal proceedings in all its phases and stages[32].

Depending on the legitimate aim pursued is determined the "margin of appreciation" which the public authorities have to impose limitations to the exercise of fundamental rights and freedoms, as provided by Article 53 of Constitution. The limits of the right of appreciation of the competent state authorities and also the respecting of principle of proportionality, are established in our constitutional jurisprudence court, including by reference to C.E.D.O. jurisprudence.

Thus, the proportionality of the interference of state authorities is considered by the international court against the requirements of a democratic society, a concept found in the jurisprudence of the Constitutional Court.

Also, our constitutional court invoked other aspects of C.E.D.O jurisprudence: the restrictive measures are: proportionate to the legitimate aim pursued if national and institutional legislative system has adequate and sufficient guarantees against abuses[33]. There is a distinction between facts and valuable judgments. If the materiality of the first one can be proved, the value judgments are not able to be demonstrated in terms of their accuracy34. Therefore, the compliance with the condition for proportionality of the restrictive measures imposed on freedom of expression is appreciated differently depending on the nature of allegations. The proportionality can be regarded as a strict fitness unto the purpose of the restrictive measure, or there may be a greater margin of appreciation of authorities when the legitimate aim pursued is public morality, for instance[35].

These are just some aspects of C.E.D.O. jurisprudence, invoked in the jurisprudence of the Constitutional Court of Romania, in case are to be analyzed the restrictive measures imposed by Parliament or Government, regarding the exercise of fundamental rights and freedoms.

The jurisprudence of the Constitutional Court of Romania contributed to identifying the features of proportionality principle applied in relation to guaranteeing the fundamental rights and freedoms, including in situations in which the competent state authorities have restrictive measures which must meet the conditions of Article 53.

In this matter, the Constitutional Court jurisprudence reveals defining characteristics of the constitutional principle of proportionality, which assumes the necessary adequacy of the constitutional guarantees conferred to fundamental rights and freedoms, to the finality pursued, namely the protection of the exercise of rights in concrete situations that could be restricted. The applying of the principle of proportionality has a dual significance: state guarantees on human rights become effective in specific situations; It is removed the arbitrary interference of public authorities in the exercise of these rights or in applying the measures for restricting their exercise, measures which constitute abuse of power.

Proportionality is a fundamental guarantee for exercising the fundamental right, subjected to a limit or circumstance. The existence of some limits or conditions for the exercise of some fundamental rights is justified by the idea of constitutional protection of some important human or state values.

In the meaning of those above Romania's Constitutional Court held: "The legislation, doctrine and jurisprudence have rejected and reject constantly the existence of absolute rights and liberties"[36]. Given this premise, the court identifies the Romanian constitutional provisions that set limits, conditions or restrictions in exercising of some rights[37].

Although not expressly referring to the principle of proportionality, the decision No.13 / 1999 is important because it reveals the peculiarities of this principle applied in the matter of fundamental rights and freedoms protection. The need for a proper balance expresses the general principle of proportionality. At the same time, the conditions, limitations or restrictions imposed on some fundamental rights must be appropriate to the objective pursued by the constituent legislator, that of protection of the fundamental rights in situations in which it can be conditioned or limited.

By several decisions, the Constitutional Court ruled that it has jurisdiction to verify the compliance with the proportionality requirement in case of certain rights' restriction. The Constitutional Court assumes this jurisdiction only if the proportionality is a condition of constitutionality of the law instituting the restriction of the right. "Unquestionably, the checking of proportionality is within the competence of Court's control, while the proportionality of restricting with the situation that has caused, it is a constitutionality prerequisite of the law that established the restriction of the right"[38].

This finding of the Constitutional Court is important for several aspects: proportionality is regarded as a requirement of constitutionality which the law, setting up the restriction of the right, must follow. In this way the principle of proportionality is not only a simple state of fact, closed to opportunity, but is a legal requirement within the Court's controlling jurisdiction. The Court draws a distinction between the general principle of proportionality, the proportionality applied in other branches of law and the constitutional principle of proportionality applicable in matter of

[32] For developments see Ion Deleanu, quoted works, vol. II, pg. 121-122.
[33] See Case Leander versus Suedia., 1999.
[34] Case Lingens versus Austria, 2002.
[35] Case Wingrove versus United Kingdom, 2001.
[36] Decision no. 13/1999, M.Of. no. 178/1999.
[37] Decision no. 13/1999 quoted previously.
[38] Considerent no. 3 of Decision no. 71/ 1996, published in the Official Gazette no. 131/1996.

certain rights' restriction. The Constitutional Court competence refers only to the constitutional principle of proportionality, consecrated by Article 53 para (2) provisions. To be noted the interpretation of our Constitutional Court on the content of the principle of proportionality applied in this matter: the appropriateness of restriction to situation that caused it.

The Constitutional Court pointed out that proportionality must be analyzed and understood pending the legitimate purpose aimed for which is applied the restricting measure. This purpose has to be one of the stipulated limiting set of article 53, par. (1). Moreover, then this, because the law through which is ordered the restriction of a right's exercising, to respect the principle of proportionality, the reference to the legitimate aim must not be generic, but it needs to be determined. Analyzing the restricting of the right to free movement, the Government Ordinance no.50 / 1994, the Constitutional Court held that the restriction of a constitutional right is possible, in accordance with Article 53 of the Constitution "solely on account of a certain law, as a measure that is being imposed whereas without that restriction, that right would be severely undermined and, according to the principle of proportionality, only to the extent necessary, so that this right be not at least partly compromised ... or, in the absence of specifying in whose service the restriction takes place, from the simple reference to the social protection right (Article 1 of the Ordinance) or to social rights existing (Article 7 of the Ordinance) does not result neither that this restriction is imposed - as required by Article 53 of the Constitution - nor that it is proportional the situation that caused it - as required by paragraph 2 of the same Article"[39].

The argumentation of proportionality reasoning, which in the matter of certain rights' restriction involves the adequacy of the restrictive measure to the situation in fact, but also to the legitimate aim pursued, is used in the jurisprudence of Constitutional Court. Analyzing the respecting of principle of proportionality, in the event of exceptions of unconstitutionality regarding the provisions of Article 148, paragraph 1, letter h of the Criminal Procedure Code, our Constitutional Court found that principle of proportionality is satisfied, having into consideration both the provisions of article 18 of the Convention and the provisions of article 53, par. (2) of Constitution. It was found that the preventive arrest measure is necessary for conducting a criminal investigation and proportional to the situation that has caused it[40].

In the jurisprudence of Constitutional Court, the argumentation of proportionality is revealed under the form of a fair balance analysis that should exist between two constitutionally protected rights, balance which determines simultaneously their limits of their exercising[41].

The Constitutional Court stressed that the principle of proportionality, under article 53, par. (2) of Constitution, has as objective only the rights and fundamental freedoms[42]. In this regard, the Constitutional Court stated that the ratio between the offense committed and the penalty imposed, which must be a just one, exceeds the regulation sphere of Article 53, para. (2) of Constitution. "It is undeniable that the verification of proportionality belongs to the controlling powers of the Court, as long as the restriction has as objective the exercise of certain fundamental rights or freedoms[43].

The Constitutional Court jurisprudence contributes to the understanding and explaining of the principle of proportionality in cases in which it is noticed its interference in the principle of equality.

To be noted that the jurisprudence of our Constitutional Court, in matters of interpretation and applying of the principle of equality has evolved, from the admitting that different situations must be treated differently up to the recognition of new constitutional rights, respectively "the right to difference"

The uniformity has been consistently rejected in the jurisprudence of the Constitutional Court, in connection to the interpretation and applying of the principle of equality. To situations, which by their nature are different, must be applied a different treatment. The principle of proportionality means, in this case the required adequacy of legal regulation to the objective situation considered. Also, the proportionality requires the existence of a motivation "objective and reasonable" for a differentiated legal treatment applied to identical situations.

These rules are formulated in the jurisprudence of the Constitutional Court: "The principle of equality before the law requires the establishment of equal treatment for situations, which pending on the purpose aimed, are not different. Accordingly, a different treatment may not be only the exclusive appreciation expression of the judge, but must be rationally justified, in observing the principle of equality of citizens before the law and public authorities"[44].

Applying the reasoning of proportionality, the Constitutional Court has reached to the recognition of a

[39] Considerent no. 16 of Decision no. 139/1994, published in the Official Gazette no. 353/1994; See Decision no. 75/1994, published in the Official Gazette no. 190/1994; Decision no. 21/2000, published in the Official Gazette no. 159/2000.

[40] Decision no. 26/2000, published in the Official Gazette no. 232/2000.

[41] Decision no. 57/1998, published in the Official Gazette no. 167/1998; On the same meaning see Decision no. 110/1995, published in the Official Gazette no. 74/1996.

[42] Decision no. 24/1997, published in C.D.H./1998, pg. 99-101; Decision no. 157/1998, published in the Official Gazette no. 3/1999.

[43] Decision no. 25/1999, published in the Official Gazette no. 3/1999; Decision no. 13/1999 previously quoted, by which the Constitutional Court ascertains that in the present case, it is not applied the principle of proportionality, stipulated by art. 53 of Constitution, Since the right to hunger strike is a fundamental right protected by constitutional norms.

[44] Considerent no. 5 of the Decision of Constitutional Court Plenum no. 1/1994, published in the Official Gazette no. 69/1994; On the same meaning see Decision no. 85/27th July 1994, published in C.D.H./1994, pg. 68-74.

fundamental right: "the right to difference". "In general, it is estimated that the violation of the principle of equality and nondiscrimination exists when applying a differential treatment to equal cases, without the existence of an objective and reasonable motivation or if there is a disproportion between the aimed purpose by unequal treatment and means used. In other words, the principle of equality does not prohibit specific rules. Therefore the principle of equality leads to underline the existence of a fundamental right, the right to difference, and as far as equality is not natural, the fact to impose it would mean to establish a discrimination[45].

Conclusions

The jurisprudence issues discussed above lead to the conclusion that the understanding and applying of the principle of proportionality by the Constitutional Court is consistent with the meanings conferred to this principle, applied in the field of human rights' guaranteeing by C.E.D.O.

However, the jurisprudence of our Constitutional Court is not generous nor edifying in the application and interpretation of the principle of proportionality in ensuring fundamental rights and freedoms, which demonstrates that proportionality, as a principle of law in general and constitutional law

in particular, does not represent another object of major concern of jurisprudence.

Most times, the Constitutional Court refers to the criterion of proportionality generically, invoking the provisions of article 53 of Constitution. There are relatively few decisions of our Constitutional Court to include elements of proportionality analysis. It is true that the interpretation and understanding of the principle of proportionality, considered to be one of the guarantees of fundamental rights and freedoms in situations where it is possible to limit or restrict their exercising, presents serious difficulties, given the diversity of concrete situations, the appreciation margin recognized by legislator, the nature of the right protected and not least the interpretative reasoning of Constitutional Court, which must be maintained to a high level of abstraction, setting the constitutionality of a provision by relating to the provisions of Constitution.

Summarizing, we can say that in the matter of fundamental rights and freedoms' protection, the principle of proportionality is explicitly or implicitly invoked by the Constitutional Court in the following forms:

a) necessary appropriateness of constitutional and legal guarantees conferred to fundamental rights and freedoms, on pursued finality, namely the protection of the exercise of rights in concrete situations in which could be restricted;
b) adequate relationship between the restrictive measures ordered by law, the situation in fact and the legitimate aim pursued, in accordance with Article 53 of Constitution;
c) "argumentation of proportionality" as a means of interpretation used by the Constitutional Court to establish the existence of a fair, equitable ratio, between categories of rights and interests constitutionally protected.

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[45] Decision no. 1071995, published in the Official Gazette no. 85/1995; See Decision no. 6/1996, published in the Official Gazette no. 23/1996; Decision no. 198/2000, published in the Official Gazette no. 702/2000; Decision no. 54/2000, published in the Official Gazette no. 310/2000; Decision no. 263/2001, published in the Official Gazette no. 762/2001.

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CONSTITUTION AND CONSTITUTIONALISM CONTEMPORARY ISSUE

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Abstract

In a democratic society, the judicial legitimacy of the state and its power, of its institutions, but also the social and political grounds are generated and determined by the Constitution, defined as expressively as possible as being: "The fundamental political and judicial settlement of a people" (I. Deleanu).
The supremacy of the Constitution has as main effect the conformity of the entire system of law with the constitutional norms. Guaranteeing the compliance with this principle, essential for the state of law, is first of all an attribution of the Constitutional Court, but also an obligation of the legislative power to receive, through the adopted normative acts, in content and in form, the constitutional norms.
Altering the fundamental law of a state represents a political and judicial act extremely complex with major meanings and implications for the socio-political and national systems, but also for each individual. This is why such measure should be very well justified, to answer certain socio-political and legal needs well shaped and mainly to match the principles and rules specific to a democratic constitutional and state system, by insuring its stability and functionality.
These are a few aspects of the Romanian contemporary constitutionalism that this study shall critically analyse in order to differentiate between the constitutional ideal and reality.

Keywords: *Constitution, constitutional supremacy, constitutional ideal and reality, fundamental rights, discretionary power of the state, constitutional reform.*

Introduction

For any people, for any form of modern social state organization, the Constitution was and is an ideal given by the meanings and role of the fundamental law especially for each one's social existence.

In modern history, starting with the 18th century, the constitution has been imposed along with other major institutions created with the purpose of expressing the political, economic or legal structural transformations as the fundamental law of a state. Towards the importance and meanings of the Constitution, of the practices in this area, it is considered as the fundamental political and judicial settlement of a state. This is why the Constitution was and is created in a broader vision, exceeding the politics, not only as a fundamental law, but also as a political and state reality identifiable with the society it creates or shapes and for whom its adoption has the meaning of a true revolution.

The constitution states the fundamental principles of the economic, political, social and legal life, in accordance with the fundamental values promoted and protected by the state. The people, according to Hegel, must have, for his constitution, the feeling of his law and state of fact, thus it may exist, in an exterior form, but without meaning and value. How current are the words of the great philosopher saying that "The constitution of any given nation depends in general on the character and development of its self-consciousness"?

The value, content and meanings of the constitution as an ideal of a democratic society were clearly stated by the constitutional acts and constitutions opening the way for the constitutional process. Thus, the French Declaration of the Rights of Man and of the Citizen of 1789 stated that "Any society, in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution". The United States Constitution, the first written constitution in the world, in 1787, stated in its preamble that "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America". As stated by the American legalists the spirit of constitutionalism has found its climax in the American Constitution. Therefore, right from its apparition, the constitution has been considered and analysed in opposition to absolutism, as a limitation in the arbitrary performance of power. Once this purpose has been fulfilled, the constitutionalism continued to play an important and, most of all, progressive role in history, aiming the efficient guarantee of the fundamental rights and freedoms for citizen.

Paper Content

The ideal of constitutionalism is best expressed by the notion of the state of law. Moving from the

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state's law to the state of law was and still remains a long and difficult process enlisted between the poles of contradictory values. Conceptually, on the foundation of the construction of the state of law is the idea of rationalizing the system of law and of emphasizing its efficacy. The essential requirement of the constitutional ideal of the state of law is represented by the subordination of the state towards the law and the limitation of the state's power using the law. The supremacy of the law and, implicitly, of the constitution, forces the state authorities to comply with the fundamental rights and freedoms of the citizens, to withheld from any arbitrary interference in their performance, moreover to adopt politically and legally appropriate and necessary means for the preservation and affirmation of the fundamental rights.

Indeed, the constitutions, in a state of law which assumes the compliance of legality and the rule of law, the protection of the individual and of the citizen in his relations with the power, the performance of the entire state activity based on and within the strict limits of the law, are or might be an obstacle in the way of the arbitrary, if they express the general will and their respect becomes a "religion" for the governors.

The ideal of the constitution, as well as of the constitutionalism, is also expressed by the concept of the supremacy of the constitution. We may say that the supremacy of the constitution is one of its qualities placing it on top of the politico-legal institutions of a state and makes the constitution the source of all regulations in the political, economic, social and legal areas. The most important consequences of the supremacy of the constitution are the conformity of the entire legal system with the constitutional norms and the fundamental obligation of the state authorities to perform their attributions within the limit and in the spirit of the constitution.

Of course, the constitution's supremacy would represent only an ideal if there were not any specific guarantees which mainly allow the control of power and the avoidance of its evolution towards the arbitrary. Among these guarantees, only two of them are more important: the control of the constitutionality of the laws which represent an important counterweight to the parliamentary and governmental powers, while the second one refers to the establishment of the principle to free access to justice. In a constitutional system based on the constitution's supremacy, the control performed by the courts represent an important guarantee of the compliance with the citizens' rights and freedoms, especially in their relations with the executive authorities.

The essence and finality of the constitution, as well as of the constitutionalism as a historic process consists in the achievement of a balance between different realities and forces, but which must coexist and harmonize to insure the social stability, the individual freedom, but also the legitimacy and functionality of the state's authorities. In other words, the purpose of a democratic constitution consists in the achievement of a fair and rational balance between different realities, between individual and public interest. In the meaning of the above mentioned, Prof Ioan Muraru stated that "In socio-legal and contemporary state realities, the constitutionalism must be seen as a complex politico-legal status, expressing at least two aspects: a) on the one hand, the constitution must reflect the demands of the movement of ideas (originating in its evolution) on the state of law and the democracy, public freedoms, organization, functioning and balance of powers; b) on the other hand, the large reflection of the subjects of law regarding the constitutional provisions. This mutual reflection is the only one able to insure the efficiency and viability of the constitution; it may insure the concordance between the constitutional rules and the political practice".

We have discussed about what could be considered as the ideal of the constitution and the constitutionalism. The reality of a constitution mainly represents the interpretation and application of the fundamental law, but especially the compliance with its provisions by the public authorities. There cannot be an ideal, perfect and immutable constitution. The constitution, as fundamental law, in order to be efficient, must be adjusted to the social, economic and political realities of the state. The dynamic of these factors shall eventually determine alterations of the constitutional norms. The achievement of an adequate relation between the constitution and the political, ideological, economic and state's realities is a complex matter, which must not be formally understood. We emphasize the fact that strictly juridical, the constitution may define both a liberal regime, as well as dictatorial one. If in any type of state, either democratic, or totalitarian there is a constitution, one cannot state that there is a real constitutional regime everywhere. The features of the constitutional regime existing at some point in history in a state, but also the way in which is perceived and complied with, the constitution determines the reality of the fundamental law and of the constitutionalism.

The differences which may arise between the constitutional ideal above expressed, and on the other hand, the reality of the constitutionalism existing in every state is justified by objective and subjective factors. Among the objectives factors, we identify:

a) the dynamic of the social life in relation to the stability of the constitution. The inevitable transformations in the social, economic, political or legal life of a state led to a distance between these realities and the viability and efficiency of the constitutional norms. This situation is one of the factors determining the revision of the fundamental law;
b) the constitution has all the features of a normative act, therefore the application of the fundamental law requires an interpretation of the public authorities, which may imply a different reception of the constitution;
c) there may be cases in which the constitutional

> regulations, though democratic in their essence are in contrast with the socio-economic realities of the moment, inferior towards the democratic constitutional principles. Such situation inevitably leads to a reduced reception of the constitutional norms among the population and to its inefficiency. The history of the Romanian constitutionalism offers a conclusive example in this meaning, if we consider the period between 1866-1938, in which the reality of the Romanian constitutionalism was inferior to the values and principles stated by the Constitutions of 1866 and 1923.

There are also subjective factors we might determine a difference between the constitutional values, and on the other hand the way in which are respected and applied. The tendency of the central authorities to abuse the power, attempting to authoritatively exercise powers, sometimes in disregard with the constitutionals norms, represents an important subjective factor denaturising the norms and spirit of the constitution, with the consequence of building a political, economic and social reality obviously contrasting with the fundamental law.

We shall exemplify the above mentioned with brief mentions to the Romanian Constitutions of 1866, 1923 and 1991.

The Constitution of 1866 was mainly a liberal constitution which stated in the area of the legal and political practice the Romanian liberalism, emphasizing the "historical role and purpose" of the Romanian bourgeoisie in the creation of a form of government and of democratic institutions based on the creative valorisation of our traditions in this area. The functionality of the Constitution raised a controverted issue regarding the incapacity of the monarchy and of the central authorities of that time to adjust to the social realities of the country. From a socio-economic perspective, the Romanian society was polarized, the middle class being extremely thin as average (formed only by clerks and liberal professionals). In exchange, the majority of the peasantry recently released from servitude, mostly analphabetic, was in contrast with the reduced average of large landowners, many of them having received a good education in western schools. Under these conditions, the Romanian monarchy system and the Romanian state system were compelled to adjust the political parliamentary regime to the existent social and political structure, and from here on sprang most of the limits of the Romanian constitutionalism, because the general interests of society interfered and were contradictory with the interests of the landowners, amid a weak economic power of the bourgeoisie crumbled into several factions and political groups. To all these, were added the personal ambitions of the politicians who, often, have seriously complicated the nature of the political area, hardening the acceleration of reforms and the amplitude of the modernization.

Analysed from a historical-political perspective, the Constitution of 1923, as an expression of the real balance of forces during 1919-1923 has represented the main legal settlement on whose base functioned the fundamental institutions of the united Romania, offering the Romanian state the monarchism, but based on the democratic parliamentary regime. The Constitution of 1923 maintains most of the structure of the Constitution of 1866, taking and deepening a series of principles offering the feature of modernity, as well as the real possibility for democratizing the interwar Romanian state and society. In this meaning, under the empire of this Constitution, the principles of representativeness, the separation of powers, the principle of legality and legitimacy of the laws, of the control of constitutionality, as well as the principles regarding the elective system and of the regime of property were much stronger than the one mentioned by the settlement in 1866. So, the Constitution of 1923 has represented a progress in the democratization of the Romanian society.

The application of the Constitution of 1923 has beard the mark of two trends: on the one hand, a series of subsequent legislations have tried to develop the democratic content of some provisions, and on the other hand, certain laws have narrowed the rights and fundamental freedoms. The position of the monarchy in the political practice has led to the reality that the appointment of the Government by the king, followed by the dissolution of the legislative bodies and the organization of new elections was, first of all, the expression of certain deals between the monarch and the representatives of the main parties, consultations which in most cases were the result of subjectivism and personal ambitions represented by the governmental changes. During the interwar period, 11 legislative bodies succeeded, representing their development within half the legal time stated by the Constitution.

Undoubtedly, the Romanian Constitution in force, adopted on 1991 has represented the rebirth of the Romanian constitutional life. The fundamental law of the state represents the fundamental legislative framework for the organization and functioning of the Romanian state and society on democratic bases. Nevertheless, the reality of the contemporary Romanian constitutionalism proves, in most cases, an abandonment of the values and spirit of the Constitution from certain central authorities, through their obvious intent to evolve towards the discretionary performance of the attributions given to them by the law and the biased interpretation of certain constitutional norms. We shall present two examples:

- The right to a decent living is stated by Art 47 of the Romanian Constitution, which states that: "The State shall be bound to take measures of economic development and social protection, of a nature to ensure a decent living standard for its citizens". It is a fundamental human right based in the feature as "social state" of the Romanian state, mentioned by Art 1 Para 3 of the Constitution which entails constitutional

obligations for the state, namely to adopt political and legislative decisions in the political, economic and social areas, whose finality to be represented not only by the guaranteeing, but also the achievement of this fundamental right. This obligation is more of a constitutional and political ideal, than a legal obligation, because there are no normative criteria based on which it could be evaluated by the constitutional court, if the legislative measures adopted by the state have as result the material, effective, and not theoretical, abstract insurance of decent living for all citizens. The only sanctions if the state does not comply with these positive obligations have a preponderant political nature, and indirectly a constitutional one, such as the adoption of a motion of no confidence for the Parliament.

– According to Art 80 of the Romanian Constitution, the President has the obligation to guard the observance of the Constitution and the proper functioning of the public authorities. In this purpose, the president is the mediator between the state's powers, but also between state and society. It is a constitutional provision which may remain in the area of the constitutional ideal, or a political principle, because it is not concretized under the aspect of the means and procedures for achievement, nor is accompanied by specific constitutional sanctions. The Romanian political practice of the last decade proved that there is the possibility of a discretionary manifestation of power from the Chief of state based on this constitutional text.

Obviously, the examples could continue. We aim to emphasize that the constitutional norm, even if in most cases it has the value of a principles, it imposes in its logic the compliance with the syllogism hypothesis – disposition – sanction, to not only stay within the area of the constitutional ideal.

The modification of the Constitution could be necessary if the social and political realities impose it. We consider that the state authorities should be more concerned by the appropriate application of the fundamental law and only in subsidiary by its possible modification. Further, we shall analyse certain legal aspects and aspects of other nature entailed by the initiatives to revise the Romanian Constitution.

The decision to initiate the revision of the Constitution of a state is, without any doubt, a political one, but in the same time it must have legal basis and to correspond to a historical need of the social system organized as a state from the perspective of its subsequent evolution. Therefore, the revision of the constitution must not be subordinated to political interests at that time, no matter how beautiful they are wrapped, but to the social general interest, well-shaped and possible to be legally expressed.

The late Prof Antonie Iorgovan rightfully stated that "In terms of the revision of the Constitution, we dare to say that where there is a political normal life, one shall express cautious restraints, the imperfections of the texts in their confrontation with life, with subsequent realities are corrected by the interpretations of the Constitutional Courts, namely by the parliamentary customs or traditions, reason for which the western literature does not longer talks about the Constitution, but about the constitutional block"[1].

The revision of the Constitution cannot have as result the satisfaction of the political interests of the temporary holders of power. In the direction of strengthening the discretionary power of the state, with the inadmissible consequence of damaging certain democratic values and principles, unlike the political and institutional pluralism, the principle of the separation of powers or the principle of the legislative supremacy of the Parliament. Also, the limitations of the Romanian constitutional revision are stated by Art 152 of the Constitution, though the political interpretation of these constitutional provisions may denaturise their meaning and finality.

The two and a half decades of democratic constitutional life in Romania proved that the political power, by its decisions, numerous times it has denaturised the constitutional principles and rules using interpretations contrary to the democratic spirit of the fundamental law, for political purposes and the support of conjectural interests. The consequences were and still are obvious: the limitation or violation of certain rights and fundamental freedoms, the generation of social tensions, non-compliance with the constitutional role of the state's institutions, in other words political actions, some dressed with a legal aspect, contrary to the constitutionalism which must characterize the Romanian state of law.

Under these conditions, a possible step in revising the fundamental law should be focused on the need to strengthen and enhancement of the constitutional guarantees for complying with the requirements and values of the state of law, to avoid excessive power specific to the politics exclusively subordinated to group interests, mostly conjectural and contrary to the Romanian people's interests, which according to Art 2 Para 1 of the Constitution has the national sovereignty.

In our view, the concern among politicians and state authorities in the current period compared to the current content of the fundamental law should be guided not so much towards the change of the Constitution, but especially towards the correct interpretation and application of it and respect of the democratic purpose of the constitutional institutions. To strengthen the rule of law in Romania, it is necessary that political parties, especially those in power, all state authorities to act or perform their duties within a loyal constitutional behaviour involving respect for the democratic meanings and significance of the Constitution.

Some proposals to revise the Romania fundamental law aim to modification of the

[1] Iorgovan, A. (2001). Revizuirea Constituţiei şi bicameralismul. Revista de drept public (1), p. 23.

constitutional system of bicameralism to unicameralism and strengthen the executive power, especially the presidential institution.

We consider that the Romanian bicameralism is appropriate for the state and social system of this historic moment, better reflecting the need to achieve not only the efficiency of the legislative parliamentary procedures, but especially "norming" and the quality of the legislation. Bicameralism is a necessity for Romania, for the Parliament to represent a viable counterweight to the executive, in the context of the exigencies and balance of the powers in a democratic state. Rightfully, late Prof Antonoe Iorgovan pointed out: "It should represent a high political risk, in that post-revolutionary tension, that in Romania be projected a unicameral Parliament, such risk still being present at this hour, under the conditions in which we can no longer talk about a political life established on the normal aisles of the democratic doctrines accepted by the West (social-democratic doctrine, Christian-democratic doctrine, liberal doctrines and ecologist doctrines)[2].

Unicameralism in a semi-presidential constitutional system, such as the Romanian one, in which the powers of the head of state and generally of the executive are significant, also considering the current excessive politicking, would have as consequence the serious deterioration of the institutional balance between the legislative and executive, resulting in the increase of the discretionary power of the executive and the minimization of the Parliament's role as a supreme representative organ and of the Romanian people, as single legislative authority of the state, as stated by Art 61 Para 1 of the Constitution. The evolution to a unicameral Parliament must not be considered as a simple act as unfortunately it results from the project law on the revision of the Constitution drafted by the Government, but it requires a general modification of the Romanian constitutional system, a reconfiguration of the role and attributions of the state authorities, in order to preserve the balance between legislative and executive and to not create the possibility of an evolution towards an overrated preponderance of the institution of the head of state in relation to the Parliament. We emphasize the fact that all European states with a unitary structure which have a unicameral Parliament also have a constitutional parliamentary system in which the head of state has limited attributions regarding the governing.

We do not aim to perform a thorough analysis of this issue, underlining only the conclusion that the Romanian unicameralism could be justified both politically and constitutionally, and appropriate to the democratic values in a state of law only if the legitimacy and role of the Romanian Presidency, as constitutional institution, is fundamentally altered. The election of the President should be performed by the Parliament. Also, in the case of a unicameral parliamentary structure, it is necessary to significantly reduce the attributions of the President in relation to the executive. Such reconfiguration of the state institutions should increase the role and attributions of the Constitutional Court and of the justice, representing guarantees of the supremacy of the law and of the Constitution also avoiding the abuse of power of the other state institutions. In Romania, the unicameralism could only be associated with the existence of a constitutional system. The unicameralism has the nature to generate a disproportion between the Parliament and the executive, by that that a single chamber of the Parliament, in Romania, does not represent a satisfactory guarantee to represent an efficient counterweight for the executive, especially that the constitutional attributions of the President as participant in the governing are obviously significant. The dispute between bicameralism and unicameralism with application to the case of Romania is very well presented by the late Prof Antonie Iorgovan: "…any bicameral or unicameral parliamentary system could generate serious dysfunctionalities, as expressed by Prof Tudor Drăganu, no matter how good the constitutional solution might be, if the parliamentary practice shows politicking, demagogy and irresponsibility"[3].

Does the current Romanian parliamentary system correspond to the exigencies of the democratic requirements of the bicameralism and is it fit for the performance of the role and functions of the Parliament? The late Prof Tudor Drăganu, in a large study of flawless argumentative logic answered this question: "The revised Constitution establishes a system claiming to be bicameral, but currently functioning as a unicameral one, convicted to break, by some of its aspects, certain elementary principles of the parliamentary regime and which embraces the danger of future serious dysfunctionalities in the performance of the legislative activity"[4]. The illustrious professor considered that the law amending the Constitution contains no explicit reference to the number of deputies and senators; it questions the substantial legitimacy of the two chambers because their members are appointed by the same body and by the same type of electoral system and electoral scrutiny; the chambers' legislative powers are not sufficiently differentiated; exercising the right for a legislative initiative by senators and deputies, as it is stated, generates constitutional contradictions.

We support that the prospect of a constitutional revision to regulate the differentiation between the two chambers using particular types of representation. The comparative law provides sufficient examples of this kind (Spain, Italy and France) and even the Romanian

[2] Iorgovan, A. (2001). Revizuirea Constituţiei şi bicameralismul. Revista de drept public (1), pp. 18-19.
[3] Iorgovan, A. (2001). Revizuirea Constituţiei şi bicameralismul. Revista de drept public (1), p. 16.
[4] Drăganu, T. (2003). Câteva consideraţii critice asupra sistemului bicameral instituit de legea de revizuire a Constituţiei adoptată de camera Deputaţilor şi în Senat. Revista de drept public (4), p. 55-66.

Electoral Law of 27 March 1926 provides a benchmark in this regard. The Senate may represent the interests of the local communities. Thus, Senators could be elected by an electoral college consisting of the elected members of local councils. Interesting to note is that in the draft of the Constitution in 1991, the Senate was designed as a representative of the local communities, grouped in counties and in Bucharest.

The criticism of Prof Tudor Drăganu is fair, according to which the current constitutional regulation does not provide a functional difference between the two chambers. This aspect was also noticed by the Constitutional Court, which referring to the parliamentary legislative procedure inserted by the project for revising the Constitution underlined that: "The cascade examination of the draft laws, in a chamber of first lecture, and in the one the second lecture, transforms the bicameral Parliament into an unicameral one"[5]. Therefore, a new initiative for the modification of the fundamental law should also consider this aspect and to perform a real and functional differentiation between the two Chambers.

The final part of this study shall refer to certain aspects that we consider necessary to be stated by a future procedure for revising the Constitution.

As above mentioned, unlike the excessive politicking and discretionary use of power from the executive contrary to the spirit and letter of the Constitution, with the consequence of violating certain rights and fundamental freedoms, manifested during the past two decades of democracy in Romania, we consider that the scientific approach and not only in the area of the revision of the fundamental law should be oriented towards solutions guaranteeing the values of the state of law, limiting the violations of the constitutional provisions for the purpose of particular interests and to avoid the excessive power of the state authorities.

1. Art 114 Para 1 of the current regulation states that: "The Government may assume responsibility before the Chamber of Deputies and the Senate, in joint sitting, upon a programme, a general policy statement, or a bill".

The responsibility of the Government has a political feature and is a procedural means by which it is avoided the phenomenon of the "dissociation of majorities"[6] for the case in which the in Parliament the majority necessary for the adoption of a measure proposed by the Government was not gathered. In order to determine the legislative forum to adopt its measure, the Government, using the procedure of assuming the responsibility conditions the performance of its activity by requesting a vote of trust. This constitutional procedure guarantees that the majority required for the dissolution of the Government, in the case of a censure motion to coincide with that for rejecting the law, the programme or the political statement to which the Government connects its existence.

Adjusting the laws as effect of invoking the political responsibility of the Government has as important consequence the absence of any parliamentary debates or deliberations on the draft law. If the Government is supported by a comfortable majority of the Parliament, this procedure could result in the adoption of the laws by "bypassing the Parliament", which could have negative consequences on the compliance with the principle of the separation of powers, but also regarding the role of the Parliament, as it is defined by Art 61 of the Constitution. As consequence, using such constitutional procedure by the Government for the adoption of a law must have an exceptional feature, justified by a political situation and a social imperative very well shaped.

This aspect of extreme importance for the compliance with the democratic principles of the state of law by the Government was well emphasized by the Romanian Constitutional Court: "This simplified means of legislation must be used in extremis, when the adoption of the draft law using the common or the emergency procedure is no longer available or when the political structure of the Parliament does not allow the adoption of the draft law using one of the above mentioned procedures"[7]. The political practice of the Government for the past years has been contrary to these rules and principles. The Executive frequently assumed its responsibility not only for a single law, but also for packages of laws, without any justification in the meanings stated by the Constitutional Court.

The Government's politicking clearly expressed by the frequency of using this constitutional procedure seriously harms the principle of the political plurality, which is an important value of the system of law stated by Art 1 Para 3 of the Constitution, but also of the principle of the parliamentary right stating that "the opposition shall express and the majority shall decide" [8]. "Denying the right of the opposition to express itself is synonym with denying the political plurality, which according to Art 1 Para 3 of the Constitution represents a supreme and guaranteed value". The principle "the majority shall decide, the opposition shall express itself" refers to that throughout the organization and functioning of the parliamentary Chambers be assured that the majority is not obstructed especially in the performance of the parliamentary procedure, and on the other hand that the majority rule only after the opposition has spoken"[8]. The censorship of the Constitutional Court proved to be insufficient and inefficient in order to determine the Government to comply with these values of the state of law.

[5] Decision No 148 of 16 April 2003, published in the Official Gazette No 317/12 May 2003.
[6] Iancu, Gh. (2010). Drept constituţional şi instituţii publice. Bucharest: All Beck, p.482.
[7] Decision No 1557 of 18 November 2009, published in the Official Gazette No 40/19 January 2010.
[8] Muraru I., Constantinescu M. (2005). Drept parlamentar românesc. Bucharest: All Beck, pp.55-69.

Conclusions

In the context of these arguments, we propose that in the perspective of a constitutional revision to limit the right of the Government to entail its responsibility for a single draft law in a parliamentary session.

1. All post-December Governments have massively used the practice of the emergency ordinances, practice blamed by the literature.

The conditions and interdictions stated by the Law No 429/2003 for the revision of the Constitution of Romania regarding the constitutional regime of the emergency ordinances, proved to be insufficient in order to limit this practice of the Executive, also the control of the Constitutional Court proved insufficient and even inefficient. The consequence of such practice is the violation of the role of the Parliament as single "legislative authority of the state" (Art 61 of the Constitution) and the creation of an imbalance between executive and legislative by accentuating the discretionary power of the Government, which in most cases turned into excessive power.

We propose that in the perspective of a future revision of the fundamental law, Art 115 Para 6 be modified in the meaning of prohibiting the adoption of emergency ordinances in the area of the organic laws. In this meaning it is protected an important area of social relations considered by the constitutional legislator as essential for the social and state system, from the excess of power of the executive by issuing emergency ordinances.

2. In the current conditions characterized by the executive's trend to profit from the obvious politicking and to unduly and dangerously force the limits of the Constitution and of the democratic constitutionalism it is necessary to create mechanisms for the control of the executive's activity in order to really guarantee the supremacy of the Constitution and the principles of the state of law.

According to our opinion, it is necessary that the role of the Constitutional Court as guarantor of the fundamental law be amplified by new attributions with the purpose of limiting the excess of power of the state's authorities. We do not agree with the statements made by the literature that a possible amelioration of the constitutional justice could be achieved by reducing the attributions of the court of administrative contentious[9]. It is true that the Constitutional Court has ruled certain questionable decisions under the aspect of compliance with the limitations of its attributions according to the Constitution, by assuming the role as positive legislator[10]. The reduction of the attributions of the constitutional court for this reason is not a legally fundamental decision. Of course, the reduction of the attributions of a state authority has as consequence the elimination of the risk for deficient performance. This is not the way to achieve the perfection of the activity of a state authority in a state of law, but by the continuous search for legal solutions for better conditions for the performance of such attributions, which proved to be necessary for the state and social system.

The attributions of the Constitutional Court might as well include the one about ruling upon the constitutionality of the administrative acts exempted from the control for legality of the courts of administrative contentious. This category of administrative acts, to which Art 126 Para 6 of the Constitution and the Law No 544/2004 on the administrative contentious refer to, are extremely important for the entire social and state system. Therefore, it is necessary a control for constitutionality, because in its absence the discretionary power of the issuant administrative authority is unlimited with the consequence of a possible excessive limitation of the rights and fundamental freedoms or of the violation of certain important constitutional values. For the same arguments, our Constitutional Court should be able to control under the aspect of constitutionality the presidential decrees establishing the referendum.

The High Court of Cassation and Justice has the competence to adopt decisions using the procedure of the appeal in the interests of the law, which are mandatory for the courts. In the absence of any form of control for legality or constitutionality, the practice proved in numerous situations that the Supreme Court overcame its attribution to interpret the law, and by such decisions it modified or completed normative acts, acting as a real legislator, thus violating the principle of the separation of powers[11]. With the purpose of avoiding the excessive power of the Constitutional Court, we consider necessary the establishment for the Constitutional Court of the competence to rule upon the constitutionality of the decisions of the High Court of Cassation and Justice, adopted using the procedure of the appeal in the interests of the law.

3. The proportionality is a fundamental principle of the law expressly stated by constitutional and legislative regulations and international legal instruments. It is based on the values of the rational law of justice and equity and expresses the existence of a balanced or appropriate relation between actions, phenomena or situations, also being a criterion for limiting the measures ordered by the state authorities to what is necessary for the achievement of a legitimate purpose, thus guaranteeing the fundamental rights and avoiding the excessive powers of the state authorities. The proportionality is a basic principle of the European

[9] Decision No 356/2007, published in the Official Gazette No 322/14 May 2007; Decision No 98/2008, published in the Official Gazette No 140/22 February 2008.

[10] Vrabie, G. (2010). Natura juridică a curţilor constituţionale şi locul lor în sistemul autorităţilor publice. Revista de Drept Public (1), p. 33.

[11] Andreescu, M. (2011). Constituţionalitatea recursului în interesul legii şi ale deciziilor pronunţate. Curierul Judiciar (1), pp. 32-36.

Union, being expressly stated by Art 5 of the Treaty on the European Union[12].

We consider that the express statement of this principle only by Art 53 of the Constitution, with application in the area of limiting the exercise of certain rights is insufficient for the valorisation of the entire meaning and importance of the principle for the rule of law.

It is useful the addition to Art 1 of the Constitution of a new paragraph stating that "The performance of the state power must be proportionate and indiscriminate". This new constitutional statement could represent a true constitutional obligation for all state authorities to perform their attributions so that the measures adopted to be within the limits of the discretionary power recognized by the law. Also, it is created the possibility for the Constitutional Court to sanction using the control for constitutionality of the laws and ordinances the excess of power in the Parliament's and Government's activities, using as criterion the principle of proportionality.

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JUDICIAL PRECEDENT, A LAW SOURCE

Elena ANGHEL[*]

Abstract

The role awarded to judge varies from one legal system to another. In the Anglo-Saxon legal systems, there is not a self-standing legislative body, so the judge is the one who creates the law; his mission consists in solving a specific case, given the existing judicial precedents; if he cannot find an appropriate rule of law, he has to develop one and to apply it.
In the continental system, creation of law is the mission of the legislature, so the creative role of jurisprudence still raises controversy. Evolving under the influence of Roman law, the continental law systems differ from the Anglo-Saxon by: the continuous receiving of Corpus iuris civilis; the tendency to abstraction, leading to the creation of a rational law; the rule of law, with the consequence of blurring the role of jurisprudence.
Underlining the creative force of jurisprudence, Vladimir Hanga wrote: "The law remains in its essence abstract, but the appreciation of the jurisprudence makes it alive, as the judge, understanding the law, taking into account the interests of parties and taking inspiration from equity, ensures the ultimate purpose of the law: suum cuique tribuere"[**].

Keywords: *jurisprudence, precedent, continental law system, creator role, anglo-saxon law system*

Introduction

In Anglo-Saxon law, the task of creating the law rests mainly with the judge. It was considered that „a law can rarely provide all cases in question; common law, that works itself pure by rules drawn from the fountain of justice, is for this reason superior to an Act of Parliament"[1]. The resolutions pronounced by the judge become mandatory in the future for all similar cases faced by the lower courts, by forming the so-called „case law". The Anglo-Saxon precedent is expressed by maxim „*stare decisis et non quieta movere*", namely „to stand by decisions and not to disturb the undisturbed".

Judicial precedent does not designate the judgment in its entirety, but the principle, the argument based on which the case was settled[2]. „Common law does not consist in the cases in question, but in the general principles illustrated and applied by them"[3]. Therefore, *ratio decidendi* and *obiter dictum* are distinguished in the structure of the judgment. *Ratio decidendi* designates the essence of the legal reasoning, the principle which led to the respective ruling, and *obiter dictum* means the actual ruling pronounced by the judge. If the judge does not find appropriate principles for the case submitted to settlement, the judge can and must create a new rule of law. By creating a new *ratio decidendi*, the judge contributes to the development of the case law (in the doctrine there was the opinion according to which the system for the recruiting of judges for the Constitutional Court should be rethought and they should be persons from among judges, persons with impeccable moral probity, university professors[4]).

Paper content

Despite its creating nature, the continental literature assigns to the jurisprudential Anglo-Saxon system many difficulties which concern the great number of precedents, the impossibility of their systematization, as well as the subsistence of many obsolete precedents. This state of facts made Hegel to claim the following: „What a monstrous confusion prevails in that country, both in the administration of justice and in the subject-matter of the law".

The role awarded to the precedent in the Anglo-Saxon law is explicable if we take into account the historical factors, namely that England did not see the revival of the Roman law, it lacked of a complete set of rules, and therefore the creation of the law according to the needs of the respective era was required. In this context, *judge made law* seemed the most pertinent and handy ruling. „Common-law was the legal system of a feudal society on the patterns of which the content of

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[**] Vladimir Hanga, *Dreptul şi tehnica juridică*, Lumina Lex Publishing House, Bucharest, 2000, pag. 80

[1] Lord Mansfield, cited by Philippe Malaurie, *Antologia gândirii juridice*, Humanitas Publishing House, Bucharest, 1996, pag. 136.

[2] We believe that this matter is well represented by the judgments pronounced by the European Union Court of Justice. In this respect, see Roxana-Mariana Popescu, *Features of the unwritten sources of European Union law*, Lex et Scientia, International Journal, no.2/2013, pag. 100-108. As example of the application of such „principles", see Roxana-Mariana Popescu, Influenţa jurisprudenţei Curţii de Justiţie de la Luxemburg asupra dreptului Uniunii Europene – case study: the concept of „charge having equivalent effect to customs duties, Revista de Drept Public, no.4/2013, Universul Juridic Publishing House, Bucharest, pag. 73-81.

[3] *Ibidem.*

[4] Elena Emilia Ştefan, *Examen asupra jurisprudenţei Curţii Constituţionale privind noţiunea de „fapte grave" de încălcare a Constituţiei*, Revista de Drept Public no. 2/2013, p.92.

the bourgeois law was laid", V. D. Zlătescu[5] noted. By characterizing the judicial precedent as being the „guiding star" of this system, the author states however that, currently, things are going so far that, even in the presence of the text of the law or of the rule of common law, the judges would rather rely on judgments that were previously implemented, than apply directly the text or the respective rule. Therefore, the rules are highly technical and formal, being accessible only to specialists. Furthermore, it is deemed that „the great malady of any legal system based on precedents is the obsolescence", as the law created in this way gets to be unreceptive to social impulses and hostile to society evolution, thus becoming a barrier which can result in considerable damage.

The Roman-Germanic system does not recognize *stare decisis* doctrine, the judicial precedent not being recognized as a formal source of law[6]. The judge is not allowed to decide based on general provisions or regulations, so that the judge cannot justify the decision, by referring expressly to the power of another judgment ruled in a similar case. Therefore, guidance decisions (*arrêts de règlement*), whereby the judge formulates a mandatory general rule for the courts of law are not admitted.

The judgment ruled by the judge in the settlement of a case produces effects only on the parties of the lawsuit, having a relative power of res judicata. In what concerns the mandatory nature of the decisions of the Constitutional Court, the failure to comply with the decisions of the contentious constitutional court draws the overall liability[7]. Notwithstanding, it is sometimes considered that, in filling the gaps of law or in the absence of law, the courts of law „persists in a particular decision, given the independence of the judiciary power, this decision acquires the nature of a legal truth, the absolute power of res judicata"[8]. It is natural that, in what concerns the settlement of a case, the courts of law study the judicial practice in the field and draw from the judgments ruled by higher courts. Such a requirement lies in the need for unity, conformity, consistency and continuity of judicial practice. Furthermore, in the continental system, which is subject to the domination of rigid laws, the case law has also a compensatory function, its role being that of conferring certain elasticity to the law.

Therefore, more generally, we can say that that Anglo-Saxon law conserves the judicial precedent as a source of law as its power is general, it extends over other courts or similar cases, and the judge is called to distinguish between *ratio decidendi* and *obiter dictum*. Roman-Germanic law gives an interpretative value to the case law, being a mean for filling the gaps, an inspiration source for the lawmaker, but the judge is bound to rule only on the case.

In order to understand the power of the judicial precedent, despite the fact it is not a source of law in the continental system, we have to make a delimitation between jurisdictional activity, which consists in the issuing of judgments and jurisprudential activity, which creates reference regulations which law is based on.

From the etymologic point of view, *jurisdictio* is the result of joining two terms: *juris* abd *dictio*, which means to tell the law. Generally, the term covers both the prerogative of judging, of applying the law in an actual situation, and the authority vested with this power. We hereby point out that the term of jurisdiction is often misused as the equivalent of the term of justice. Strictly speaking, justice is performed exclusively by the judicial power, all the other entities endowed with the power to judge in certain fields which are strictly regulated, being broadly called jurisdictions. In order to remove the existent confusion, they are also called jurisdictional activity bodies or special jurisdictions, for example, constitutional jurisdiction. The result of the activity of all jurisdictional bodies is the jurisdictional act.

In the opinion of Mircea Djuvara, the jurisdiction act carries a wider meaning, designating an individual nature act whereby the state establishes general rules of positive law applicable in an individual case. The jurisdictional act simply finds, in the light of the positive law regulations, the legal relationships which have to be applied to an actual social fact. The difference between the two terms consist in the fact that „the case law broadly includes not the facts which were acknowledged as law at some point in time, but the facts which were applied, namely the facts which were executed based on the respective acknowledgment". Generally speaking, the jurisdiction act belongs to the organized courts of law, but it is also included in the area of the administrative or political acts; for example, the control of the government in the parliamentary regime is also a jurisdictional act[9].

Therefore, the jurisdictional activity of the judge consists in the settlement of the litigation. In this regard, the judge performs two tasks: that of telling the law (*jurisdictio*), by acknowledging from the claims in litigation the one corresponding to the legal regulations in force and that of ordering the fulfillment of the decision pronounced (*imperium*), by means of the coercive force of the state, if the case may be.

Etymologically speaking, Bergel notes that the jurisdictional act is the act by means of which the judge tells the law. Seemingly simple, the task of qualifying an act of the judge as being jurisdictional is difficult and

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[5] Victor Dan Zlătescu, *Panorama marilor sisteme contemporane de drept*, Continent XXI Publishing House, Bucharest, 1994, pag. 143 and the following.

[6] For a detailed analysis of the role of precedent in Roman-Germanic system, see Nicolae Popa, Elena Anghel, Cornelia Beatrice Gabriela Ene-Dinu, Laura-Cristiana Spătaru-Negură, *Teoria generală a dreptului. Caiet de seminar*, Edition no. 2, C.H. Beck Publishing House, Bucharest, 2014.

[7] Elena Emilia Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ, ProUniversitaria Publishing House*, Bucharest, 2013, pag.269.

[8] Dan Claudiu Dănișor, Ion Dogaru, Gheorghe Dănișor, *Teoria generală a dreptului*, C. H. Beck Publishing House, Bucharest, 2006, pag. 148.

[9] Mircea Djuvara, *Teoria generală a dreptului (Enciclopedie juridică)*, All Publishing House, Bucharest, 1995, pag. 280.

entails multiple doctrinal controversies, the provided criteria being inexhaustible. Essentially, the jurisdictional act is considered the act whereby the settlement of the litigation is aimed[10].

According to Terré, two aspects are found in every judgment: individual, actual aspect, which claims the pronouncement of the settlement of the case and general principle, which the judgment is founded and substantiated on. These general principles are rather revealed to the judge than the directives of the law, which have a discreet nature, this is why, the Court of Cassation tends to grant a privileged attention to the generalizing function of the judicial act, to the detriment of the individualizing function. According to the author, certain patterns arise from these decisions of the Court of Cassation, which are designated to guide the future work of the judges of the merits, being capitalized based on two trends: law of imitation and law of continuity. Especially in private international law, but also in civil and commercial law, the judge substantiates the decision on general principles which the judge founds and establishes and the violation of which represents a ground of invalidation[11].

The author notes that in French law, Parliaments, as courts of law and the other sovereign courts had the power to pronounce guidance decisions12. We are drawn the attention on the fact that the use of term „decisions" is not exactly correct, as they were not pronounced on the settlement of a litigation between two parties, but they were genuine regulations. Guidance decisions were however limited under two aspects: in space, as their mandatory force was extended only on the division which the respective Parliament belonged to; in time, due to the fact that such decisions were temporary, being valid until the adoption of a law.

By means of the provisions of art. 5 of the French Civil Code, these guidance decisions were prohibited. According to Terré, this does not mean that the judge is prevented to issue decisions in principle, if a connection can be established between the expressed principle and the ruling pronounced in the case. In other words, the text of the law prohibits the judge to create rules, outside the litigation, but it does not exclude the creation of praetorian rules within the jurisdictional activity. In this way, the motivation and the ruling pronounced in a case can be adjusted to other similar cases. Furthermore, it is considered that, if the issuance of decisions in principle is allowed in the settlement of the litigation, there is nothing to prevent their modification in order to be used for the settlement of other cases.

Similarly, Djuvara notes that, if the legitimacy of a new regulation is acknowledged, the legitimacy of any other identical act is necessarily acknowledged, based on generalizing legal induction, which leads to a general regulation. But, „this general regulation was not previously established, but it is formed in mind only by acknowledging the individual regulations"[13].

Therefore, it is noted that the decisions „which the judges not only pronounce but also substantiate, lead to the occurrence of the gaps of the legislation in force, and to the rulings of actual and individual application, formulated as general rules of legal issues brought into the respective litigations"[14].

Given all the aforementioned, we conclude that the judgments are of two kinds: judgments in principle, defined by the fact that the ruling is substantiated on a general principle and case judgments, limited to the settlement of an actual case.

The Romanian Civil Code prohibits guidance decisions, but does not prohibit *decisions in principle*. The possibility of the judge to issue a decision in principle does not violate the rule provided by the Civil Code, as this decision only produces *inter partes* effects; the substantiation of the judgment is the one that it is based on a preexistent legal principle. Whenever the law is silent or insufficient, the judge, being bound to settle the case under the penalty of denial of justice, shall seek to found a general principle admitted by the law system. But, „the creation of law is naturally a continuous process where every step generates unforeseen consequences on what we can do and what we should do next"[15]. As the dynamics of social life continuously reveal new aspects, such as euthanasia, human cloning, artificial procreation, the judge often finds himself obliged to create innovative principles, consistent with the existent ones, based on which he can substantiate his ruling. The legislative changes that occur at some point in time raise serious issues for certain fields of law, in terms of interpretation and application of normative acts[16]. In this case, the judge pronounces a decision in principle which, without pretending to be imposed as mandatory, will influence rulings pronounced in similar cases.

The literature shows that the decisions in principle suggest „a potential rule to follow", therefore, the provisions of the Civil Code do not prevent the jurisprudential development of law, but only mandatory precedent[17]. The authors point out that, although the judge settles an actual case, the judge formulates a principle and his reasoning must be a general one, applied to the actual case, but which could be applied to any similar case. Such a decision is

[10] Jean-Louis Bergel, *Méthodes du droit. Théorie générale du droit*, 2nd edition, Dalloz Publishing House, 1989, pag. 314.
[11] François Terré, *Introduction générale au droit*, 7th edition (Dalloz Publishing House, 2006), pag. 285.
[12] *Idem*, pag. 279.
[13] Mircea Djuvara, *op. cit.*, pag. 495.
[14] I. Comănescu, D. Pașalega, I. Stoenescu, *Contribuția practicii judiciare în dezvoltarea unor principii ale dreptului civil socialist*, in Justiția Nouă 4/1963.
[15] F. A. von Hayek, cited by Philippe Malaurie, *op. cit.*, pag. 348.
[16] Elena Emilia Ștefan, Contribuția practicii Curții Constituționale la posibila definire a aplicabilității revizuirii în contenciosul administrativ, Revista de Drept Public no. 3/2013, pag. 82-83.
[17] Dan Claudiu Dănișor, Ion Dogaru, Gheorghe Dănișor, *op. cit.*, pag. 147.

substantiated on the „internal logic of the legal system, but not in the sense that it has a generally binding value”[18].

Dimitrie Alexandresco noted that nothing prevented the judges, in motivating their decision, to present general considerations, to state principles of law, to make inductions or deductions. Notwithstanding, „the judges could not motivate their ruling, by simple reference to a previous sentence, although they could take into account their own case law or the case law of a superior court”[19].

Similarly, professors Demeter and Ceterchi wrote that, in socialist law, the lack of general-mandatory nature of the judgment did not exclude the possibility that the courts, in solving different cases, took into account previous decisions. The settlement of an actual case raises certain general aspects which, „if settled fairly and persuasively, can be a valuable guide for all state bodies, called upon to settle similar cases”[20]. Furthermore, it is shown that, given the hierarchy of courts, lower courts study the judicial practice of higher courts, without this practice being mandatory, but in order for the pronounced decisions not to deviate from the „general line of law interpretation and application”.

Gh. Mihai acknowledges that the primary role of the judge is to apply the law, but „provided that the grounds of several cases are the same, they can be general inspirations derived from a series of previous decisions”[21]. Mircea Djuvara notes that, if a doctrinal opinion of a legal expert or a judgment is „established as mandatory for future disputes, they play the role of the law”[22].

The power of the case law, according to Vălimărescu, is not inferred from text, but from the „power of things and lessons of history”[23]. If a certain issue of law receives the same ruling from several courts, the ruling shall be most often complied with by all the courts, therefore it is deemed that „the case law is established and it has legal force”.

Another opinion shows that, although theoretically, the judge cannot introduce a new regulation in the legal system, as the judge only „discovers” a regulation which exists in the system by default, however, „this strictly archaeological work is a mere fiction, beneath which a work of creation is hidden”[24]. The judge cannot claim previous case law as the legal ground of the new decision, due to the fact the judiciary precedent is not formally acknowledged as a formal source in continental law, but, the judge often relies on these principles. The judge „shall claim the principle as being incident to the system and not as being created by the judicial practice”.

Given all the aforementioned, in Roman-Germanic system, judicial precedent has only persuasive value: as far as the judge finds that a principle emerges from a constant case law, the judge shall acquire the principle and shall apply it in the case he has to settle. The judge is not bound to comply with the precedent, but the principle can be mandatory for the reason by means of its intellectual value. Given these grounds, the *ratio decidendi* of a previous decision is often found in similar cases, even under the same formulation. Furthermore, due to reasons concerning the consistency of the system, the continuity of the principles and the safety of legal relations, the unification of the judicial practice is a challenge.

The power of a case law, according to Djuvara, is enforced „based on the great principle of stability and of the security of social relations, which is a general principle of justice: without such a consistency of the rulings, not only that similar cases are settled in a particular way, which represents an injustice, but nothing is certain and nobody knows on what to rely, general legal order being therefore reached”[25].

The literature explains the persuasive value of precedent by considerations relating to the following: the need to ensure non-discriminatory treatment to individuals, which entails the considerations of rulings pronounced in similar cases; the fact that the judges represent a social body with well defined ideas, „which discriminates individual opinions in favor of the continuity of concepts which are expressed in decisions”; the hierarchical control of decisions, by higher courts, which determines, despite the independence of judges, the adoption of solutions in line with those pronounced by higher court[26].

We note that, under the apparent rigor of the provisions of the Civil Code, which force the judge to rule only by case decisions, the judge may, within certain limits, to exceed the framework of the enacted law. Although the judge claims to rely on preexistent law, in fact, the judge gets to create himself general principles of law.

Conclusions

In the light of all the aforementioned, we note that the legal principles drawn from the case law are enforced as mandatory, even if the judicial precedent is

[18] *Ibidem*, pag. 326.
[19] Dimitrie Alexandresco, *Principiile dreptului civil român*, vol. I, Atelierele grafice SOCEC, Bucharest, 1926, pag. 54.
[20] I. Demeter, I. Ceterchi, *Introducere în studiul dreptului*, Edit. Ştiinţifică, Bucharest, 1962, pag. 163
[21] Gheorghe Mihai, *Fundamentele dreptului. Teoria izvoarelor dreptului obiectiv*, vol. III, All Beck Publishing House, Bucharest, 2004, pag. 224.
[22] Mircea Djuvara, *op. cit.*, pag. 476.
[23] Alexandru Vălimărescu, *Tratat de Enciclopedia dreptului*, Lumina Lex Publishing House, Bucharest, 1999, pag. 237.
[24] Dan Claudiu Dănişor, Ion Dogaru, Gheorghe Dănişor, *op. cit.*, pag. 146.
[25] Mircea Djuvara, *op. cit.*, pag. 476.
[26] Dan Claudiu Dănişor, Ion Dogaru, Gheorghe Dănişor, *op. cit.*, pag. 149.

not mandatory in our legal system. The decisions establishing these principles are not formally mandatory for the courts of law, but the hierarchy of jurisdictional bodies and the authority of the Supreme Court require, at least in practice, the observance by lower courts of the Praetorian regulations.

Due to these grounds, recent specialized studies place continental case law, in terms of its creative role, between two limits: *de jure* negation and *de facto* acknowledgment[27]. Furthermore, we talk more and more about the power of the precedent in continental system, beyond its persuasive value. As an argument in favor of the acknowledgment of a creative case law, the possibility that the law grants to the judge in order to fill the gaps of the law is claimed, the judge having to choose between the potential meanings of concepts, such as: good faith, public order, good morals, equity. Furthermore, it is shown that the judge is authorized to remove potential contradictions, thus ensuring the consistency of the legal order[28]. Furthermore, the judge is liable to adjust law to the needs of social life, a prerogative that resulted in certain jurisprudential creations such as the institution of matrimonial regime and of the civil liability in French law or the institution of the tort liability and joint tenancy on shares, in Romanian law.

The matter of the judicial precedent role is very complex and very actual. The law creator role of the judge is discussed not only nationally, but also at the European Union level. The doctrine points out that although the rulings of the European Union courts are not *erga omnes* opposable, being binding only upon the parties of the litigation, they have „indirect law creator effect, due to the fact the settlement of similar litigations is also indicated"[29].

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[27] Steluţa Ionescu, *Justiţie şi jurisprudenţă în statul de drept*, Universul Juridic Publishing House, Bucharect, 2008, pag. 115.

[28] Ion Deleanu, *Construcţia judiciară a normei juridice*, în Dreptul, an XV, no. 8/2004, pag. 25.

[29] Laura-Cristiana Spătaru-Negură, *Dreptul Uniunii Europene – o nouă tipologie juridică,* Hamangiu Publishing House, Bucharest, 2016, pag. 158. For further details on the case law of the European Union courts as source of law, see, Laura-Cristiana Spătaru-Negură, *op. cit.*, pag. 156-165.

JUSTICE AND EQUITY

Elena ANGHEL[*]

Abstract

Juridical principles have a privileged place within the positive juridical order, representing foundation of the legal edifice: they prove the continuity of law during the centuries and that is why here we have to dig in order to find out the foundation of law, its permanent nature, its substance; they precede and give birth to positive law, which lies upstream of legal rules; principles build and direct the entire system of law, conferring to the legal order its necessary stability; being the underlayer of positive law, the principles of law represent a stability factor and, also, a source of unity, coherence, consistency and efficiency for that legal system[1].

The entire law science consists in reality of "generating from the multiplicity of law dispositions their essential, namely these exact last justice principles, from which all the other dispositions derive. Hereby, the entire legislation becomes of a great clarity and is caught in the so-called legal spirit"[2].

Keywords: *justice, equity, principle, value, judge*

Introduction

The scope of law, according to Alexandru Vălimărescu, consists in achieving a balance of interests which social harmony derives from, an harmony which is reached by means of two factors: the idea of justice and the idea of order[1].

The ultimate scope of the law, namely the idea of justice has received a multitude of meanings over the time. Regardless of the way it was founded (universal, divine, liberal, egalitarian, etatist justice, etc.), it was always considered that justice and society cannot be separated: *ubi societas, ibi jus*. It would be absurd to pretend that there is no justice if a positive law does not establish it, according to Montesquieu, thus claiming the transcendental nature of the principle of justice, which governs the society independently from its establishment in the regulations of the positive laws.

In the light of these historical considerations, we note that justice was assigned a multitude of meanings over the time: the meaning of justness, thus substantiating the positive law (principled justice); the individual's sense of justice (subjective justice); attainable ideal of any positive law (commutative justice); entitlement of judiciary institutions (distributive justice); prerogative of a state body to establish law (technical justice).

The following perspectives of approaching the concept of justice are noted in the current literature: ontological, as a principle of positive law; axiological, as a value of justness or of justice; moral, as a virtue of the human; sociological, as a social status, like equality or freedom; technical and legal, as a guiding principle of balanced organization of the society; political, as institutionalized power of the state[2].

Paper content

From the ontological point of view, justice is the basis of any law. According to Professor Gh. Mihai, there is a single multidimensional principle, the principle of Justice; it is a fundamental principle, which does not require acknowledgment, because it exists by itself; it is an innate principle, attached to human spirituality. The other fundamental principles – freedom, equality, responsibility – are only „dimensions" of the principle of Justice[3].

According to Djuvara, the idea of justice warms our souls and it is so rooted in our souls that we subordinate everything to it. It is „the guardian of our highest expectations"[4]. Therefore, the law as a science, discipline that dominates its every day application, „is based on an idea that owns it entirely, which infuses its whole life, the idea of justice. Without justness, namely without justice and equity, law cannot be understood, it is only a mean of torture of the people, and not a mean a peaceful coexistence between them"[5].

Sometimes, justice was mistaken for lawfulness. According to Gh. Mihai, we forget that justice is the knowledge of the ground the lawfulness is based on, as a tool which guarantees and ensures order. The father of the constitutions is the lawmaker and their mother is

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[1] For a detailed analysis of the importance of the general principles of law, see Nicolae Popa, Elena Anghel, Cornelia Beatrice Gabriela Ene-Dinu, Laura-Cristiana Spătaru-Negură, *Teoria generală a dreptului. Caiet de seminar*, Edition 2, C.H. Beck Publishing House, Bucharest, 2014.

[2] Mircea Djuvara, *General Theory of Law (Legal Encyclopedia),* All Publishing House, Bucharest, 1995, page 214.

[1] Alexandru Vălimărescu, *Tratat de Enciclopedia dreptului*, Lumina Lex Publishing House, Bucharest, 1999, pag. 68 and the following.

[2] Gheorghe Mihai, *Fundamentele dreptului*, All Beck Publishing House, Bucharest, 2004, pag. 25.

[3] *Idem*, pag.184.

[4] Mircea Djuvara, *op. cit.*, pag. 11.

[5] Mircea Djuvara, *op. cit*, pag. 114.

justice. Therefore, the law has to be in accordance with justice. *Dura lex sed lex* (the law may be harsh, but it is still the law) outlines the vision according to which the strict application of the law, and not the dispensing of justice is important. Nowadays, it is widely acknowledged and confirmed in the constitutions of all countries of the world that nobody can be exempted from liability for the offenses committed in the exercise of public function[6]. The violation by the lawmaker of the justness standard often leads to the adoption of unfair laws. Although Romanian people stated that *lex injusta non est lex*, the reality contradicted them, so the question is to determine to what extent the law manages to express the standard of justness.

The possibility that the laws are unjust was noted by Toma d'Aquino, which wrote that it is always required to avoid unjust judgment, but it is not required to comply unconditionally with the laws, these being often unjust, „being by themselves contrary to natural law, either always, or most often; the same, well drawn up laws are in some cases faulty; in these cases, the judgment shall not be performed by the law, but by resorting to labels, according to the lawmaker's intention"[7].

Paul Roubier considers that unjust laws hurt the feeling of justice[8]. Despite this, they exist. The author gives several examples of serious damage caused to the achievement of modern justice, either by the imperfections of legal techniques (for reasons of practical utility, which concerns the effective implementation of justice, the legal technique sometimes proceeds with the suppression of justice contained in certain rules of law, in order to turn them into simple and easily applicable rules), or by the adoption of a certain legal and content policy of the institutions; in this respect, the author believes that the law moves away from the requirements of justice when it establishes the opportunity to acquire ownership by adverse possession by a bad faith person. We note that sometimes justice is sacrificed in favor of social order, an aspect justified by M. Hauriou by the fact that „the established social order is the one which separates us from catastrophe; most people in civilized countries prefer to bear a certain dose of injustice than to risk a catastrophe". Notwithstanding, Roubier claims that the supreme goal of law is to achieve justice as the feeling of justice animates social order[9]. In this respect, the author suggests two potential remedies against unjust laws: by way of interpretation, the harmful effects can be reduced, by resorting to actual sources, instead of formal sources and by applying a „free law", and not a „pure law"; furthermore, injustice can also be removed by controlling the constitutionality of the law, which is one of the highest expressions of a law substantiated on justice[10].

Gh. Mihai points out that not the actual facts can be qualified as just or unjust, but the legal regulation which connects legal consequences with such facts. Therefore, thus relating it to the principles of law, the regulation can be legal, but this does not mean that it possesses the justness: justice does not always establish lawfulness from the moral and legal point of view.

Mircea Djuvara noted that unjust laws have to be removed, because the lawmaker „can often be wrong, but the idea of justice necessarily dominates any conception of the law". The law „takes its authority from the principle of justice, which, at least formally, represents"[11]. The ideal of justice is covered by the legislation as it could be roughly formulated, so that the application of this legislation can lead to actual cases of injustice. Notwithstanding, the principle of justice remains the sole criterion for the assessment of justness. The fact that this principle was subject to different interpretations or applications over time, leading sometimes to the regulation of slaves sale, or war or euthanasia, is not likely to affect the uniqueness of the concept of justice.

For Mircea Djuvara, justice is a scope in itself: positive law has a sole justification, namely justice. The rule of law is observed because it is established by itself, it contains its value in itself, rationally, because „for our reason, nothing is superior to the idea of justice that such a rules entails; we necessarily understand that we cannot scarify justice in favor of another interest; the ideal of justice is superior to any other interest, in this respect being the ultimate ideal"[12].

However, the author does not embrace the idea of eternal justice, by postulating that justice remains an ideal, which is never achieved completely, a directive of thinking that subordinates the entire law: „just like geometric shapes, it is an ideal form, empty of contents"[13]. Djuvara defines the ideal as being an absolute rational concept, but points out that its achievement is always relative, since it depends on the facts and conscience that we have on it at some point in time. Therefore, this ideal is not fixed, but it varies from people to people and from a stage to another, it is „a reflex which changes according to places and times, thus representing the ideal of justice of every people, in every moment of its evolution"[14]. Therefore, we can

[6] Elena Emilia Ștefan, *Examen asupra jurisprudenței Curții Constituționale privind noțiunea de „fapte grave" de încălcare a Constituției*, Revista de Drept Public no. 2/2013, p.86.
[7] *Apud* Philippe Malaurie, Antologia gândirii, pag. 56-57.
[8] Paul Roubier, *Théorie générale du droit, Histoire des doctrines juridiques et philosophie des valeurs sociales*, 2 edition, Éditions Dalloz 2005, pag. 221.
[9] *Idem*, pag. 199 and the following.
[10] *Idem*, pag. 225.
[11] Mircea Djuvara, *op. cit.*, pag. 270.
[12] *Idem*, pag. 214.
[13] *Idem*, pag. 243-244.
[14] *Idem*, pag. 299.

conclude that legal system is characterized by diversity, legal regulations being variable in time and space: „every state has its enacted law, which it deserves in accordance with its traditions and values, with its own social and political development"[15].

Even with this variable content, justice lasted from early evolution of human society, as the ancients defined it: *Fiat justitia, pereat mundus*. The source of the law is the idea of justice, rational idea which is established by means of its own authority; laws are formulated at least under the plea of being just, because law „is not at all Law when it can no longer be considered an effort to achieve Justice"[16]. Under these terms, according to Djuvara, it can be said that „law itself is justice in its essence and the scope of any social organization can only be the achievement of law and therefore of the justice, in the broader and deeper meaning of this expression"[17].

Giorgio del Vecchio conceives justice *a priori*, considering that nothing can be claimed in the name of justice without obedience to its rules. Absolute justice, which „transcends all positive legal findings", remains a high ideal criterion, as it is reflected in all laws, but it is not perfected in any of them. The author analyzes the relation between absolute justice and lawfulness: lawfulness is just an empirical and positive justice, therefore absolute justice represents an inexhaustible source meant to fill the gaps of the lawfulness. However, „those who easily violate laws undermine the very basis of civil life and damage the conditions the respect shown to own person depends on". This does not mean, according to the author, that justice is perfected by the mere cult of lawfulness: „we cannot answer to the vocation of our legal consciousness by standing impassively in the middle of the established order or by waiting passively for justice to fall from the sky. It requires an active and determined participation in that eternal drama, the scene of which is the history and the subject of which is the contrast between good and wrong and just and unjust. We need not only to obey the laws, but to vivify them and to cooperate to their renewal"[18].

According to Paul Roubier, the basis of the law is the ideal of justice; justice is the value which the author lays at the foundation of law and which dominates its entire general theory. First of all, it deals with the external appearance of the rule of law, then, following a rigorous and critical examination of the theories of the great school of laws, it investigates the basis of the legal regulation. Given that justness, the supreme moral value of the society, exists in the civilized human consciousness, beyond strictly legal terms relating to the formal framework of the rule of law, we cannot define law in its external appearance, without analyzing the contents of the rule of law[19].

According to Paul Roubier, the knowledge of the content of the law entails the understanding of the legal rules formation. The establishment of a rule of law must always start from the knowledge of social life needs, depending on which the rule is enacted, and then, according to them, the organization of legal relations is proceeded with. If the first approach is scientific, the second concerns the art of the law. The society is continuously evolving and the law is permanently renewed. The individual is not satisfied with knowing how the things are, but he will always seek to discover how the things should be. He relates to an ideal all the time, and this ideal cannot be found by scientific means, but only by valuable judgments. This is why law is an art, directed towards an ideal.

Therefore, the legal creation work covers two stages: the acknowledgment of those givens of social life and the construction of the rule of law and based on them[20]. By assessing the foundation of the rule of law, the author shows that, if the lawmaker creates the rule of law without taking into account all the givens of the social order, the lawmaker performs an useless work. The author lays at the basis of the law structure two givens: the experience and the ideal of justice, which turn the social order into a superior moral order.

Therefore, the superior principles of law are placed above positive laws[21]. The ideal of justice is the supreme moral value that governs the relations between people, is the „idea of a superior order which must reign in society and which will ensure the triumph of most respectable interests". Roubier pleads for the existence of a substantial criterion of the legal system; justness is contained in the rule of law. Justice is the product of a continuous progress, of law refining work, performed by lawyers in order to ensure a social balance. Therefore, all things which comply with „the superior order of human interests" are just.

According to Nicolae Popa, justice, the Roman sister of Dike, represents „the ideal general state of the society, achievable by ensuring for each and every individual and for all individuals together the fulfillment of their legitimate rights and interests"; if we say justice, we mean subordination to a hierarchy of values[22].

Justice is the reference point which guides the law towards the harmonization of individual interests with the interests of the society, a condition of the wished-

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[15] Laura-Cristiana Spătaru-Negură, *Dreptul Uniunii Europene – o nouă tipologie juridică,* Hamangiu Publishing House, Bucharest, 2016, pag. 44. For further details on unity and diversity in the typology of law, see Laura-Cristiana Spătaru-Negură, *op. cit.*, pag. 42-44.

[16] Mircea Djuvara, *op. cit.*, pag. 501.

[17] Mircea Djuvara, *op. cit.,* pag. 504.

[18] Giorgio del Vecchio, *Justiţia*, Cartea Românească Publishing House, Bucharest, 1936, pag. 33-117, *Apud* Ion Craiovan, *Tratat de teoria generală a dreptului*, Universul Juridic Publishing House, Bucharest, 2007, pag. 130.

[19] Paul Roubier, *op. cit.*, pag. 120.

[20] *Idem*, pag. 193.

[21] *Idem*, pag. 58.

[22] Nicolae Popa, *Teoria generală a dreptului*, ediţia a 3-a, C. H. Beck Publishing House, Bucharest, 2008, pag. 100 and the following.

for social balance. Standing at the basis of law, justice acts as "glue of all other principles and at the same time, as a regulating principle, by limitation, of these principles"[23]. Due to the fact that social order is the ultimate purpose, justice occurs as a limitation of individual freedom: „human world would be more balanced if every entity of it accomplished its scope, by affirming its purpose in the scope of the world living in; only under such conditions, the respective entity would be and would have what it deserves"[24].

Therefore, the principles are levers the judge relies on in carrying out the work of justice, motivated by the fact that the principles: represent a quality guarantee for the system of justice, ensure the stability of justice, entail the required adjustment of law to social life conditions and enable the filling of the gaps of the law. And yet, ***„people move under the abstraction of the laws and sacrificing them to an excess of logic means to say that human is made for the law and not that the law is made for human, which is an absurdity"***[25]**.**

Permanently engaged in „what should be", justice can often seem cruel. In social reality, the ideal is never achieved, due to the fact „it is covered by the legislation of a moment as it could be roughly formulated. The application of this legislation can lead to actual cases of injustice"[26]. Therefore, too much social justice can mean injustice for actual individual. The high number of cases where the Romanian state was responsible for the activity of the powers of the state should be a warning for the Romanian lawmaker in order to improve legislation and to reconsider all the theory of legal liability in general[27].

If the severity of the principle of justice requires an overview of social relations, **equity** corrects this inconvenient: it is focused on actual cases, by taking into account personal circumstances of every situation and applies and becomes subject to the value of justness in social diversity in order to do JUSTICE, an actual justice. „Equity shows us the fair assessment, from the legal point of view, of every individual case. This assessment is therefore the individual legal relation, having a particular form in every case. It is at the beginning and at the end of law"[28].

The law establishes a formal legal equality, but there cannot be an absolute equality in the society because inherent natural and social differences exist between people[29]. The equity is the one establishing the balance required for the coexistence of individuals, by referring constantly to the idea of equivalence, proportionality. „Legal law, written or not, limited in space and time, lacks of the capacity to cover and establish equity in its universality, but cannot ignore it, by engaging it in the equality relation, which represents the translation of the equity in formal-legal terms"[30].

Equity humanizes positive law, by including the categories of moral in its content. As we have already stated, law does not exhaust the wealth of content of value horizon: besides self-standing legal values which establish the rules of law, other non-legal values, such as equity, are also required for human coexistence. Equity is the guarantor of „the unit of inner life of human individuality with the relative exteriority to the others and to the community", according to Gh. Mihai, adding that the principle of equity lies in the consensuality of Justice with Moral Goodness, with the same founding universality[31].

According to Dumitru Mazilu, equity is a general principle of law, concerning both the creation and the application of law; therefore, equity requires moderation in what concerns the prescription by the lawmaker of the rights and obligations, but also impartiality in the distribution of advantages and disadvantages in the activity of the bodies applying the law[32].

Equity serves as guidance in the filed of the legal liability. The statement engages again the idea of proportionality, this time between the seriousness of the offense and the sanction applied to the offender. But, as legal law is not the same with just law, the legal sanction is not necessarily just. This is why the legal sanction is required to stand between lawfulness and equity: sanction lawfulness would remain „a rigid and repressive form outside the connection with the equity, which ensures a minimum of morality to its content recorded in temporarity"[33].

Equity is an universal principle-idea. It is found as a reference point in the Roman law and in *Manu's Code*, but also in modern legislations. C. Perelman believed that equity represented the appeal of the judge against law. Therefore, equity represents a reference point for the case law, leading to the creation of legal constructions by Praetorian means, such as the theory of heir apparent. According to François Terré, the role

[23] Dan Claudiu Dănișor, Ion Dogaru, Gheorghe Dănișor, Teoria generală a dreptului, C. H. Beck Publishing House, Bucharest, 2006, pag. 63.

[24] Gheorghe Mihai, *Fundamentele dreptului. Dreptul subiectiv. Izvoare ale drepturilor subiective*, vol. IV, All Beck Publishing House, Bucharest, 2005, pag. 29.

[25] Nicolae Titulescu, quote from Victor Duculescu, Georgeta Duculescu, *Justiția Europeană. Mecanisme, deziderate și perspective*, Lumina Lex Publishing House, Bucharest, 2002, pag. 269.

[26] Mircea Djuvara, *op. cit*., pag. 228.

[27] Elena Emilia Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ*, ProUniversitaria Publishing House, Bucharest, 2013, p.317.

[28] Mircea Djuvara, *op. cit*., pag. 227.

[29] In what concerns the right to nondiscrimination, see Elena Emilia Ștefan, *Opinions on the right to nondiscrimination*, published in CKS e-Book 2015, pp.540-544.

[30] Gheorghe Mihai, *Fundamentele dreptului*, vol. I - II, All Beck Publishing House, Bucharest, 2003, pag. 183.

[31] *Ibidem.*

[32] Dumitru Mazilu, *General Theory of Law*, All Beck Publishing House, Bucharest, 1999, pag. 178.

[33] Gheorghe Mihai, *Fundamentele dreptului*, vol. I - II, All Beck Publishing House, Bucharest, 2003, pag. 384.

of the equity is different if we refer to a legal system where law is dominant, case in which it occurs as a remedy thereof, or if case law or common law ranks first in the category of the sources of law[34]. In what concerns the power of the judge to decide on equity, Paul Roubier believes that, if it appeared as established in the old French monarchy, where it was considered that individuals could not be equal before the law, it is no longer justified today, when modern democratic societies vigorously promote the principle of civil freedom and equality. Furthermore, the author notes that, the appeal to equity can be dangerous if it contradicts legal security and social order, social values considered superior[35].

Conclusions

Being a moral-legal constant of humanity, the idea of justice is closely connected with the principle of justice. Mircea Djuvara believed that justice and equity are mistaken as ideals: „if they reach differentiation, this is a mistake that has to be remedied"[36]. We believe that they complement each other. Due to its requirements, the ideal of justice never leans on actual cases, this is why law has to include the ideal of equity in its content, and the two concepts should balance each other.

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[35] Paul Roubier, *op. cit.*, pag. 100.
[36] Mircea Djuvara, *op. cit.*, pag. 228.

POSTWAR INTERNATIONAL ORGANIZATIONS PREDECESSOR OF THE EUROPEAN UNION

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Abstract

The European Union, as its existence that we can meet in the present moment, is not a creation which came out of nothing or arising of the history's hazard, but is rather an evolutionary process that began after the end of the Second World War. In this respect, in their continuing search for security, cooperation and common prosperity, European countries have made, in turn, organizations with different profiles (economic, political, security), such as the Treaty of Dunkirk, Western Union, Organization Economic Cooperation in Europe, Council of Europe, Western European Union, all of which are creations precursor Union and, before being dissolved as obsolete or being embedded in Cleaned have served the aims of their times, representing evolutionary steps in defining project European.

Keywords: *Dunkirk, Western Union, Organization for Economic Cooperation in Europe, Council of Europe, Western European Union.*

1. Preliminary considerations.

By the present approach, we want to bring to the attention of readers those international organizations which have planted the seeds of cooperation among European states in the new political, economic and security paradigm which followed the Second World War, following the construction of cooperation or integration on the old Continent, from the Treaty of Dunkirk to the formation of the European Communities.

In this note, we wish to prove that the future European Comunities represent the culmination of a process of creating and deepening a culture of cooperation in Europe, who's premises can be identified before World War II, but which is decisively influenced by its catastrophic consequences, and also by the new power configuration which would define the postwar world. We belive that this study is relevant for the student body, specialists and enthusiasts of the domain, due to itțs relatively sporadic treatment in the Romanian specialty literature, a fact that may be considered the product of the historical circumstances that define Romanias relations with the european cooperation or integration projects. Thus, during the period which holds the events presented, Romania was placed in a different influence zone, as part of the socialist system, its connection with the ensemble of the European community being interrupted. However, given the resumption of Romania's European course, after the fall of the communist regime, and its present status of member state of the European Union, we don't consider as lacking in interest the presentation of the roots of these process and any approach that is likely to support the deepening of European culture phenomenon in our country and its complete understanding.

As far as we are concerned, in this study that we bring to your attention, we wish to bring our modest contribution towards reaching the aforementioned purposes by chronologically and synthetically presenting the highlights marking the creation of postwar European international organizations that precede the establishment of the European Communities.

For this purpose we use primarily the bibliographical research method, by appealing mainly to primary sources, and especially to the agreements signed by the founding states of the aforementioned organizations. We select from the ensemble of provisions, mainly the elements that appear as characteristic for the purposes of the Member States and for the concrete ways in which they are put into practice.

Following, we perform certain correlations between the events that were presented and we emphase the role of each moment analyzed in the broader picture of the system consisting of the analyzed organizations and their relationships.

We believe that that our approach can be harmoniously integrated into the overall existing literature in the vernacular doctrinal space, thus contributing to the completion of the already existing assembly of writings with a number of elements of detail, based on the study of primary sources, and also with a number of personal considerations, which we consider to be the starting point for future debates.

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2. The End of World War II and the United Nations.

For this, however, we must start our analysis from a brief description of the postwar international context and a presentation of some provisions of the UN Charter, relevant to the case, without insisting on issues well known to readers that would expand impermissibly the limits of the study we propose to you for analysis.

As the distinguished reader very well knows, the end of World War II offers mankind the full measure of the worst disasters resulting from the destructive action of man in the history of our species. In Europe and in great part of the rest of the world, many generations contemplate their disturbing fate and mourns the tens of millions of deaths, material achievements of many years of human struggle lie destroyed and prospects are almost as grim as the War that has just ended. Moreover, the discovery of the horrors of the Nazi regime, no less important, however, to the communist ones, installed in the USSR and beyond (Eastern Europe, China, part of South-Eastern Asia and in perspective, Africa and Latin America) take a serious question mark over man's ability to cooperate with the different others, instead of using violence fueled by unleashed hatred.

In this context, which we have mentioned because, as constructivist thinkers such as Alexander Wendt teach us, the ideas that dominate the thinking of decision-making people and, more generally, of human societies have great impact on their actions, both victors in the war mentioned and the states that have not taken part in hostilities seek a formula to establish and preserve the future climate of peace and security worldwide, which would make impossible to repeat past experience.

Certainly, having at hand the project, be it failed, of the League of Nations in the interwar period (hence the set of ideas and concepts that materialize in the United Nations is not entirely new, but it already existed in the relevant collective mind), the solution that shows the handiest refers to the establishment of a similar organization, whose charter to correct, however, the vulnerabilities that led to the failure of the previous approach, thus ensuring its superior functionality of Nations.

Thus, starting from the efforts of the period of the war, of the Allied Powers, to bring together the international society to defeating the common enemy, Nazi and others, which we can exemplify in moments, such as the Atlantic Charter (1941), Statement of US President F.D. Roosevelt (Washington, 1942), Moscow and Teheran Conferences etc., but which we will not explain in this endeavor, for reasons related to its wideness, a total of 51 countries signed in San Francisco on June 26, 1945, which became the United Nations Charter, or, in other words, the constitutive document of the most important organization with universal vocation of the contemporary world.

The stated purpose of the new Organization was, as its Preamble showed, to save future generations from the disaster of war, which twice in the founders' lifetime caused unprecedented human suffering.

In this respect, Article 2 of the Charter expressly mentions the obligation of every Member State to abstain in the conduct of its international relations from the threat or use of force against the territorial integrity or political independence of any State.

To ensure, however, the efficiency and effectiveness of this article, the Charter allowed, and even encouraged, I would say, the existence of regional arrangements or other agents with responsibilities for maintaining international peace and security, provided that such arrangements or structures are consistent with the principles and purposes of the United Nations[1]. Moreover, the same Charter expressly specified that the decision making structure with the most extensive powers of the Organization can use these regional organizations for actions to implement the provisions of the Charter, under its close authority[2].

Moreover, however, one of the symbolic articles of the Charter, namely Article 51, provides that nothing in the Charter does not prevent the inherent right of self-defense, individual or collective, in case of an armed attack against one member of the United Nations, which is exercised until the Security Council takes the necessary measures to maintain international peace and security[3].

These fundamental articles of the UN Charter will form the legal basis for the establishment and functioning of European international organizations, before the Union, which we will analyze below.

3. The initial moments of economic integration. BENELUX debut year.

Before analyzing key debut moments of security cooperation it is necessary, as this is required by the chronological criterion, to take a look on what will become the main level of European integration, which will lead to the Union that we see today into being, namely the economic field.

In this regard, we consider it appropriate to begin the analysis with the series of agreements that will serve as a model for the creation of the European Communities, namely the agreements between the Netherlands, Belgium and Luxembourg that will create the space known today as the BENELUX.

Thus, it is useful to remember that the roots of this happy ending are still in the period of the Second World War, more precisely in 1943, when representatives of the governments in exile of the three countries

[1] United Nations Charter, art. 52.
[2] Ibidem, art. 53.
[3] Ibidem, art. 51.

mentioned, meeting in London, signed, on October 21st the Monetary Convention between Belgium, Luxembourg and the Netherlands.

Without going into the many technical details contained in this Convention, which do not fall either in the space, or the purposes of this study, we shall merely present some essential provisions drawn from reading the said Convention.

Therefore, the purpose of this agreement of wills is defined by the signatory parties, by stabilizing monetary relations and facilitating mechanisms for payments between the Netherlands and Economic Union Belgium-Luxemburg (dating from 1921)[4], as well as between their territories overseas (provisions which will see their relevance diminished with increased decolonization process). Further, the Convention sets out details of the fixed exchange rate between the currencies of the Member concerned, to be used in mutual economic and financial relations, covering a multitude of technical relevant aspects for the covered field.

The next agreement concluded by the same three states that we can consider a vanguard of the European project is the Customs Convention between the Netherlands, Belgium and Luxembourg, signed in London on September 5th, 1944.

It aims to create, upon handing the territories of the Economic Union, Belgium-Luxembourg and the Netherlands, the most favourable conditions for a subsequent sustainable customs union and the resumption of economic activity[5] disrupted by the ongoing war and the German occupation.

In this regard, starting with its first article, the Parties intended to implement, at the entry of gods from third states on their territory, the same customs duties, according to an annex that was part of their agreement[6].

We see, therefore, the highly advanced degree of integration that the signatory states suggest from the start, like the common market that the European Communities have achieved many years later.

Further, Article 2 of the Convention includes the prohibition of customs duties collection at the entry of goods from the territory of a Member State in the other signatory states, except for certain categories of goods such as spirits, wines, sugar or tobacco[7].

To ensure and develop the organization created, Article 3 of the Convention establishes the creation of an Administrative Council of Customs, composed of three delegates from the Economic Union Belgium-Luxembourg and as many from the Netherlands, with President exercised in turn by delegates of the Union and the Netherlands. The purpose of this Council was to propose the necessary measures to harmonize laws and regulations and administrative regulations regarding the levying of customs duties in the Member States[8].

We see virtually in those provisions, a possible source of inspiration for future Commissions of the European Communities.

The Board of Directors will be assisted under Article 4, by a Commission of customs disputes, composed of two delegates from the Economic Union Belgium-Luxembourg and the Netherlands, which will decide, ultimately, on complaints relating to decisions of competent bodies of the Parties, which are considering applying legal provisions or administrative regulations resulting from application of the Convention. Member States enforce the Commission's decisions[9].

In our view, there can be identified some similarities between this committee and the forthcoming Court of Justice of the European Communities, also accounting for the task of ensuring the interpretation and uniform application of Community law.

Further, the Convention also provides for the establishment of a Council of Administrative Regulations for Foreign Trade, with a similar composition of the Administrative Board of Customs and a presidency exercised according to the same model. It will have the mission to provide advice to the competent authorities of the Member States in all matters they wish to regulate, in matters covered by the Convention (customs duties, charges having equivalent effect, imports and exports, transit of goods, licenses, quotas, administrative fees) and coordinate the measures to achieve a common regime in the Member States, to ensure the administration of import, export and transit quotas, common to the Member States and to provide advice to the competent authorities of the Member States concerning all legal measures related to bonuses or grants which Member States want applied[10].

We must not forget the Commercial Agreements Council, composed and chaired by the same rules, competent to ensure as far as possible, the coordination of provisions relative to the relations with third countries[11].

We can identify, in the mentioned institutional framework, the seeds of future supranational institutions of the Communities and later the European Union, although the proportions should be maintained properly and assimilation cannot exceed a limited correspondence. However, given that constructions such as the Communities rarely occur spontaneously, ideas that lead to their creation have evolved gradually,

[4] Monetary Convention between Belgium, Luxembourg and the Netherlands, signed in London October 21, 1943.
[5] Customs Convention between the Netherlands, Belgium and Luxembourg, signed in London on 5 September 1944.
[6] Ibidem, art. 1.
[7] Ibidem, art. 2.
[8] Ibidem, art. 3.
[9] Ibidem, art. 4.
[10] Ibidem, art. 5.
[11] Ibidem, art. 6.

step by step, we consider useful their exposure in the study which we bring to your attention.

Another provision which appears as interesting consists of temporal application of this agreement, conceived as unlimited[12], which is detached from the practice that we observe applied in international relations, in the period under review.

The aforementioned Customs Union came into force on January 1st, 1948, supporting with its innovative means, however limited they may be, economic recovery, encouraging a free trade in the area bounded signatory states' territories.

4. Transposition of the cooperative spirit of the UN Charter in Europe. Alliance and Mutual Assistance Treaty of Dunkirk.

As indicated in the title of this part of our study, in our opinion, the UN Charter and general predominance of the idea that peaceful cooperation between countries is the paradigm taking place in relations between the states of postwar democratic world. However, in terms of the Treaty which we will analyze, a number of other considerations will contribute to it materialization.

Thus, as we can deduce from the works of neoliberal and constructivist thinkers of international relations science, the cooperation's culture between the two countries can influence in a significant way, their mutual actions. In this sense, history shows the existence of a long cooperation between Britain and France in the field of security, began with Entente Cordiale, marking overcoming the millennial rivalry between the two countries, which did not correspond to the interests and circumstances of the present times. As a result of this agreement, the two states form common front in World War I against Germany, and the second conflagration places them in almost exactly the same circumstances.

It is not surprising, therefore, that, just two years after the end of World War between the years 1939-1945, Britain and France signed in Dunkirk, on Belgian territory (a place chosen also because of its symbolic significance for Anglo-French solidarity, manifested through the joint effort of evacuating approximately 340,000 combatants, of which 120,000 French and Belgian, before the German offensive against France and Belgium, in the spring and summer of 1940), a Treaty of Alliance and Mutual Assistance, on March 4th, 1947.

Even in its Preamble, the parties affirm their desire to confirm, through a treaty, cordial friendship and close association of interests.

The parties also noted the same Preamble, their determination to work together through mutual assistance in the event of any renewal of German aggressive trends, stating also their belief in the sense of opportunity of concluding a treaty between all parties which hold responsibilities in relation to Germany, in order to prevent it from turning again into a threat to peace.

We see, therefore, in this paragraph, both the intention of extending forms of European cooperation and reminiscences of strategic thinking in the periods before and during the two World Wars. Of course, looking in retrospect at the events, it is easy to accuse Europeans decision-makers of the time of a slight myopia in connection with the distribution of further power and the source of threats to their security, but, judging by the information which they had and in the paradigm of thought developed in previous decades of this Treaty, including marked by two world wars which had Germany as the protagonist, their approach appears as natural. Moreover, we can not know whether the further development of the European security architecture would have been the same if French and German leaders would not be afraid of an uncontrolled rearmament from Germany and would have not insisted to include in all their integrative endeavours.

However, we consider important to note that the Treaty of Dunkirk includes provisions that exceed the security scope aimed at deepening French-British cooperation in a number of other areas. Thus, the Preamble to the Treaty also underlines the intention of the Parties to strengthen economic relations between them to their mutual advantage and in the interest of general prosperity.

However, in terms of the security aspect, Article I of the Treaty includes the obligation of the Contracting Parties to undertake, after mutual consultation and, if necessary, with prospective parties which would have responsibilities for the German problem, those actions on which they will agree upon to end any threats arising from the adoption by Germany of a policy of aggression or any action to facilitate such a policy[13].

We note in this article, the existence of provisions designed to give Parties the ability to combat since the beginning any aggressive policy of Germany, without allowing it to benefit from the respite necessary to put intentions in practice, as it happened in the recent war that ended. Basically, we can say that we are dealing with a preventive action mechanism which, once implemented, prevents escalation of violence to war.

However, if either Party saw itself again involved in hostilities with Germany, triggered both by an attack launched by Germany and the action carried out in accordance with Article I, described above, the other Party shall provide immediately the full support, military or otherwise, which lies in its possibilities[14].

Moreover, the Treaty also includes in its article V, the obligation for Contracting Parties not to enter into any alliance and not to take part in any coalition

[12] Ibidem, art. 8.
[13] Alliance and Mutual Assistance Treaty of Dunkirk, art. I.
[14] Ibidem, art. II.

directed against the other Party and not to assume any obligation which is not in accordance with the Treaty[15].

Regarding the duration of this agreement, Article VI sets it to a period of 50 years.

Therefore, in our opinion, we are dealing with an embryo of the future European security architecture. Although maybe its provisions do not represent something new and do not have a pan-European vocation, the Treaty lays the foundation of cooperation that will expand gradually and can be seen in this paradigm as the first part of the whole that is to be defined.

5. Strengthening cooperation on the issue of security. Western Union.

As previously stated, the Treaty of Dunkirk is only a first security cooperation exercise between West European states. Shortly after its signing, policymakers in Britain and France realized that, compared with tensions between Western countries and the Soviet Union (fueled by the aggressive behaviour thereof, exemplified by events such as the Berlin Blockade or the establishment by force of some governments faithful to the Soviet power in Eastern Europe, including Romania) the coalition effort of European states should strengthen. Moreover, we are witnessing, in the same period, a gradual shift of attention from a possible rearmament of Germany, in an uncertain future, to the Soviet aggression, immediately perceptible. This is the framework in which the second security organization analyzed will be established, the Western Union.

Thus, the Constitutive Treaty signed in Brussels on 17th of March, 1948 by representatives of Belgium, France, Luxembourg, the Netherlands and the UK will include, in the preamble, reaffirming the intention of signatory parties to preserve their faith in fundamental rights of the human being, in the dignity and worth of the person and in the other ideals proclaimed in the Charter of the United Nations.

Also, the same Treaty contains a number of core values that Member States share, including democracy, personal and political freedom, constitutional traditions of the Member and the rule of law, considered the common heritage of the legal systems and political conditions in Western Europe.

Accordingly, Member states reaffirm their desire to strengthen the economic, social and cultural ties between them, on which to coordinate their efforts to create an adequate basis for European economic recovery.

In addition to these targets, Parties emphasize what will become, in fact, the most important component of the Organization, namely the security aspect. Accordingly, mutual assistance is an aim of their approach, in accordance with the provisions of the UN Charter, for the maintenance of an international climate of peace and security and to combat any policy of aggression, coming not only from Germany (specifically mentioned) but also from other international players (undefined).

The open, pan-European nature that the Treaty wanted to print to this construction is further emphasized by the desire to associate progressively other states that share the same principles and are animated by the same goals.

However, the Treaty does not begin to state the provisions relating to collective defense, but by the economic provisions. Thus, Article I contains the obligation for Member States to organize economic policies so as to support the common goal of European economic recovery and eliminate the conflict of mutual economic relations.

In order to harmonize the interests and actions of signatory states in the economic sphere an Advisory Board is constituted by the same Article I, stating that membership in it does not contravene the Members' belonging to any other forms of economic association, as long as they pursue similar objectives[16].

Article II of the Treaty also contains a very interesting and ambitious objective, namely to cooperate, both at headquarters and in the various bodies and agencies to achieve a high level of life standard and to accelerate economic and social development in signatory states[17].

Similarly, Article III includes members' wish to promote cultural ties that unite them, forming the foundation of their common civilization[18].

Collective defense will make its appearance in Article IV, which states that if one of the parties will become subject to an armed attack, taking place within the geographical limits of the European continent, the other Parties are obliged to give, in accordance with the provisions of Article 51 of the UN Charter, the necessary assistance, by any means, including military[19].

Moreover, Article VI continues a provision mentioned in the Treaty of Dunkirk, namely the obligation of the parties not to take part in any agreement that would imply provisions contrary to this Treaty[20].

The same treaty also includes provisions concerning the settlement of any dispute between Member States which, through its article VIII, brings

[15] Ibidem, art. V.
[16] *Treaty between Belgium, France, Luxembourg, the Netherlands and the United Kingdom of Great Britain and Northern Ireland, signed in Brussels on March 17, 1948*, art. I.
[17] Ibidem, art. II.
[18] Ibidem, art. III.
[19] Ibidem, art. IV.
[20] Ibidem, art. VI.

them to the attention of the International Court of Justice, if states from which the dispute arises are unable to settle it by better operational means[21].

Moreover, Article IX provides for the possibility for Contracting Parties to invite other member countries to be part of this agreement, if they agree with the principles, values and concrete provisions thereof[22].

Article X establishes, exactly as in the case of the Treaty of Dunkirk, whose natural continuation I, the same validity period of 50 years[23].

We therefore have before us a linear, continuous example of the European security construction and furthermore, of the cooperation development and, ultimately, European integration. This is the conclusion we are led to both due to the expansion of the membership of the new construction, in relation to the Treaty of Dunkirk and the horizontal and vertical development of areas covered by the Treaty, the ongoing cooperation also including economic and cultural aspects, but setting up a specialized institution to coordinate them. Of course, in spite of certain results in economic and social policy and some meetings devoted to this theme, between the Parties, these areas will fall in relative disuse, with the establishment of some perfected forms in the field, here referring mainly to European communities. The security side, however, will develop, gradually having increasingly more advanced forms.

Until then, we propose to consider the efforts made by European countries in the predominantly civil fields.

6. Economic cooperation at continental level. Organization for Economic Cooperation in Europe.

As we said at the beginning of our study, after the end of World War I, Europe was in a state of unprecedented devastation, which left European countries vulnerable to any shock from outside. In this world that was struggling to find itself after the War, two superpowers were left with no other potential adversary, namely the USA and the Soviet Union, and their confrontation would mark the following five decades of world's history, placed under the sign of bipolarism.

United States came out of war with an industry intensified by the effort to support its specific military actions and changing again major industrial producers in the production of peace put a difficult problem, namely targeting goods surplus, which otherwise could create an overproduction crisis. That is why the United States needed a European market able to absorb goods produced and which exceeded domestic consumption capabilities. But more than that, the United States could not afford communism to expand in Europe. However strong the US economy was, it could not exist without a free world with which to conclude commercial agreements. And as widespread poverty, installed in Europe after WWII could only encourage the rise to power of the communist parties supported by the Soviet Union, it was necessary to help these countries to overcome this state of poverty and thus limit the audience of communist parties[24].

The way to achieve these goals has been stated, for the first time publicly by Secretary of State George C. Marshall, in a speech in June 5, 1947, at Harvard University in Cambridge, Massachusetts. His plan, subsequently approved by Congress, which would bear his name, included a helping scheme for European countries on the basis of agreements with each of them, in order to re-launch their economies and combat communist influence. The Marshall Plan, however, involved a much larger mobilization of energies favourable to democracy across Europe, including the opinion leaders' activity, radio and TV media, intellectuals', civil society's activities etc. This vast concentration of energies has reached its goal, in the first elections organized in the European states, after launching the aid plan, communist parties registering unfavourable results.[25] However, the Marshall Plan remains, in our view, the Europeans subjected to Communist dictatorships, a distant dream and a limited success, as the Soviet Union did not allow states in its sphere of influence to benefit from US aid.

US aid has also assumed, however, another aspect, namely to encourage, by the Partners over the Ocean, economic cooperation among European states in order to improve its effects. In this regard, benefitting from the contribution of American diplomacy, the governments of Austria, Belgium, Denmark, France, Greece, Iceland, Ireland, Italy, Luxembourg, Norway, Netherlands, Portugal, United Kingdom, Sweden, Switzerland, Turkey and the powers in charge with the occupation areas of Germany, signed on 16 April 1948, in Paris, the Convention for European Economic Cooperation.

The Convention contains a number of obligations on Member States, where we would certainly recognize future provisions of the Treaties establishing the European Communities.

Thus, in the very first article of the Convention, the Parties agree to work closely for the development and execution of a concerted economic recovery program. Its objective was to achieve in the shortest time, and to maintain at a satisfactory level the economic activity, limiting external aid needs, and to develop mutual economic exchanges with third countries. With this stipulation, the signatory states

[21] Ibidem, art. VIII.
[22] Ibidem, art. IX.
[23] Ibidem, art. X.
[24] *www.cvce.eu*, 07.07.2016, accessed on January 16, 2016.
[25] Ibidem.

approved the establishment of an Economic Cooperation Organizations in Europe[26].

In accordance with Article 2, the Contracting Parties undertook the obligation to strongly promote the development of their production, through the effective use of available resources[27].

Also, under the auspices of the Organization, Member States will set up programs for the joint production and exchange of goods. Further, Article 4 is the core of developing countries' efforts in cooperation, the highest possible level of interchange of goods and services. To this end, States bear the obligation to create in the shortest time, a multilateral system of payments and cooperate to ease restrictions on trade and payments between them, in order to finally abolish these restrictions completely[28].

In addition, they will continue to study the possibility of establishing a Customs Union or an arrangement similar to a free trade area, as a means to achieve goals set by the Convention[29].

States will also assume the obligation to ensure the attainment and maintenance of relative stability of prices and macroeconomic coordinates, which will increase their credibility internationally[30].

Another interesting provision, in perspective, of the Convention is the obligation for Member States to seek full employment of labour force and, when needed, to use labour from other partner states. To this end, Article 8 encourages states to adopt measures for the establishment of free movement of labour force and freedom of residence for workers' families and, as a prospect, for the abolition of all obstacles to the free movement of persons in general[31].

Aims of the Organization were, under the Convention, to prepare and implement measures needed to achieve the aspirations set out in Article 11 (a high level of European economy and cooperation between Members), to facilitate the implementation of this Convention, to adopt the measures necessary for its enforcement and to facilitate the optimal use of states' resources, whether internal or external, and to manage the relationship with the US or other third countries in order to conclude commercial agreements[32].

The Convention also establishes a specific institutional system to the freshly created Organization, consisting of a Board, as a supreme decision-making body, which includes representatives of all Member States, an Executive Committee consisting of seven members appointed annually by the Council, before which there is a Secretary General, responsible for managing the technical aspects, a Secretariat, subordinated to it, technical committees and other bodies. Also, the Organization reiterates, in Article 25, its open character[33].

We find practically, in the scheme shown, both common elements of cooperative organizations and elements that can lead us thinking about the future institutional structure of the European Communities.

7. Initial moments of political cooperation. Council of Europe.

The idea of setting any kind of European political cooperation, in less than five years after a devastating war that took millions of lives, harmed profound national dignity of the belligerent states and, normally, would have created animosity difficult to overcome between countries and peoples of Europe seems difficult if not impossible to conceive, unless we consider the existence, even during war, of some strong resistance movements, in both countries occupied by the Axis powers, and within them.

Furthermore, reversing the course of history made it that, after the war, many members of the movements mentioned or supporters of their ideas reached decision-making positions in West European countries, and thereby had the opportunity to put into practice pro-European vision.

After the feverish activity of all groups of major pro-European influence, on 7 May 1948, an International Congress for the coordination of movements favourable to European unity was convened, in Hague. Although many ideas were presented there, some contradictory and important differences between federalist and functionalist followers were revealed, participants failed to agree on a political resolution calling for convening a representative European assembly, drafting a Charter of Human Rights and creating a Court of Justice charged with interpreting and defending its observance. Actually, their approach benefits from the entire efforts of the US administration, favourable, in general, to the idea of European unity and even more to a form of European unity that includes the Federal Republic of Germany. European federalist movement representatives addressed on 18 August 1948 their draft to the European governments concerned[34].

They managed to capture the interest of governments in France and BENELUX, but faced opposition from Great Britain, which rejected the idea of international institutions (or, rather, supranational institutions) whose members are not appointed by the governments of the organization's member states they

[26] *Convention for European Economic Cooperation*, signed in Paris, April 16, 1948, art. 1.
[27] Ibidem, art. 2
[28] Ibidem, art. 4 and the following.
[29] Ibidem.
[30] Ibidem.
[31] Ibidem.
[32] Ibidem, art. 11.
[33] Ibidem, art. 11-25.
[34] *www.cvce.eu*, 07.07.2016, accessed on 19.10.2016.

belong to. To overcome the crisis, a study committee for the European Union was constituted on October 26, 1948, meeting in Paris under the chairmanship of Edouard Heriott. The Committee reached an agreement and presented Governments of the States mentioned a draft of European Union on 15 December 1948, only to be faced with a new British refusal. After further negotiations, the foreign ministers of the countries concerned reached an agreement on the creation of a Council of Ministers endowed with certain powers of decision and a Consultative Assembly, where members are appointed under a procedure chosen by each individual government[35].

The Five (France, UK and the BENELUX countries) invited representatives of Ireland, Italy, Denmark, Norway and Sweden to attend the Conference on the creation of the Council of Europe, held in Saint-James Palace, in London, between 3 and 5 May 1949, after which there was signed what was to become the Council of Europe Statute, which entered into force on August 3rd, the same year, after ratification by the UK[36].

Basically, these efforts contain the steps of creating a European Union, a federative entity that, even if it will not be carried out on this occasion, it will inspire efforts to create Communities that will give birth, tens of years later, to today's European Union, which, in turn, can only represent the form of a construction in progress to strengthen.

In what follows, we will present some of the essential provisions of the Agreement on the Statute of the Council of Europe, as it was adopted in 1949. Of course, this document has undergone a number of changes over time, which we will approach in other research efforts.

First, we wish to emphasize that, in the preamble of the Agreement, the signatories considered that it represented the mission of the new Organization. Thus, they emphasized their conviction that consolidation of peace, founded on the ideas of justice and international cooperation is essential for the survival of human society and civilization. Attached to the spiritual and moral values that represented the common heritage of their peoples and which are underlying the principles of individual and political freedom and the rule of law, underpinning genuine democracy, they decided to constitute a Council of Europe consisting of a Committee representing Governments and the Consultative Assembly.

Further, Article 1 of the Statute clearly establishes the Organization's goal: achieving greater unity between Member States and safeguarding and promoting the ideals and principles which are their common heritage and favors their economic and social progress, an aim had in view through the established institutions. However, letter d) of the same article states expressly that problems in the sphere of national security and defense are outside the Council of Europe's competence[37].

To strengthen the above, Article 3 reiterates that all Member States recognize the principle of the rule of law and the one according to which all persons under its jurisdiction enjoy the provisions concerning its human rights and fundamental freedoms, for the observance of which Member States are committed to work together[38].

The open nature of the new organization, for any European state that adheres to the principles laid down by the Statute, is outlined in Article 4, while sanctions for failure to comply with it, which can reach up to the withdrawal of membership, are outlined in Article 8.

Further, the Statute provides the institutional structure of the Council, made up of the Committee of Ministers and the Parliamentary Assembly (Consultative, in the French version of the Statute of 1949).

Of these, the Committee of Ministers, composed of the external affairs ministers of member states has as responsibilities examining, on a recommendation from the Parliamentary Assembly or on its own initiative, measures that are necessary to accomplish the purpose of the Council's existence and to facilitate the conclusion, by the States, of international agreements and conventions in the field, thus trying to coordinate their foreign policies, in the areas within its competence. The Committee of Ministers presents the activity report to the Parliamentary Assembly, at each session[39].

As for the Parliamentary Assembly, it is the deliberative body of the Council, responsible for the debate of relevant issues in the fields of competence, and for submitting its conclusions to the Committee of Ministers, in the form of recommendations. The Assembly is composed of representatives of Member States, designated under the 1949 Statute, at the desire of Great Britain, according to the rules adopted by each state. Membership of the Assembly is incompatible with that of Member of the Committee of Ministers[40].

Moreover, the Statute also details the rules of procedure applicable to the institutions mentioned, especially regarding the voting rules for each area. The Council also benefits from the contribution of a Secretariat responsible with managing the

[35] Ibidem.
[36] Ibidem.
[37] *Statute of the Council of Europe, signed in London*, 5 May 1949, taken from www.cvce.eu, accessed on 20.10.2016, available at Archives Nationales du Luxembourg, Luxembourg, Organisations internationales, Conseil de l'Europe - Constitution. Statut du Conseil de l'Europe, AE 12380, art. 1.
[38] Ibidem, art. 3.
[39] Ibidem, art. 10 and the following.
[40] Ibidem, art. 10 and the following.

organizational aspects involved by the Organization's existence and activity[41].

We are, therefore, dealing with an organization which benefited from a particularly promising foundation, the pro-European effervescence provided by the federalist movements, but failed in fulfilling the federalist ideal, coming down to an intergovernmental character. It results from a compromise between the original federalist idea and the desire to ensure a pan-European vocation of the Council, in particular by including Great Britain in its composition. Or, as we see in many other aspects related to British foreign policy guidelines, and the dominant mentality at all levels, in this state, the United Kingdom is a constant source of opposition to the supranational aspirations.

8. Conclusions

Summarizing the presented information so far, we are able to conclude that World War II and the new worldwide balance of power that were brought contributed, by undermining the foundations of traditional politics power in Europe and by the shock generated by the magnitude of its catastrophical results, and the emergence of a new actor involved in European issues, namely the US, the emergence and development of a system of cooperation focused on several levels, which led, ultimately, to the creation of the European Communities and, for a longer period of time, the European Union. Moreover, even this creation can not be seen as the end of the road by the analyzed developments, but also as an evolving entity, as can be seen even from the analysis of recent events.

Thus, the analyzed period began with an example of an economic cooperation, namely Benelux Customs Union, in the section dedicated to it being presented as a first exercise of its kind in Europe. Further, we showed how cooperation can target the military aspect, analyzing moments such as the Treaty of Dunkirk or the establishment of Western Union, both steps seen as based on fear of a possible new rearmament of Germany. Next, we presented the role of US involvement in Europe's economic recovery, but also the specific requirements its Atlantic partner had in order to obtain the requested aid, which have an important role in developing a culture of cooperation among European states. Finally, we presented a first exercise of political and legal cooperation between the European states, also exposing the moments that preceded, generated and promoted the creation of the Council of Europe.

In our opinion, the ideas in this framework can be a useful working tool for the readers interested in studying the phenomenon of European construction, thanks to the fact that gives them details about a period somewhat less analyzed in the domestic space. However, our aim is also to provide premises for the elaboration of approaches for future research, in which case the communication face only serves to draw attention to this field of study, which we consider important because of the natural need to know the starting points, the premises and the context that generated the paradigm in which we find ourselves now.

In particular, we see as possible developments of this theme, the analysis of the initial moments of European Communities, of the stranded episodes as the European Defence Community and European Political Community and, in a broaded context, the development of some works that present, in a full picture, the evolution of cooperation and European integration in the aftermath of the Second World War, giving all the main organizations that make up this framework, in a chronological unfolding, enabling the analysis of the relationships between them and their systemic research.

At the end of this presentation, we can say that, in our opinion, analyzing the constitution and peculiarities of postwar international European organizations, prior to the European Communities, reveals that the idea of European unity, circulated more or less concrete for nearly a millennium, in the space of the Old Continent, reaches, both before and during, and especially after the Second World War, a level of concreteness which places it already, under its various aspects, on the agenda of European and even Americans policy makers. However, at least so far, despite a surprisingly high degree of acceptance of the need for Europe to move in the future towards a federal form of organization, actual achievements are not approaching this level. In other words, *"the European construction has oscillated since its beginning between integration and cooperation, between deepening and staging / rescheduling the progresses that had to be achieved from the collaboration between states"*[42]This, however, does not justify, in our view, a highly critical approach of the progress achieved in this period in terms of putting the European idea into practice. It is true that, for starters, cooperation focused on the economic component and limited regionally, but we can also notice a cooperation increasingly more extensive at the security level between almost all countries of Western Europe, which will result in future in including Germany, which ended the German aggressive policy, regular source of conflict in Europe. Moreover, we can notice how, after economic and security cooperation exercise, we are witnessing the first political approach that will bring together gradually, almost all European countries, which is, with all its drawbacks outlined above, a first in the tumultuous history of Europe.

All these efforts represent a great milestone in the history of Europe, which makes the transition to a new paradigm that will get more concrete forms with the creation of the European Communities.

[41] Ibidem, art. 10 and the following.

[42] Laetitia Garat, *Le federalisme dans le Traite de Lisbonne*, apud Mihaela-Augustina Dumitrașcu, *Dreptul Uniunii Europene și specificitatea acestuia*, Universul Juridic, Bucharest, 2012, p.13.

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- Convention for European Economic Cooperation, signed in Paris, April 16th, 1948;
- *Statute of the Council of Europe*, signed in London, May 5th, 1949;
- www.cvce.eu.

THE RATIONALE OF LAW. THE ROLE AND IMPORTANCE OF THE LOGICAL METHOD OF INTERPRETATION OF LEGAL NORMS

Mihai BĂDESCU*

Abstract

The interpretation of law was and remains an indispensable postulation, inherent and the most significant in the application of the law. Through interpretation the aim is to clarify the obscure text, to rectify the imperfection of the text of the legal norm, to remedy its shortcomings, and in consequence, to specify the exact meaning of the legal norm. Interpretation concerns itself with emphasizing the authentic meaning of the normative texts, finding the spirit of the lawmaker-author, the authentic legal sense of the actions that occurred, of the conduct of the perpetrator, and the significant legal connection of these meanings. The necessity of interpreting legal norms is justified by several considerations, out of which the most important remains the one regarding the act that the lawmaker cannot and need not provide everything in the normative text. The unity between the spirit and the letter of the law, the continuity of interpretation, the useful effect of the legal norm are just a few of the principles that need to be taken into account in interpretation. Be it official (obligatory), or unofficial (doctrinary), interpretation remains an extremely important stage in the application of the law: the literature of specialty consecrates five important methods of interpretation (grammatical, historical, systematical, teleological, and logical). The latter method allows for the formulation by the interpreter of certain rational assessments, done through operations of generalization, of logical analysis of the text, of analogy, through applying formal logic.
The present study will mainly deal with this method, analyzing the main logical arguments used in interpretation.

Keywords: *legal norm, interpretation, method, logical argument*

1. Interpreting legal norms designates the intellectual process of establishing the exact sense of the legal norm[1].

Usually, through interpretation we understand the analysis and explanation of an obscure text, of a text that "*leaves room for interpretation".*

From the very beginning, interpretation was an indispensable postulate, inherent and the most significant in the application of law. Not the other way around, in the sense that the application of the law determines its interpretation, because in that case, substituting itself to the lawmaker, the interpreter would also become the judge of the opportunity of laws. But a law that would be impossible to interpret would also be impossible to apply, because nobody can apply something they do not know, something they do not understand[2].

Interpretation means, beside clarifying the obscure text and circumstantiation of a general text, the rectification of imperfections in the text of the legal norm, solving the contradictions in the specific text.

Through interpretation what is intended is eliminating the ambiguities in the legal text, the remediation of its shortcomings and, in consequence, specifying the exact meaning of the legal norm.

Interpretation concerns emphasizing the authentic text of the legal texts, finding the spirit of the lawmaking author, the authentic legal meaning of the actions that occurred, of the behavior of the offender and the legal-significant connection of these meanings[3].

In the specialty literature it has been said that interpretation doesn't have general utility in law, but only when the law is unclear. In this sense we are facing an obvious contradiction because in order to establish whether a law is clear, it needs to be necessarily interpreted. Claiming the formulation is unclear in a legal norm does not lead to the only basis of interpretation; the more general the formulation, the more jurisprudence there is; the more heterogeneous the practice, the more uncertainties and freedom of interpretation increase. On the contrary, rigor and detailing regulations, the abundance of jurisprudence, the uniformity of practice diminish the number of ready variants in interpretation, without ever eliminating them[4].

The theory of law contains several syntagms regarding law and interpretation. Thus, expressions such as the following can be heard: "the interpretation of law", "the interpretation of laws", "the interpretation of legal norms", "legal interpretation".

Through "*the interpretation of law*" we can focus on "*a philosophical discourse, that takes into consideration the explanation of the main bases of the position and functioning of law in society (the theoretical and philosophical interpretation of law)*[5].

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[1] The term "interpretation" comes from *inter* and *pretium,* which designates *the intermediary, the interpreter.*

[2] D-C. Dănişor, I. Dogaru, Gh. Dănişor, *Teoria generală a dreptului,* C.H. Beck Publishing House, Bucharest, 2008, p.77.

[3] Gh. Mihai, *Inevitabilul drept,* Lumina Lex Publishing House, Bucharest, 2002, p. 433.

[4] Gh. Mihai, *op. cit.* p. 436.

[5] N. Popa, *Teoria generală dreptului,* All Beck Publishing House, Bucharest, 2002, p. 238.

The interpretation of law makes reference to "a certain hierarchy of the sources of law", the primordiality of the law as a main source of law being obvious[6].

Through *interpreting legal norms* we do not have in our scope the entirety of normative acts, but the interpretation as a moment of the application of the law.

2. The necessity of interpretation of legal norms is justified by the following considerations:

- in the process of applying the law, the implementing body (the judge, the administrative body) **is forced** to clarify with all precision the text of the legal norm, to bring law closer to the social reality, to go from general to particular and vice versa, to establish the compatibility of the legal norm in in a certain factual situation;
- the legal norm that has a general and impersonal nature cannot, not matter how perfect it is expressed, contain all possible situations that arise in the social reality. Through it's nature, the legal norm is general. It does not concern itself with concrete situations. This is why, many times it is incapable of predicting the rapid changes of concrete reality. The general sense of the legal norms can make the law obscure; thus it is necessary that its provisions should be adapted to each and every aspect of social reality that it regulates, in a general sense. **The lawmaker cannot and need not predict everything.** Is it impossible to them to encompass in a law all the needs of a society because it is so wide-spread?[7]. They don't have to, because in laws certain "*blank spaces"* are needed, some *"valve concepts"* to "*allow for the dilation and for the communication with the world outside* […][8], that can thus prevent the excess of compression in the legal system. The empty space created by the lawmakers, due to their impossibility of predicting all hypotheses of application – otherwise law would not be a general and abstract norm but an array of individual norms – is filled by the interpreter. Thus interpretation can have the traits of a "*complementary legislation"*[9].

Legal norms are established in a system; their application implies diverse relationships. In order for it to be correctly applied, it is necessary that it should be elaborated in conjunction with other legal norms that have the same domain, or a similar domain of regulation. And rightfully so it has been underlined that the current state suffers from a kind of *"legislative bulimia"*[10]. It tends to regulate everything. This excessive tendency of regulating through lawn leads to a legislative inflation and, in consequence, to a loss in value of legal norms. The rule does not have sufficient time any longer to crystallize and subsequently, it will be poorly drafted and coordinated with the rest of the legal system. This way contradictions appear between the provisions of the same normative act, between the provisions of multiple normative acts, between normative provisions and the general principles of law[11]. The role of interpretation is precisely that of eliminating these contradictions, the interpreter applying the principle of hierarchy of normative acts and thus solving any conflict between two acts (rules) of this kind[12];

- the reasoning of interpretation of the legal norms is given by the method in which the normative text is drawn up, by the language and style used in the normative construction. From this point of view the possibility of a confusing legal norm draft is not out of the question, a "product" of disregarding the requirements of lawmaking. The language used in a legal text is presumed to be utilized in the general sense. The general sense must be determined by the interpreter, and not specified by the lawmaker like in the case of technical terms;
- certain normative acts that are still in force were adopted a long time ago. As a consequence, disregarding the language of the times that was used (certainly outdated today), the normative text – that upon its adoption reflected the social reality of the moment – no longer corresponds to the reality "in the field".

3. In the legal doctrine and in jurisprudence a series of **principles** are relevant, principles that are at the foundation of the process of interpretation of legal norms. From a multitude of such principles, in order to form a general theory of interpretation of the legal norm, we have decide upon the following:

3.1. In the process of interpretation of the legal norms what must be respected is **the unity between the letter and the spirit of the law,** without any exaggeration on one side or the other. The imbalance between the letter and the spirit of the law leads to an abuse of rights, to the fraud of law.

Unity between the letter and the spirit of the law – as appreciated by prof. Gheorghe Mihai – irrevocably leads us into a system of law *"Indeed, for this «spirit of the law» can mean «the spirit of the lawmaker», determined, who is in a position to appropriate the de jure knowledge of certain principles, but in a personal formulation, and to disregard other principles or declaring certain personal assertions as principles; but it can very well also mean an array of natural principles, that*

[6] Gh. Boboş, *Teoria generală a dreptului,* Dacia Publishing House, Cluj-Napoca, 1994, p. 234.

[7] Portalis, even since the preparatory phase of the French Civil Code, signaled the fact that it is extremely dangerous to want to regulate and provide everything: „*To predict everything is impossible to achieve. The needs of society are so extensive that it is impossible for the lawmaker to provide everything"* (apud N. Popa, *Teoria generală a dreptului,* C.H. Beck Publishing House, Bucharest, 2014, p. 206.

[8] N. Popa, *Teoria generală a dreptului,* All Beck Publishing House, Bucharest, 2002, p. 237.

[9] I. Dogaru, D-C. Dănişor, *Teoria generală a dreptului,* Ştiinţifică Publishing House, Bucharest, 1999, p. 393.

[10] D.-C. Dănişor, *Drept constituţional şi instituţii politice,* vol.I, *Teoria generală,* Europa Publishing House, Craiova, 1995.

[11] I. Dogaru, *Elemente de teorie generală a dreptului,* Oltenia Publishing House, Craiova, 1994, p. 227.

[12] D.-C. Dănişor, I. Dogaru, Gh. Dănişor, *op. cit.* p. 93.

overtake the preferences and interests of a lawmaker or another, the reality of which subsequently being accepted by the lawmaker and affixed as the foundation of all its normative acts[13].

The spirit of the law situates itself above the spirit of the lawmaker, if we understand the term "law" with it's universal meaning, that is *"the spirit of any laws, regardless of places and times".*

In ancient roman times law was defined as *ars boni et aequi* (the art of good and fair), concept in which we find the coordinates of law and moral. "Equity is not against that which is just in itself, but against that which is just according to the law" said Thomas Aquinas. From this point, Perelman concluded that equity is the appeal of the judge against the law. Still, sometimes the law itself makes reference to equity, so not always do we encounter the opposition stated by Aquinas and Perelman[14].

3.2. In the process of interpretation we must always have in mind the will of the lawmaker, what he intended in the moment of the lawmaking[15].

The will of the lawmaker concerns his mediated and immediate objectives, achievable step by step through the given laws

3.3. The principle of continuity of interpretation presupposes that once the interpretation is established in a certain sense, it cannot be too easily modified. The reason for this is given by the necessity for stability of legal rapports and so that one of the most important desiderata of the state of law – the predictability of constraint – can be achieved[16].

3.4. An interpretation must **become** *„subiectum materiam",* that is, it must be in direct relation with the entirety of the normative act (with the entire economy of law), with the legal institution and with the branch of law it pertains to.

3.5. Exception is to be strictly interpreted - *exceptio est strictisimae interpretationis.* Between law and exception there is the following relationship: *specialia generalibus derogant* – the general rule does not derogate from the special law, the special law derogates from the general law. In law, an exception exists only if it is provided expressly by the legal norm. The exception cannot be created through interpretation, and the existing ones must be restrictively interpreted. Restrictive interpretation is imposed in the legal presumptions that do only exercise their role in the precise cases for which they were written. In criminal law, *poenalia sunt restringenda,* in complete respect of individual freedom that cannot be touched but in the strict limits provided by law expressly.

3.6. Where law doesn't distinguish, neither should the interpreter – *ubi lex non distinguit, nec nos distingere.* According to this rule, to the general formulation of the text corresponds an equally general application. The interpreter cannot introduce distinctions if the law doesn't incorporate them.

The silence of law can be interpreted in favor of the freedom of action: all which is not forbidden, is permitted. The lack of express constraint must hence be always interpreted in the favor of the individual.

Tightly connected to the aforementioned is what Roman jurists called *in dubio pro reo,* in other words, when a text seems ambiguous or obscure, the court must always conclude in the sense that is most favorable for the accused.

This principle derived from doubt, favorable for the guilty part, is to have consequences upon the matter of proof; indeed, every man is under the presumption of innocence until proven otherwise and if the evidence do not meet the attributes provided in the law, objective and subjective, then it is natural that the accused should profit from them[17)].

3.7. The principle of effectiveness is expressed through the adage actus interpretandus est potius ut valeat quam ut pereat = the law must be interpreted in the sense in which it is valid.

The interpreter must at all times begin from the premise that the lawmaker adopted the legal norm in order for it to produce effects; we cannot ever state that the decreed legal norm is a nonsense and in consequence does not find its applicability. Legal norms must always be interpreted as such, so that their effect is ensured. An interpretation which would cancel the practical effect of the rule is not permitted.

4. The interpretation of legal norms knows **two main forms,** after which the interpretation must be done by a public authority or a particular person: **official interpretation and unofficial interpretation.**

4.1. Official interpretation (obligatory) is done by the state bodies that have attributions either in regards to elaborating legal norms, or in regards to their application. Thus we distinguish the following: *authentic interpretation (legal or general), judicial interpretation (causal), administrative interpretation.*

Authentic interpretation (legal or general) is done by the legislator himself when, through a normative act (interpretative act), he interprets his own adopted normative act. Nothing can be opposed to an issuing body of a normative act (the lawmaker) interpreting it on the basis of the principle "*a majori ad minus"* (who can do more, can also do less).

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[13] Gh. Mihai, *op. cit,* p. 489.

[14] Ibidem, p. 490.

[15] *„Optima lex quae minimum judici, optimus judex qui minimum sibi"* = the best law is the one that leaves as little as possible to the interpretation of the judge and the best judge is the one that bases his decision in such a way through the law, that the arbitrary is as minimal as possible.

[16] *„Minime sunt mutanda quae interpretationem certam semper habuerunt"* = those that have a clear interpretation have always suffered the minimal amount of change (Paulus, *Digestele lui Iustinian, 1.3.23.).*

[17] Ibidem, p. 491.

We are not in the presence of an authentic interpretation but to the extent to which there is a strict equivalence between the original act and the act that interprets it, that is, if the interpretation is done by the same body and in the same form as the original act[18].

The interpretative normative act will be a common body with the interpreted act, it will be obligatory (in the sense that it is imposed to courts) and it will present the advantage that it radically eliminates all doubts the interpretation of law raises.

We are facing an authentic interpretation when, for example, the Parliament interprets through an interpretative law, a different law previously adopted or when the Government interprets a decision through another (interpretative) decision.

Through the normative act of interpretation, the only aim is to explain the adopted normative text, a correct understanding of the purpose and its finality and in no way adding new rules to the existing normative act.

The interpretative act should be applied from the date of its coming into force of the interpreted act, and consequently, the effects of the authentic interpretation being retroactive.

This aspect of retroactivity of the interpretative acts has constituted and constitutes the subject of certain major disputes in the specialty literature.

Judicial interpretation (causal) is done during the process of application of the law by the judge; it is always an interpretation by case. It only has obligatory force for the respective case and for the participants of the respective case.

Sovereignty of the judicial interpretation is a consequence of the independence of the judicial power. The courts remain not compelled, free in the sense of their own interpretations, otherwise also necessary to justly solving the causes brought forth unto them (to be tried).

In the specialty literature[19] what is underlined is the fact that between authentic and judiciary interpretation there is a main difference. In the case of the first form of (authentic) interpretation, the interpretation is granted a freestanding value and is made with the purpose of clarifying the meaning of a rule, not being conditioned by the necessity of concurrently solving a concrete cause. In the case of the judiciary interpretation, on the contrary, interpretation is just a means to solve a concrete cause. In these last situation, it is not about an act of interpretation, but about a (individual) legal act of application.

- *Administrative interpretation* is done by the administrative bodies in the process of application (of exercising) of the law.

The administration can emit general administrative acts of execution of the law (Government decisions, decisions and orders of the local councils) through which laws are interpreted, but these acts are not obligatory for courts, because of the fact that they are administrative acts, they are jurisdictionally controlled.

4.2. The unofficial interpretation (or doctrinary) does not have legal force, being optional (it does not have an obligatory nature) and it does not materialize in legal acts which have their being complied to and their application guaranteed by the state. It is represented by the opinions of the unofficial persons in touch with the elaboration and the application (and respect) of the law.

The unofficial interpretation made by specialists (scientists – jurists in the various scientific papers, treatises, courses, textbooks, monographs) is bestowed with a distinguished importance as a consequence of the analysis *(„de lege lata" or „de lege ferenda")* made during the theoretical research of law, which ca be invoked in the process of the application of the law, but which is not mandatory.

The plea of the lawyer in a certain cause also has an optional interpretation; the court can take into consideration the arguments of the lawyer, *if it so desires*, brought forth in the case before the trial or it can reject the without any specific reason.

5. În deciphering the exact meaning of the legal norm the interpreter relies on a series of methods[20] named **methods of interpretation.**

The legal literature the existence of five inportant methods is consecrated[21]: the grammatical method, the historical method, the systematical method, the teleological method, and the logical method upon which we will mainly focus.

- **The grammatical method** is an elementary method of interpretation of legal norms and it is constituted out of using the morphological and sintactical analysis procedures of the text of the legal norm, starting from the meaning of the terms and expressions used, from the link between them, from the construction of the sentence.

Grammatical interpretation is oriented in three directions: etymological, syntactic and stylistic[22].

Etymological interpretation regards the original meaning given by the lawmaker to a term.

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[18] P. Pescatore, *Introduction á la science du droit*, Luxemburg, 1978, p. 329.

[19] I. Craiovan, *Tratat elementar de teoria generală a dreptului,* All Beck Publishing House, Bucharest, 2011, p. 277.

[20] The word "method" derives from the Greek *"meta"* = after + *„odos"*=way. Methods are an ensemble of rational procedures (elaborate set of rules) and rational operations, organized according to some principles in order to achieve a certain thing (see Gh. Mihai, *op. cit*, p. 495).

[21] Some authors like S. Popescu, M-L. Hrestic,A.Șerban,R.Stancu,M.Viziteu (See *Teoria generală a dreptului,* Pro Universitaria Publishing House, Bucharest, 2016) classify the methods of interpretation as *intrinsic methods* (that have at their basis the very texts that were interpreted, such as the grammatical method and the logical method) and *extrinsic methods* (that emphasize the external elements of the interpreted texts – the teleological method, the historical method and the systematical method). Other authors group methods of interpretation in *analytical methods* (the grammatical method and the logical method) and *synthetical methods* (the historical method and the systematical method).

[22] See Gh. Mihai, *op. cit.*, pp. 501.

This meaning could be a common one, or a technical one, or of specialty.

Te common meaning has priority if it is found in a provision of material law, presupposing that the lawmaker spoke to everyone's understanding.

The technical meaning has priority if the term is found in a provision of formal law, because in this kind of situations the technical language is used. But there are situations in which with the occasion of the interpretation it will be given the meaning requested by the context of the regulation, even if it corresponds to the technical scientific one.

The syntactical interpretation also imposes certain rules. Thus:

- a term used in the singular implies the plural as well and vice versa. In normative acts the singular is used, because it is a stronger way of expressing the impersonal nature of the legal norm. The singular exceeds the plural or vice versa, only when the law treats them separately or uses a quantitative formula of exclusion. If it were always considered that using the singular excludes the plural, absurd solutions would be reached, contrary to the vision of the lawmaker;
- when a term can be both a noun and an adjective, it's true role must be discernible;
- words are examined in a certain order: nouns together with their adjectives, verbs together with their adverbs;
- interpretation needs to keep sight of the specific meaning of the terms in the legal domain to which it refers in the moment when a solution to the cause is being searched for.

From the point of view of *stylistic interpretation* it is established that there is without doubt a style of the lawmaker, a different manner of expression for the judge and for the lawyer[23].

The stylistic technique uses, as a crutch, the linguistic context to which a word or sentence, which the interpreter wishes to determine, pertains; the more concise the text, the more common, elliptical, the more possible interpretations, it would seem.

In conclusion, the grammatical method represents an array of common reasonings through which we search for the authentic meaning of the legal norms. *"The grammatical interpretation of the normative text is more likely a semantic activity – pragmatics specific to an intellectual act of adjusting the suitability of the normative judgment with the reality it refers to"*[24].

1. **The historical method** permits the intimation of the historical conditions in which the normative act was adopted, the totality of the social and legal circumstances that stood at the basis of elaborating the law *(„occasio legis"),* thus determining the aims desired by the lawmaker*(„ratio legis").*

Interpreting the legal norms through the historical method, the interpreter will have to:

- ascertain the mood in which the author of the normative act were, what were the reasons that determined them to legislate and how they represented the applicative future of the elaborated normative act;
- determine what was the will of the lawmaker that enacted the norm, studying for this purpose, the array of reasons made with the opportunity of the adoption of the law, the official statement of the debates, the reactions in the press of the time, the economic, political, and social situations of the time;
- to proceed to compare the actual regulations with the previous ones in the domain.

2. **The systematic method** allows for the interpretation of the legal norm and determination of its content through establishing the place it occupied in the system of law, through its classification in the economy of the normative act it pertains to and with other normative acts in the same of in a different branch of law.

The legal norm cannot be understood (interpreted) if it is isolated, broken off from the other legal norms. The necessity of interpretation through this method stems from this very unbreakable systematic bond between the components of an internal system of law.

The systematic interpretation is also defined by the fact that the interpreter "*applies his own reasoning and does not base his conclusion on just a provision of law [...] instead he bases it on an ensemble of provisions simultaneously taken into consideration, that have an accumulated efficacy which will impose the choice of a certain meaning rather than another […] (thus) to have in mind a group of complementary provisions that are examined in conjunction with each other*"[25]. Considering that a normative act constitutes a structured whole, there being links of logical coherency and legal consistency between its elements, based on logical legal principles, Savigny suggests the systematic method of interpretation through which we obtain the rational and just sense of the rule through the very investigation of these links in which the principles are employed.

Through the systematic method of interpretation:

- first and foremost what is checked is whether the law respects its position in the hierarchy of legal norms; applying the rule, the judge checks to see if there is a conflict between it and the superior law; if it is ascertained that such a conflict exists, it will give priority to the superior law;
- the interpreter has to establish the place of the law subject to interpretation in the system of positive law and even in relation to the fundamental principles of law, the affiliation of the law to a certain branch of

[23] Ibidem, p. 504.
[24] Ibidem, p. 505.
[25] Ibidem, p. 506.

law, if the law subject to interpretation is common or exceptional, in relation to the normative act in which it is enclosed, if the normative act is common or special, as well as the place of the legal norm subject to interpretation in the framework of the articles, sections, chapters, titles, books, parts of the law26. Thus, for example, legal norms in the special part of the Penal Code cannot be applied (interpreted) without making reference to the general part; equally, commercial legal norms must be in connection to the civil laws (contained in the Civil Code) etc.

The utility of this method – as is correctly affirmed by prof. I. Craiovan – is even more obvious in the case of incomplete rules (cross-referred rules and blank rules) which gain full content only through what is added through interpretation[27].

3. The teleological method (or by purpose)

In the situations when the interpretation through the aforementioned methods does not conclude or fails to accomplish the clarity and precision of a provision in a text of law, in the elucidation of it we can resort to **the purpose aimed for by the lawmaker** through adopting the respective normative text. Sometimes this purpose is explicitly formulated in the preamble of the respective normative act, other times one must begin from other clear texts of laws and from the results they led to or were in the process of leading to after their application.

Once the purpose of the lawmaker is established, the unclear legal provisions are to be given out of two or more possible interpretations, the one which is most consistently in tune with the purpose of the lawmaker. The presumption from which we begin for this kind of interpretation is, evidently, the identity or convergence of purposes aimed for by the lawmaker through the contained provisions in the same law or in different laws that regulate the same domain of social relationships.

Here the question that arises is if the interpretation must take account for the goals and will of the lawmaker, the actual author of the respective rule and who, sometimes, is at a great distance in time from the moment when the issue of interpretation arises, or from the aims and will of the current lawmaker.

Thus the teleological method is characterized by the investigation of the social purpose aimed at by the lawmaker, which is estimated to be of greater value today than the letter of the law. The usage of this method permits the intimation of what is called *„ratio legis",* meaning the finality, the reason for being[28]. For example, in the legal regulation of adoption, *„ratio legis"* is the restitution of a home to children who do not have a family[29].

6. The logical method of interpretation permits the formulation – by the interpreter – of certain rational assessments, achieved through generalizing operations, of logical analysis of the text of the legal norm, or analogy, through applying formal logic.

The logical method consists of using certain processes of general formal logic, such as inductive reasoning, deductive reasoning (syllogisms), the demonstration processes for unraveling the meaning of the legal norms.

As opposed to the historical interpretation which emphasizes occasio legis, logical interpretation emphasizes ratio legis and mens legis; logical interpretation appears to be a perfected variant of the other methods[30].

In what follows we will examine several **arguments** employed by this method.

- **The *per a contrario* argument** (or *„a contrario")* has at its basis the law of the excluded third party*(„tertium non datur"),* which means that in the case of contradicting notions, which cancel each other out, only one can be true, the other being false and the third possibility being nonexistent *(qui dicit de uno negat de altero- statements about the one deny those of the contrary)*. The specialty literature specifies the idea according to which this argument has a limited value, having to be carefully employed, preferably only in the case of limitative legal enumerations and rules of exceptional nature[31]. Thus, if art. 73 of the Constitution shows which are the domains regulated by the organic law, it means that, *a contrario,* all other domains are regulated by ordinary law or, by case, constitutional laws (of revision of the Constitution).

The *a contrario argument* isn't, after all, a logical argument, but a simple assumption based on the silence of the lawmaker. It only has value only if it relies on extrinsic arguments: on the exceptional or limited nature of a provision, on *ratio legis,* on the genesis of the texts of on the practical result of the interpretation[32].

- **The *a fortiori* argument** (- *all the more so)* consists of extending a law from a hypothesis not provided in it, because that hypothesis is motivated by the law. Thus we have moved from a known subject to an unknown one on the basis of superiority of reasons.

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[26] D.-C. Dănișor, I. Dogaru, Gh. Dănișor, *Teoria generală a dreptului,* C.H. Beck Publishing House, Bucharest, 2008, p. 106.
[27] I. Craiovan, *op. cit.,* p. 280.
[28] S. Popescu, op. cit., p. 287.
[29] Ibidem.
[30] N. Popa, *op. cit.,* p. 245.
[31] Gh. Beleiu, Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil„Șansa" SRL Publishing House and Press, 1992, p. 57.
[32] f, for example, a rule provides that "dogs are forbidden from entering", applying the a contrario argument, when I am walking a bear, I can enter with it. What is opposed to such an interpretation is the purpose of the law: interpreting ratio legis we arrive to the conclusion that "if entering with dogs if forbidden, even more so entering with bears is forbidden". Thus, the a contrario argument has value only if it supports the reason of law.(P. Pescatore, op. cit., p. 349.

Interpretation through the *a fortiori* argument is an extensive interpretation, applied to a larger sphere of deeds than the one originally covered by the law, because the reasoning used in drafting it are even more obvious in the given case.

Thus, if the lawmaker has forbidden an incapable person of selling their goods, it *a fortiori* forbidden them to donate the goods, for the donation is a more prejudicial action than selling. In the same way, if the right to property (which is the most important real right) can be gained through adverse possession, even more so can a property law clause of this right be acquired *(usus, fructus* etc.).

In the same sense, once bilateral civil acts, irrevocable in principle, can be annulled as a consequence of vitiated consent, there is an even more powerful reason for the annulment, on the same basis, of unilateral civil acts, because they, in principle, are revocable[33].

The *a fortiori ratione* rule – admits professor Gheorghe Mihai -, counts on the comparison of two situations, objects or events that are the same in nature, but have different degrees of importance (established through reporting to the same standard of value: good, useful, just, etc.); this expresses, in the activity of interpreting the rule, comparison through assessment[34].

The variants of the a fortiori argument are a majori ad minus and a minori ad minus.

- **The *a majori ad minus* argument** (- *who can do more, can also do less*) is at the foundation of the extension of the legal norm to a case not expressly provided in the law, but which, from a legal point of view, is evaluated as analogous but less important that the provided cases[35].

Also encountered under the form of *qui potest plus, potest minus*, this argument is specific to extensive interpretation. „*In the history of law* – affirms prof. Nicolae Popa – *we only find an exception from this principle, when more could have been done, but not less. It is about the right the married women had over the dotal property, before Justinian. Thus, the woman could sell the property, but couldn't mortgage it, the mortgage being a civil legal act with a narrower scope of effects than the sale*"[36].

Regarded as a form of *a fortiori ratione,* the argument represents a logical instrument through which the provisions of the rule develop towards those elements not contained within the typology of the hypothesis, but which express, with a more powerful motivation, the reasoning of the rule. The argument concerned is understood as a concentrated expression, in natural language, an appreciative reasoning scheme[37].

- **The *a minori ad minus* argument**, signifies the fact that *if the law prohibits less, it implicitly prohibits more.* In other words, if the lawmaker prohibits a certain class of actions because they damage certain values and purposes, then it *a fortiori* prohibits actions that can bring even further damage to them, even if they are not expressly mentioned in the formulation of the law. Thus, the principle is the following: if the lawmaker instituted for a certain legal situation an important interdiction, what follows is that for the same situation a similar interdiction should be applied but less severe. This way, if a person is prohibited from exercising his private rights, it will be ascertained that he is even more so excluded from exercising his political rights[38].
- **The *ad absurdum* argument** (- *reduction to absurdity)* presupposes establishing the truth of the thesis to be demonstrated through the refutation of the thesis which it contradicts. The interpreter demonstrates – resorting to this argument – that any other interpretation given to the text of the legal norm, besides the one given by him, leads to indubitable consequences, contrary to the law, absurd.

For example, if the law permits the party whose legitimate rights were injured by an administrative act, they should address the competent court to have it annulled *ad absurdum* it is deduced that the contested act can only be an individual act, one that produces, modifies or discharges a concrete legal report, because it is absurd to accept that subjective rights can be directly injured through legal normative acts that are general, abstract, and impersonal[39].

- **The *a simili ad simile* argument**(similar to the *a fortiori* argument*)*, relies on the idea that the lawmaker, regulating a situation, also established all similar cases. In other words, the regulation is applicable to all identical situations if the law does not derogate.

In criminal law the principle that prohibits the application of an analogy of law in the detriment of the accused produces is acknowledged. Although some authors are of opinion that even in this case sometimes the reasoning is done in the same fashion, but, in order to save face, they do not say that it is analogy, but an "extensive interpretation" of certain rules[40].

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[33] I. Santai, Introducere în studiul dreptului, University of Sibiu, 1991, p. 121 (apud Ioan Humă, Cunoaştere şi interpretare în drept. Accente axiologice, Academiei Române Publishing House, Bucharest, 2005, p. 111).

[34] Gh. Mihai, Fundamentele dreptului. Argumentare şi interpretare în drept, Lumina Lex Publishing House, Bucharest, 1999, p. 238

[35] For example, French Civil law contains an article according to which who owns a just title and a property in good faith, can be granted the property by a limitation period of 10, 20 years respectively (in accordance with the home of the owner). On the basis of this article it is ascertained, reasoning with a majori ad minus, that in the same conditions, we can also be granted other real rights, for example usufruct or easement, which are lesser than the right to property.

[36] N. Popa, op. cit., p. 246.

[37] I. Humă, op. cit., p. 113.

[38] G. Kalinowski, Introduction á la logique juridique, Paris, 1965, p. 163.

[39] I. Humă, op. cit., p. 115.

[40] Egon Schneider, who makes this statement, cites the following example: Prussian criminal law regarding poaching, provides punishments far harsher for actions of poaching in which a covered cart, a boat, or a beast of burden are used. The Federal court of Justice decided upon the

- **The *a pari ratione* argument**(also named *analogia legis)* is founded on the reasoning that for identical situations, identical solutions should be ruled. In the absence of a rule that should regulate a concrete situation, we can resort to a rule that regulates a similar situation. Also under the form of *ubi eadem ratio, ibi idem ius* (- *where there is the same reason, the same provision is applied),* this argument having as its basis the idea according to which the same case produces the same effects.
- **The *a pari* argument** is founded on the idea of legal equality which necessitates that in *similar* situations, the same normative provisions should be applied. Thus, it is not about *identical* situations, for which we needn't resort to analogy. Here the rule exists; it mustn't be analogically deduced, but applied rigorously to all cases *of the same kind.* The transition from identical (the same rule) to analogical (similar cases to those regulated by the rule) is in fact the transition from analogical to identical; in other words it is a creative operation or lifting, through interpretation, similar deeds to the convergent light of the existing rule. The rule becomes applicable to other cases than those it originally refers to, because they are found in the reasoning it encompasses[41].
- **The *a rationale legis stricta*** and ***a generali sensu* arguments**, are rather rules of linguistic interpretation that logic per se; they are about showing that, due to the fact that the respective text of the law is clear and precise, it requests to be applied to the letter, without restrictions or extensions. These rules rely on the principles, consecrated in the legal practice,, *clara non sunt interpretanda,* and *ubi lex non distinguit, nec nos destinguere debemus* respectively(- *where the law doesn't distinguish, the interpreter must also not distinguish*[42].
- **The *in dubio pro reo* argument**(*doubt for the accused*) is applicable in criminal law where, if there is doubt about the guilt of the accused of having committed a felony, this doubt is in favor of the accused[43].
- **The *ab eadum* argument**(- *on the same route; equivalence*) is used to avoid the sanction that intervenes for not obeying the legal form, if an equivalent form was used. The argument of equivalence it met in the matter of succession. For example, it is considered that the testament is valid if it does not contain a calendaristic date, but contains the mention that it was dawn up on Christmas, because, universally, the indicated day corresponds to the date of the 25th of December[44].

Sometimes even ***other arguments of logical interpretation*** are used, but their value is debatable[45]:

- the *ad populam* argument– founded on the existence of the agreement of a majority;
- the *ad ignorantiam* argument– the impossibility of proving the contrary in certain cases;
- the *ex silentio* argument – evokes the idea that a thing is stated if it was not negated by anyone.

After presenting the main arguments of the logic utilized in interpreting the legal norms, an aspect must be emphasized: none of these arguments is justifiable of purely logical grounds, bur presupposes evaluations and decisions from the judge or administrative body interpreter, evaluations regarding the degree of similarity, from a legal aspect, of the cases, the relative importance of different obligations, prohibitions, or rights, the purpose of the lawmaker[46]. Thus in identical situations it can happen that a court will consider the *a simili* reasoning applicable, and another will adopt a different solution using the *a contrario* argument. As U. Klug says *„analogy and the a contrario argument,* precisely like all other logical operations in legal logic, intervene only after the premises were clarified in advance, through interpretation. Which certainly does not exclude the fact that interpretation is accomplished, in itself, following logical laws […]"[47].

Usually, as another author remarks in the same sense in the analysis he does of legal arguments, decisions are made before conducting such an interference, the aforementioned being rather only the technical legal form utilized in the final motivation of the decision that is taken[48].

The methods of interpretation of legal norms are interdependent, they must be applied in a complementary and interfering fashion, the process of interpretation requiring at the same time the creativity of the interpreter. But, as Mircea Djuvara said, it is about a temperate, prudent creativity which must refer to the harmonious and rational understanding of the law, resorting to historical tradition, preparatory works, the principles of law, the sense of equity presumed by any law[49].

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application of this provision to cases in which vehicles are used as well (E. Schneider, Logic fir Juristen, Verlag Franz Vahlen Gmih, Berlin und Frankfurt am Main, p. 92).

[41] I. Humă, op. cit., p. 117.

[42] An example for this would be the following: a French law from 1887 gave the state property over art and archeological objects found in Algeria in the concessioned lands, without making distinction between old and new concessions; in consequence, the law was applied to objects found on the concessioned lands before the year in which the law was promulgated, as well as on the lands concessioned after that date.

[43] "The doubtful interpretation exists when using all processes leads to nothing but a doubtful result. In case of doubt, the solution that created the fewest restrictions or deprivations of freedom, rights, or interests will be adopted" (V. Dongoroz, Curs de drept penal, 1942, p. 121).

[44] L. Barac, Elementele de teoria dreptului, All Beck Publishing House, Bucharest, 2001, p. 128 (apud V. Cristea, Interpretarea și aplicarea normelor juridice,C.H. Beck Publishing House, Bucharest, 2014, p. 223).

[45] G. Boroi, C.A. Anghelescu, Curs de drept civil. Partea generală, Hamangiu Publishing House, Bucharest, 2011, p. 49.

[46] See also M. Bădescu, Teoria generală a dreptului, Sitech Publishing House, Craiova, 2013, p. 182.

[47] U. Klug, Juristische Logik, Zweit Aufl., Springer Verlag, Berlin und Gottingen, 1958.

[48] E. Schneider, op. cit., p. 172-173.

[49] I. Ceterchi, I. Craiovan, op. cit., p. 103.

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THE PLACE OF POLITICAL PARTIES IN A DEMOCRATIC STATE, THROUGH THE GLASS OF CONSTITUTIONAL REVIEW

Valentina BĂRBĂȚEANU[*]

Abstract

Political parties are nowadays key actors in democratic societies, shaping social mentalities, creating and following ideologies, inducing common vision, establishing targets and ideals. Their main goal is gaining the political power by conquering the access to the highest levels of decision in the State. They are based on the freedom of association and, unlike other associations, they have a specific constitutional and legal position because they are defining and giving expression to the citizens' political will, in respect of the principles of democracy. Romanian Basic Law provides that political pluralism represents one of the supreme values of the Romanian State governed by the rule of law. In this context, the Constitutional Court has solved, over the years, various issues regarding the political parties. Authorities of constitutional jurisdiction in European countries have also been asked to express, one way or another, their opinion in connection with the activity of the political parties. Taking into consideration their importance for a healthy democratic system, the European Commission for Democracy through Law -Venice Commission has paid special attention to the complexity of aspects involved by the protection of democratic values.

Keywords: *Political parties, Democracy, Freedom of association, Freedom of expression, Constitutional review.*

1.Introduction

The present study aims to analyze the topic of political parties as they depend, in various stages of their existence, by the authorities of constitutional jurisdiction's decisions, trying to highlight the role the latter play in the life of a political party. Basically, constitutional courts seek to preserve the values of democracy and the rule of law, as they are defined in the Constitution. In what concerns the political parties, constitutional jurisdictions may be asked to decide on the degree of political parties' conformity with the requirements enshrined in the Basic Law for their registration and operation, the ultimate penalty being the dissolution of the party declared unconstitutional. The issue in discussion also requires the analysis of some decisions rendered by the European Court of Human Rights in what concerns the respect of the fundamental right of association and freedom of expression by the common courts or the constitutional jurisdictions regarding the political parties. So, the importance of this study lies in emphasizing the need to comply with the constitutional and legal rules of the registration and operation of political parties. In clarifying this matter, the paper will present the case law of constitutional jurisdiction authority, in particular those rendered by the Constitutional Court of Romania, the German Federal Constitutional Court, the Constitutional Tribunal of Spain and the Turkish Constitutional Court. The paper will also try to point out the fact that political parties manage to turn into vectors for the political will of their members and/or of their supporters. Acquiring the state power, they manage to transform their ideologies into markers that influence the general will when endowed with binding force due to its embedding into rules laid down by the Parliament or Government, as authorities which are formed as a result of free and fair elections. They also contribute to the effective expression of every citizen's political options during the electoral process, by offering adequate options. In the specialized juridical literature, the problems involved by political parties were a frequently approached topic, especially in terms of political doctrines or in what concerns the way they intervene, how they act and how they evolve in the general landscape of the State and society. For example, an exhaustive presentation was made by Professor Maurice Duverger[1]. In the Romanian literature, reputable scholars like Dimitrie Gusti[2], Ion Deleanu[3] or Ioan Muraru[4] approached the complexity of the issues regarding political parties. Nevertheless, a study that conduct an analysis of the Romanian and foreign constitutional case law in this area is necessary, taking into consideration the recent cases that were solved in this field, not only by the Romanian Constitutional Court, but also by other foreign authorities of constitutional jurisdiction.

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[1] Maurice Duverger, *Les partis politiques*, (Paris: Librairie Armand Colin, Collection „Points"), 1976.

[2] Dimitrie Gusti, „Partidul politic", in *Doctrinele partidelor politice*, Institutul Social Român (București: Editura Cultura Națională, 1922).

[3] Ion Deleanu, *Instituții și proceduri constituționale în dreptul român și în dreptul comparat* (București: Editura C. H. Beck, 2006), p.159-173.

[4] Ioan Muraru, „Aspecte teoretice privind conceptul de partid politic", in *Studii constituționale*, vol.I (București, Editura Actami, 1995), p.129-137.

2.Framing The Political Parties In A Democratic Society

Authentic representative democracy and effective citizens' participation in the process of government would not be fully realized unless the political parties represent active entities in the life of the state. The whole State's architecture is based on the essential ability of political parties to shape and define the political will of citizens, conducting their beliefs and gathering them under the same vision. Due to the political parties, the ideas and opinions expressed by every individual, member of that party, have the potentiality of becoming general will, if the party succeeds in elections and its leaders gain the right to issue, as State's representatives, decisions endowed with binding force[5]. From this point of view, a very concise definition provides that a political party is „a group of people who try to achieve political power and who are united by common beliefs about how the country should be run"[6].

They are based mainly of the freedom of association, enshrined in Article 10 of the European Convention for Human Rights, and usually granted at the national constitutional level, as well. Freedom of expression is also a key element that define the activity of a political party. The goal of association in political parties is the intention to participate in the management of public affairs and the main means of doing that is the presentation of candidates to free and democratic elections.

The European Court of Human Rights has noted that political parties are a form of association essential to the proper functioning of democracy. The Court has also noted: "It is in the nature of the role they play that political parties, the only bodies which can come to power, also have the capacity to influence the whole of the regime in their countries. By the proposals for an overall societal model which they put before the electorate and by their capacity to implement those proposals once they come to power, political parties differ from other organisations which intervene in the political arena."[7].

Political parties also inter-connect the executive and legislative branches of government and shape the decision-making process in accordance with their own doctrine and with their own view on the legislative agenda within a system of government.

The European Commission for Democracy Through Law - the Venice Commission noticed that, given political parties' unique and vital role in the electoral process and democratic governance, it is commonly accepted for states to regulate their functioning insofar as is necessary to ensure effective, representative and fair democratic governance[8].

According to the Romanian Basic Law (Article 8), the political parties assist in defining and giving expression to the citizens' political will and they are urged to respect national sovereignty, territorial integrity, the legal order and principles of democracy. They are established and pursue their activities in accordance with the law. This fundamental rule, prescribed by the Romanian Constitution has to be read through the glass of the Venice Commission's view, who noticed that „striking the appropriate balance between state regulation of parties as public actors and respect for the fundamental rights of party members as private citizens, including their right to association, requires well-crafted and narrowly tailored legislation" [9].

It is also of particular importance that the regulations concerning political parties be elaborated also in accordance with the universal and regional legal instruments that provide the main landmarks in this field, most relevant being the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 11 of the European Convention on Human Rights and Article 22 of the said Covenant protect the right to associate in political parties as part of the general freedom of assembly and association. In addition to these legally binding instruments applicable to states in this regard, there are also relevant political commitments persuasive upon the states members of the Organization for Security and Co-operation in Europe (OSCE). One of the most notable is the Document of the Copenhagen, which is the final act of the meeting of the Conference on the Human Dimension of the Commission for Security and Co-operation in Europe (CSCE), the so-called Copenhagen Document, but there are also a number of guiding documents which can provide an understanding of good practice with regards to legislation concerning political parties, like those adopted by the Venice Commission[10].

In this respect, Romanian Political Parties Law no.14/2003 regulates the whole range of aspects involved by creation, functioning and dissolution of political parties. In the post-communist era, Romania prizes the idea of a pluralist political society that has been established by the new democratic Basic Law adopted on the 8th of December 1991, in contrast with the previous period dominated by the unique party that monopolized the entire power of decision in the State.

[5] Ioan Muraru, Simina Elena Tănăsescu, *Drept constitutional și instituții politice*, vol.II (București, Editura C. H. Beck, 2013), p.27.

[6] Peter Hodgson Collin, *Dictionary Of Politics and Government*, third edition (London: Bloomsberg Publishing Plc., 2004), p.183.

[7] Case of the Refah Partisi (The Welfare Party) and Others v. Turkey. (40/1993/435/514) (European Court of Human Rights, February 13, 2003), paragraphs 87-89.

[8] Guidelines On Political Party Regulation By OSCE/ODIHR and Venice Commission, adopted by the Venice Commission at its 84th Plenary Session (Venice, 15-16 October 2010), CDL-AD(2010)024, p.6.

[9] Ibidem, p.7.

[10] One of the most important is the Code Of Good Practice In Electoral Matters, adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002), http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev-e, accessed March 23, 2017.

In this context, it is worth noticing that the European Court of Human Rights has appreciated that political parties hold an "essential role in ensuring (…) the proper functioning of democracy"[11]. Thus, the State should enact legislation that facilitate a pluralistic political environment, that help the citizen to choose most appropriate political viewpoints, from a wider variety, contributing to the creation of a healthy democratic society.

3.Freedom Of Association And The Two Important Moments For A Political Party: Registration And Cessation Of Activity

In Romania, according to Article 40 paragraph 1 of the Basic Law, citizens may freely associate into political parties, trade unions, employers' associations and other forms of association. The purpose of the association in political parties is different from that of other associations established under Article 40 of the Constitution. The main goal of the political parties is to shape and express the political views of citizens and to materialize their political freedom, developing and strengthening political society and obtaining the votes of the majority of citizens in order to conquest and exercise the state power in accordance with its own political program[12]. Legal benchmarks for their activity are set by the Law no.14/2003, which provides that in their activity, political parties have to promote national values and interests and political pluralism. They also have to contribute to the formation of public opinion, participate with candidates in elections and in establishing a public authority and stimulate the participation of citizens in polls (Article 2).

4.Issues Of Constitutionality Regarding The Registration Of Political Parties

The registration application of the political party has to be addressed to the Bucharest Tribunal which examines it both from the point of view of fulfilling formal registration requirements and from the perspective of complying with the fundamental values enshrined in the Constitution and the law.

4.1.Issues of constitutionality regarding the formal requirements

According to Article 19 Paragraph 3 of the Law no. 14/2003 on political parties, among the requirements consisting in various documents, there appeared a list of at least 25 000 supporting signatures of founding members, residing in at least 18 state counties and in Bucharest, but no less than 700 persons for each of those counties and Bucharest. These legal provisions made the subject of the a posteriori constitutional review performed by the Constitutional Court[13]. Considering that the impugned regulation is an interference by the State authorities with the right of association, the Constitutional Court analysed, by applying a proportionality test, whether it is justified under the rigorous requirements of the European Court of Human Rights and of the Venice Commission. Regarding the legality of the challenged law, the Court found that it was originally provided by Decree-Law no. 8/1989 on the registration and operation of political parties and public organisations in Romania, that revived the political pluralism and set a minimum number of 251 founding members as preliminary requirement. Seven years later, the Law no. 27/1996 on political parties increased the number to 10,000; while the new law in 2003 (Law no. 14/2003 on political parties) increased it even more, to 25,000. According to the explanatory memorandum, expressed during the adoption of the latter bill, through the significant increase from the minimum 10,000 to 25,000 founding members, the legislator wished to avoid „the incorporation of certain political parties with reduced representation or of certain regional parties", aiming at the occurrence of „some persons who have the ability to submit lists of candidates in most state counties".

However, the Court found that although, in the abstract, this measure is adequate in the sense that it can lead to the fulfilment of its purpose, it is not necessary in a democratic society. The alleged requirement for the registration of a political party is excessive and disproportionate in the current social and political context of the country and in relation to the legal measures in force concerning the public funding of political parties and election campaigns, as well as the parliamentary representation of the electorate.

Having examined the reasons provided by the legislator at the moment of the adoption of Law no. 14/2003, the Constitutional Court found that they no longer reflect the current state of Romanian society marked by the natural historic and political evolution of the democratic system installed in late 1989. Thus, if the risk of creating a large number of political parties, of the „devaluation" of the idea of political party, of the fragmentation of their parliamentary representation and of an excessive burden of the State budget on account of their public funding represented an acceptable justification in the social and political context of the 1990s, the Court noted that, precisely at that time, the minimum number of founding members required for the registration of a political party was the lowest in the entire evolutionary history of the legislation, i.e. 251 members (during 1989-1996), which increased then to 10,000 (during 1996-2003). Then, in 2003, 14 years after the events in December 1989, which marked the change of the communist regime and the transition to a

[11] Case of the Refah Partisi and Others v. Turkey.

[12] Bianca Selejan-Guțan in Ioan Muraru, Elena Simina Tănăsescu (coord.), *Constituția României. Comentariu pe articole* (București: Editura C. H. Beck, 2008), p.84.

[13] Decision no.75 of 26th of February 2015, published in the Official Gazette of Romania, Part I, no.265 of 21st of April 2015.

democratic form of government, the legislator significantly increased again this number, citing the same reasons.

The Court found that the possible negative effects that would occur in the absence of adopting the legal measure examined are counteracted by the existence of appropriate legal instruments and such a requirement can no longer be considered necessary.

Thus, the Court found that there is no fair balance between collective and individual interests, since, by the requirement of a very high representation, the subjective right of the persons concerned to register a political party meets a drastic restriction, which exceeds the possible benefits. Likewise, in order to establish and maintain the right balance, the legislator must use means which entail the lowest possible interference with the right of association. However, in this case, the requirement of the minimum number of founding members and their territorial dispersion exceeded what is fair and equitable in relation to the protected fundamental right, namely, the right of association.

For these reasons, the Court held that the challenged provisions of Article 19 paragraph 3 of Law no. 14/2003 on political parties, in relation to the current state of evolution of Romanian society, no longer meet the requirements of necessity and, by their excessive nature, impede the exercise of the right of association guaranteed by Article 40 of the Constitution, which is tantamount to affecting the right in its very substance. As a result, by majority vote, the Court allowed the exception of unconstitutionality and held these provisions to be unconstitutional.

The Court also held that Article 61 of the Constitution accords the sovereign power of law-making on Parliament, which is the supreme representative body of the Romanian people and the sole legislative authority of the country. Consequently, in order to remove the flaw of unconstitutionality, within its limited margin of appreciation, the legislator must re-examine the provisions of Article 19 pararaph 3 of Law no. 14/2003 in order to decrease the minimum number of founding members in the lists of supporting signatures for the registration of a political party and for reconfiguration of the requirement of territorial dispersion, ensuring that all requirements justifying such interferences by the State with the right of association are met.

Soon after this decision of the Constitutional Court, less then a month later, the Parliament amended the Law no.14/2003 and diminished massively the required number of signatures[14]. According to the new provisions, the list has to comprise the signatures of at least three founding members. This proves the positive effect the Constitutional Court's decisions can have on the effectiveness of fundamental rights and freedoms.

4.2.Issues regarding the compliance with the constitutional fundamental values

In this last-mentioned respect, Article 40 paragraph 2 of the Basic Law provides that political parties or organizations which, by their aims or activity, militate against political pluralism, the principles of a State governed by the rule of law, or against Romania's sovereignty, integrity or independence, shall be unconstitutional.

The registration application is submitted to the Bucharest Tribunal, which is, according to Article 18 of the Law no.14/2003, the court entitled to analyse and approve it. When it examines the registration application, the tribunal checks if the future political party that requests the registration observes all these imperatives. If the party's program proves beyond any reasonable doubt that it does not fall under the scope of the constitutional requirements, the tribunal will reject the application.

Nevertheless, the refuse to register the political party on the fore mentioned reasons has to be wisely balanced with the citizens' right to association. Romania has been subject to a decision where the European Court of Human Rights found that the Romanian State has violated Article 11 of the European Convention in the Case Of *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania,* 3 February 2005. The Bucharest Tribunal rejected the application of registration of the said party, reasoning this decision on the fact that it follows from the party's statute and political programme that it „pursues the aim of establishing a humane State based on communist doctrine, which would imply that the constitutional and legal order in place since 1989 is inhumane and not founded on genuine democracy". The applicant appealed against that decision to the Bucharest Court of Appeal, which dismissed the appeal on the ground that the assessment made in the tribunal's decision had been correct.

Analysing the complaint lodged by the party and its leader, the European Court of Human Rights stated that there can be no democracy without pluralism and that is why freedom of expression as enshrined in Article 10 is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. The fact that their activities form part of a collective exercise of the freedom of expression in itself entitles political parties to seek the protection of Articles 10 and 11 of the Convention (§§ 45). The Court underlined that it has previously held that a political party may campaign for a change in the law or the legal and constitutional structures of the State on two conditions: firstly, the means used to that end must in every respect be legal and democratic, and secondly, the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders

[14] Law no.14/2003 has been amended by Law no.115/2015, published in the Official Gazette of Romania, Part.I, no.346 of 20th of May 2015.

incite to violence or put forward a policy which does not comply with one or more of the rules of democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention's protection against penalties imposed on those grounds (§§ 46).

The Court noted that the national courts based their refusal of the applicants' application solely on an assessment of whether the PCN's statute and political programme complied with the provisions of political parties law (at that time, Legislative Decree no. 8/1989). In the same time, the Court also noticed that the PCN had not been politically active before applying for registration. It observed, in this connection, that neither the Romanian courts did not base their rejection decisions on any other document produced by the PCN or on any particular position taken by the leaders of the PCN (§§ 51). Examining the PCN's statute and political programme, the Court noticed that these documents laid emphasis on upholding the country's national sovereignty, territorial integrity and legal and constitutional order, and on the principles of democracy, including political pluralism, universal suffrage and freedom to take part in politics. It further noted that they did not contain any passages that could be considered a call for the use of violence, an uprising or any other form of rejection of democratic principles – an essential factor to be taken into consideration – or for the "dictatorship of the proletariat".

The Court considered one of the principal characteristics of democracy to be the possibility it offers of addressing through dialogue, without recourse to violence, issues raised by different strands of political opinion, even when they are irksome or disturbing. Democracy thrives on freedom of expression. From that point of view, there can be no justification for hindering a political group that complies with fundamental democratic principles solely because it has criticised the country's constitutional and legal order and sought a public debate in the political arena.

The Court noticed that national jurisdictions did not show any way in which the PCN's programme and statute were contrary to the country's constitutional and legal order and, in particular, to the fundamental principles of democracy. The Court also dismissed the Government's argument that Romania cannot allow the emergence of a new communist party to form the subject of a democratic debate. The European Court stressed that the PCN's programme could hardly have been belied by any practical action it took, since its application for registration was refused and it consequently did not even have time to take any action. It was thus penalised for conduct relating solely to the exercise of freedom of expression. The Court took into account the historical background, meaning Romania's experience of totalitarian communism prior to 1989. However, it observed that that context cannot by itself justify the need for the interference, especially as communist parties adhering to Marxist ideology exist in a number of countries that are signatories to the Convention (§§ 54-57).

A similar situation occurred in Spain, where the Constitutional Tribunal stated[15] that the refusal to register a political party, based solely on the suspicion that it could continue the activity of a banned political party, violates the fundamental freedom of association, by violating the right to create political parties. In the case, the Special Chamber of the Supreme Court declared the founding of the political party *Sortu* to be unlawful and refused its incorporation in the Register of Political Parties. In its judgment, the Supreme Court ruled that *Sortu* continued the unlawful activities of *Herri Batasuna*, *Euskal Herritarrok* and *Batasuna*, which were political parties banned in 2003 by a judgment pronounced by the same Chamber of the Supreme Court. *Sortu* appealed at the Constitutional Tribunal against that decision. The Constitutional Tribunal considered that the expressions in support of exclusively peaceful and democratic ways to achieve political objectives and the condemnation of terrorism (expressly including ETA) as an instrument of political action, comprised in the party's statute, should be regarded as a sufficient circumstantial evidence to counteract or dilute the probative force of other pieces of evidence from which it could be inferred that *Sortu* could continue or pursue the activity of legally banned and dissolved parties. Therefore, the suspicion that *Sortu* could continue the activity of outlawed parties could not constitute a legally sufficient argument to infringe the exercise of the freedom of association.

5. Cessation Of Activity Of A Political Party Due To Unconstitutional And/Or Unlawful Activity

It is possible that a party which initially complies with the requirements stated in the Basic Law, to disregard them during its activity. The constitutional provisions of Article 40 Paragraph 1 in the Romanian Basic Law that grant the freedom of association have to be read in conjunction with those of Article 30 Paragraph 7 that forbid defamation of Country and Nation, any instigation to a war of aggression, to national, racial, class or religious hatred, any incitement to discrimination, territorial separatism, or public violence, as well as any obscene conduct contrary to morals. In this situation, the Constitutional Court of Romania is competent to rule upon the challenges as to the unconstitutionality of a political party, according to Article 146 Letter k) of the Basic Law. A similar provision can be found in Article 39 of the Law no.47/1992 on the Organisation and Operation of the Constitutional Court.

[15] Decision 138/2012 of 20th of June 2012, published in *Boletín Oficial del Estado* (Official Gazette), 163 of 9th of July 2012, https://www.boe.es/boe/dias/2012/07/09/pdfs/BOE-A-2012-9214.pdf, accessed March 23, 2017.

To this end, the Court verifies the fulfillment of substantive requirements regarding the political party's activity, provided in Article 40 paragraph 2 of the Basic Law, which states that parties or organizations which, by their aims or activity, militate against political pluralism, against the rule of law or against the sovereignty, integrity or independence of Romania are unconstitutional. In the same time, exercising this type of constitutional review, the Court also takes into account Article 3 of the Political Parties Law No.14/2003, which states that only political associations that are duly established and that militate in favor of national sovereignty, state independence and unity, territorial integrity, legal order and constitutional democracy principles, may function as political parties. The same article states that political parties that, by their statutes, programs, propaganda or by other activities they organize, breach the fore mentioned constitutional provisions are prohibited.

The Romanian Constitutional Court has rendered only one decision regarding the constitutionality of a political party[16]. The complaint was rejected as inadmissibile, mainly because the plaintiff was not entitle by law to lodge such a complaint. Subjects which may apply to the Court to exercise this power are expressly and exhaustively listed in Article 39 Paragraph 2 of the Law no. 47/1992. Thus, the law grants this right only to the Government and the President of the Chamber of Deputies and the President of the Senat, based on a decision taken by the Chamber's majority of its members. In light of these legal provisions, the application was considered inadmissible, being drawn by a person that did not have the legal ability to call the Constitutional Court to rule over the constitutionality of a political party.

Moreover, the Court noted that an impediment to judging on the merits of the application lied in its very object. In this regard, the Court stated that, according to Article 146 letter k) of the Constitution, it has the power to decide on complaints regarding the constitutionality of a political party. The case concerned the Democratic Alliance of Hungarians in Romania (*Uniunea Democrată Maghiară din România*). As reflected in the electronic records of the Ministry of Justice, it is not listed in the register of political parties kept by the Bucharest Tribunal, but in the National Register of Nongovernmental Organizations. The Court stated that the assimilation made by the law in terms of participation in the electoral process does not lead to the transformation of the Democratic Alliance of Hungarians in Romania into a political party, but preserves its status of legal association. Since the Democratic Alliance of Hungarians in Romania do not fall under the provisions of the Law No.14/2003 on political parties, the Constitutional Court was not entitled to review its constitutionality and, therefore, it rejected the application as inadmissible.

A similar type of argumentation has been used by the Federal Constitutional Court of Germany[17] when the National Democratic Party of Germany (*Nationaldemokratische Partei Deutschlands*) drew an application asking the Court to ascertain that the mentioned party is not unconstitutional. The Court dismissed the applications as inadmissible, noteing that the Federal Constitutional Court Act does not provide a party with the option to invoke the Federal Constitutional Court's jurisdiction for a declaration of its constitutionality. Political parties are free to exercise their rights as long as the Federal Constitutional Court has not established their unconstitutionality. If it is contested that they are entitled to exercise these rights, they can take recourse to the courts[18].

The National Democratic Party of Germany (NDP), which was considered a party far to the right of the political spectrum[19], represented a subject that the Federal Constitutional Court dealt with in several ocasions. In 2001, the Court decided jointly on applications lodged by the Federal Government and the two chambers of the Federal Parliament, the *Bundestag* and the *Bundesrat*. The Court noticed the co-ordinated nature of the applications, lodged by the three politically highest ranking institutions of the Federal Republic of Germany, fact that indicated the extraordinary political importance of the case. During the proceedings, the Court learnt that several important functionaries of the NPD were, at the same time, working not only as party functionaries, but also as undercover agents of the *Verfassungsschutz*, the public authorities which investigated the NPD and prepared the case for the Constitutional Court. In March 2003, considering this information, the Constitutional Court decided that the proceedings had to be discontinued[20].

Very recently, on the 17th of January 2017, the Federal Constitutional Court re-opened the proceedings and rendered a decision regarding the constitutionality of the fore-mention party[21]. In order to do that, the Court firstly examined the admissibility of the application to prohibit the NPD. In this regard, it stated that there is neither an infringement of the strict requirement that there be no informants at the party's executive level (*Staatsfreiheit*) nor an infringement of the principle of fair trial that would preclude carrying out the proceedings. The applicant convincingly demonstrated to the Court that all police informants at

[16] Decision no.272 of 7th of May 2014, published in the Official Gazette of Romania, Part I, no.451 of 20th of June 2014.

[17] Cases before the German Federal Constitutional Court are quoted as published either in Entscheidungen des Bundesverfassungsgerichts (BVerfGE) or - since 1 January 1998 - on the website of the Court at http://www.bundesverfassunqsqericht.de/entscheidunqen.html, accessed March 23, 2017.

[18] Bundesverfassungsgericht, 2 BvE 11/12, Decision of 20th of February 2013, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2013/02/es20130220_ 2bve001112.html, accessed March 23, 2017.

[19] Hans-Heinrich Vogel, "Prohibition Of Political Parties In Germany", in CDL-JU(2009)052, report presented at the Conference "Constitutional Restrictions On Freedom Of Association", Belgrade, Serbia, 2 June 2009, p.5.

[20] http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2001/07/bs20010703_2bvb000101.html, accessed March 23, 2017.

[21] http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2017/bvg17-004.html, accessed March 23, 2017.

the executive levels of the NPD had already been deactivated, at the latest, at the point in time at which the intention to file an application to prohibit the NPD had been announced, and that there had been no follow-up aimed at obtaining information. It could also be assumed that the NPD's procedural strategy has not been spied out with intelligence service means and that there have been sufficient precautions to ensure that information obtained incidentally through the observation of the NPD is not used to the party's detriment.

The applicant, the *Bundesrat*, requested the declaration that the NPD is unconstitutional because it seeks, by reason of its aims or the behaviour of its adherents, to undermine the free democratic basic order. The Court noticed that, indeed, the National Democratic Party of Germany advocates a concept aimed at abolishing the existing free democratic basic order. The NPD also intends to replace the existing constitutional system with an authoritarian national state that adheres to the idea of an ethnically defined "people's community" (*Volksgemeinschaft*). Its political concept disrespects human dignity and is incompatible with the principle of democracy. Furthermore, the NPD acts in a systematic manner and with sufficient intensity towards achieving its aims that are directed against the free democratic basic order. However, the Court noted that, currently, there is a lack of specific and weighty indications suggesting that this endeavour will be successful. For that reason the Second Senate of the Federal Constitutional Court unanimously rejected as unfounded the *Bundesrat*'s application to establish the unconstitutionality of the NPD and its sub-organisations[22].

In the German constitutional case-law, there were two more decisions which implied the prohibition of political parties, both of them delivered on applications made by the Federal Government in November 1951. They challenged the constitutionality of a party of the extreme political right, the *Sozialistische Reichspartei* (SRP), and one party of the extreme political left, the *Kommunistische Partei Deutschlands* (KPD). Both parties were declared unconstitutional, the first one in 1952[23] and the second one[24], in 1956. The Court dissolved them, confiscated their assets and issued a ban on establishing organisations to replace the dissolved party.

Turkey is also one of the countries that faced the problem of potentially unconstitutional parties and the Constitutional Court has been called to solve this kind of cases. For instance, in one case, the Chief Public Prosecutor at the Court of Cassation launched a court action seeking the dissolution of the Rights and Freedoms Party *(Hak ve Özgürlükler Partisi HAK-PAR)*. He claimed that the statute and programme of the Party described the "Kurdish problem" as "the main problem of Turkey". He pointed out that such an approach, drawing a distinction between Turks and Kurds and accepting the existence of a separate Kurdish nation, entailed the rejection of the concept of nationhood, which depends on conscience of citizenship. Analizying the application, the Constitutional Court reiterated that political parties are indispensable elements of democratic political life and they are free to determine policies and to suggest different solutions to society's social, economic and political problems. They can only be banned if their policies and activities pose a clear and present danger to the democratic regime. The *HAK-PAR* Party was only established a short time before the application and there is no evidence of its having committed unconstitutional acts since its establishment. It is therefore safe to say that the party does not pose a serious threat to the democratic regime[25].

In an other case, the Constitutional Court of Turkey decided the dissolution of the Democratic People's Party, based on the fact that the defendant party rejected the concept of a modern nation and its political program depended on racial and regional discrimination. The Court also noticed that there was made a discrimination between Turks and Kurds in the Party's manifesto and the party asserts that there is an ethnically Kurdish nation which is subjected to assimilation. In these circumstances, the Court concluded that it was clear that this kind of conception could corrupt the state order, which depended on territorial and national unity. The Court also found that the party aimed to create minorities by protecting, by promoting and by disseminating languages and cultures other than Turkish and Turkish culture[26].

6. Conclusions

The basic idea that it has been intended to be depicted in this study centers on the fact that regulations regarding political parties offer an image of the degree of democracy in each state and the way the legislator approaches this issue is defining for the stage of development of the society. The existence of the political parties itself is one of the signs of a genuine democracy. Nevertheless, the mere possibility granted by law to form a political party is not enough if the legal requirements are so restrictive that jeoperdize its institution. The fundamental right to association has to be permanently kept in mind by the legislative when it

[22] Bundesverfassungsgericht, 2 BvB 1/13, Decision of 17thh of January 2017, http://www.bundesverfassungsgericht.de /SharedDocs /Entscheidungen/DE/2017/01/bs20170117_2bvb000113.html, accessed March 23, 2017.

[23] 1 BvB 1/51, BVerfGE 1, 349.

[24] 1 BvB 2/51, BVerfGE 5, 85.

[25] http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/tur/tur-2008-2-004?f=templates$fn=document-frameset.htm$q=%5Bfield,E_Alphabetical%20index%3A%5Borderedprox,0%3APolitical%20party%5D%5D%20$x=server$3.0#LPHit1, accessed March 23, 2017.

26 http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/tur/tur-2001-3-012?f=templates$fn=document-frameset.htm$q=%5Bfield, E_Alphabetical%20index%3A%5Borderedprox,0%3APolitical%20party%5D%5D%20$x=server$3.0#LPHit1, accessed March 23, 2017.

adopts legal provisions regarding the institution and the functioning of political parties.

The authorities of constitutional jurisdiction are the guardians of democracy and, in most European countries, they have the power to protect the values incorporated in the essence of any political party, which is mainly to express and shape the political will of citizens and to convey it to the highest levels of decision in the State. The aim of this paper was to highlight the importance of political parties in contemporary societies and the necessity to design a legal framework adapted to the constitutional exigencies required by the protection of the right to free association. At the same time, any sideslip has to be ammended. Constitutional jurisdictions hold the legal instruments to keep the balance in the political life, by sanctioning the infringments of the freedom of associations, on one hand, an, on the other hand, by banning those political parties that diverge from the standards of good faith in relation with the State or its institutions and put in peril the conquests of democracy by trying to establish a radical, extremist political order, atacking the values of democracy and underming the rule of law.

The sphere of political parties' activity is very wide and it offers many reasearch posibilities for legal scholars. Topics like the internal discipline and the responsibility of the members, the involvement in the electoral proceedings or the system of alliances political parties form in variouse moments of their existence on contingency basis are only few of them. A vast, intriguing and very proteic issue is also represented by the political doctrines chosen, followed and spread by political parties. In other words, the subject of political parties opens a very generous field of research and also rises awareness in what concerns their importance both in the life of individuals that thanks to them are able to participate in the State's decisions and in the State's life itself.

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- 1 BvB 1/51, BVerfGE 1;
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THE SEPARATION OF POWERS IN THE CONSTITUTIONS OF THE EU MEMBER STATES

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Abstract

The purpose of this study consists of realizing and offering an overview of the manner in which the principle of separation of powers is consecrated in the constitutions of the EU member states.
We thereby aim to prove that there is no direct relationship between the form of government of a state, the expressis verbis constitutional regulation of the principle of separation of powers in the state and its effective observance, for the existence of the last fact being necessary the simultaneous concurrence of more social, economic and political factors at the level of the society as a whole.
Also, we aim to offer a perspective as realistic and comprehensive as possible regarding what does the principle of separation of powers imply, mostly from a legal point of view, as well as about the implications that its respecting or lack of it, as the case, does have at the level of a society.
Eventually, we hope to provide a relevant academic study regarding the subject of both great topicality and theoretical and practical interest regarding the fundamentals and especially the operating mode of the principle of separation of powers, a study which could serve, if it shall be taken into consideration by the political plan of the state, to the substantiation of some responsible decisions in the ongoing act of exercising the power.

Keywords: *Constitution, EU member states, separation of powers, Parliament, Government, judicial power*

1. Introduction

The object of the study consists of the principle of separation of powers in the constitutions of the EU member states.

Its importance results out of the necessity to observe in a fundamental manner the existence or inexistence of a direct relationship between the express or implicit constitutional consecration of the principle of separation of powers in the state, its form of government, the manner in which the three powers belong to the public authorities that exercise them, as well as the effective observance of the principle.

We aim, by aggregating some systematizations referring to the constitutions of all the EU member states, to prove the apparent lack of such relationship, considering that the effective observance of the principle cannot be caused by the express consecration of the principle, by one or another form of government or by the exercise of the powers by certain authorities together or independently. Ultimately, the effective observance of the principle is related to the degree of responsibility and maturity of those who possess and exercise the three powers, so of the society as a whole, having an indissoluble relationship with the level of general development of the respective society, implicitly with the quality of the educational system of that state, with its historical accumulations.

A study with an identical subject does not exist in the romanian doctrine (the joinder in a single document of all fundamental laws of the EU member states), this being a reason for us to invite, on this occasion, any interested person to deepen the research of the proposed subject. Of course, regarding the specialty literature referring to the principle of separation of powers, it must be regarded as a premise for the elaboration of this study, a short doctrinaire introspection.

2. The principle of separation of powers

2.1. Fixation of theoretical elements

Enunciated by John Locke in the paper *Treatise on Civil Government* (1690), the theory of separation of powers is completed and explained in detail by Charles-Louis de Secondat, baron de la Bréde et de Montesquieu in the famous paper *The Spirit of Laws* (1748). Montesquieu had shown in his paper that in any organised society, the principle of separation of powers is the basic instrument for the safety of the citizens, followed by the existence of the three great functions: the enactment of legal rules - the legislative function; the enforcement of these rules - the executive function; the judgment of litigations - the jurisdictional or the judicial function[1].

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[1] Ioan Muraru, Elena-Simina Tănăsescu et al., *Constitution of Romania. Comments on articles* (Bucharest: C.H. Beck Publishing House, 2008), 13.

The theory of Montesquieu, approximately in a mirror with the one of Locke, represents, therefore, a reaction against the arbitrariness in the governance and the monarchical absolutism, the two philosophers aiming, through this theory, to ensure the observance of individual freedoms, to allow for the free development of the people. Montesquieu thereby came to distinguish precisely between the three powers which became classical nowadays, namely: the legislative power (or the power to create, modify and abrogate laws), the executive power (or the power to apply the laws, to actually manage the state) and the judicial power (or the power to punish the felons/criminals and to judge the litigations between private individuals, in the sense of "saying the law"). However, the last one – the judicial power – was not developed in the further research of Montesquieu, because of a perception rather ignorant which was specific to that age, considering it unimportant to the society, "almost null"[2]. Nevertheless, it is essential the fact that, in the parameters of theoretical analysis, Montesquieu mentioned the jurisdictional power, rather as a function of the state which must be regarded individually, which must operate distinctly, in order to allow the state to be considered democratic.

Besides, John Locke avoids as well to expressly affirm the existence of a judicial power, although he believes in the jurisdictional function which is realised by the state, this depending, in his opinion, on the legislative power. Therefore, Locke distinguishes three powers of the state, but four functions. Beginning from the fact that "the main purpose which urges people to create states and thereby to subdue to a government" is "the defense of property", Locke proves the existence of a jurisdictional function which is exercised by the state. In the same context, he shows that what does the state of nature lack, the state previous to the existence of society, is, first of all, an established and acknowledged law, second of all an acknowledged and impartial judge and, third of all, a power able to found, sustain and enforce a sentence[3].

The principle of separation of powers must not be interpreted as an absolute separation of the three powers of the state, but as the interdiction that one of the powers shall cumulate and exercise attributes specific to others, thus becoming a discretionary power in the state. More than that, the separation of powers must imply, however, a collaboration between the powers of the state in the general process of exercising the power of the state. By proceeding in such manner, a balance between the powers of the state is established, as each power is bound to limit its prerogatives to those entrusted to it by the Constitution[4].

Rousseau grasps, though, that the theory of separation of powers exhibits a fundamental vice, namely that, although the sovereignty cannot be divided in its principle, we still find it divided in its object. In other words, if we do not acknowledge the indivisibility of the sovereignty, it would be natural to not acknowledge the divisibility of power. However, Rousseau finds another two inseparable elements: to create laws and to maintain them efficient in activity. Still, this second aspect implies and justifies the supervision of the executive by the legislative. "The Government", the holder of the executive power – said Rousseau – is nothing but the "minister" of the legislative, an "intermediate body" of it and subordinate to it[5]. We must regard the theory of Rousseau through the prism of the age contemporary with him, of the conceptions of that period and, implicitly, of the language of that age.

In time, as the constitutional law and the human civilization evolved, the separation of powers consolidated as an essential operating mode of democratic states, as a mark for identifying the democracies, respectively for depicting what autocracies lack. The principle of separation of powers in the state naturally causes the emergence and application of the law constitutionality control without which the supremacy of the Constitution could not be ensured[6].

Doing a short review of the current situation at the global level, we may lay out certain observations. Therefore, while in the parliamentary political regimes operates the principle of equality between the Parliament and the Executive, thus realising the balance between these (Great Britain, Germany), in the semi-presidential political regimes, the head of the state (who is also, generally, the chief of the Executive, but the Executive is, essentially, bicephalous) is not politically liable to the Parliament, but the Government must earn the trust of the Parliament in order to exercise the function of governance, respectively to have its list and program proposed for governance approved (France, Romania). Specific to the presidential political regimes, as it is the one of the U.S.A., is the belonging of the executive function to the head of the state and his subordinates who do not hold the quality of ministers, as there is no concept or institution of Government, the belonging of the legislative function to the Parliament (bicameral in the U.S.A. example – the House of Representatives and the Senate), and of the judicial one to the Supreme Court (the supreme court in the state, generally expressly regulated by the Constitution) and the other courts established by the law[7].

The theory of separation of powers had a special role, maybe a decisive one, in the promotion of the

[2] Quote by Bianca Selejan-Guțan, *Constitutional law and political institutions. Vol. II* (Bucharest: Hamangiu Publishing House, 3rd edition, 2016), 12.
[3] Quote by Dan-Claudiu Dănișor, *Constitutional law and political institutions. Vol. I* (Bucharest: Științifică Publishing House, 1997), 273.
[4] Cristian Ionescu, *Constitutional law and political institutions* (Bucharest: Hamangiu Publishing House, 2012), 141.
[5] Quote by Ion Deleanu, *Constitutional law and political institutions. Vol. I* (Bucharest: Europa Nova Publishing House, 1996), 87.
[6] Ștefan Deaconu, *Constitutional law* (Bucharest: C.H. Beck Publishing House, 2nd edition, 2013), 69.
[7] I. Muraru, E.S.Tănăsescu, *Constitutional law and political institutions. Vol. II* (Bucharest: C.H. Beck Publishing House, 12th edition, 2006), 227.

representative system, namely in the democratic harness of the relationship between the sovereign holder of the power and the state organisation of the political power; in the searching or even the state organization and functioning of the power in such manner that the guarantees of full exercise of the human rights and of the citizen are ensured. As the Constitutional Court of Romania specified, *"the separation of powers in the state does not imply the lack of a control mechanism between the power of the state, on the contrary it implies the existence of a mutual control, as well as realising a balance of forces between these. The acts of the executive power are censored through the administrative contentious, and this involves, among others, the possibility of the court to suspend the execution of the alleged unlawful act"* (D.C.C. no. 637/2006; to see the most recent decisions of the Constitutional Court, namely no. 63/08.02.2017, no. 64/09.02.2017 and no. 68/27.02.2017)[8].

The Constitutional Court had constantly affirmed that it fulfills an exclusive role of "negative legislator", never a role of "positive legislator", so that it had not sanctioned "maturities" or "legislative gaps", although it was often confronted with such situations (Decision no. 761/17.12.2014). That is the reason why its decisions are, mostly, "simple decisions" or "extreme/categorical decisions" which establish their constitutionality or lack of it. However, in a moderate form, the Constitutional Court of Romania had recoursed to some intermediate decisions, through which the constitutionality or lack of it was established with certain reserves[9].

Despite its indisputable relevance, like any theory, the theory of separation of powers principle has its own critiques. Such a critique is the aging of the theory of separation of powers[10]. This is explained by the fact that the theory was elaborated on the background of some institutional problems exhibited by the power, during an age when political parties were not yet established. As a consequence, the emergence of political parties and their particular role in the configuration of legal and political institutions causes the nowadays separation to occur not between the Parliament and the Government, but between a majority, consisting of a winning – in elections – party or parties which hold the Parliament and the Government at the same time, and an opposition (or oppositions) which waits for the next elections "to take revenge". Such a scheme is, in principle, applicable anywhere, but more evident in the two-party constitutional systems[11].

Other critiques are those represented by the theory of the power uniqueness, respectively the argument of violating the divisibility of sovereignty. Both, however, are easily countered. The first one because it does not take into consideration the fact that the power of state is, in fact, a system of bodies which coexist and control each other, while the latter has critiques with arguments from the theory of fractionated sovereignty.

The principle of separation of powers is distinctly consecrated in different constitutions of the world, but it does exist regardless the shape that it takes. While in some constitutions it is expressly regulated through a legal provision (*e.g.* the Constitution of Moldavia, of Romania), in others it results implicitly from the constitutional provisions and the method of structuring the texts of the fundamental law (*e.g.* the Constitution of France, Belgium and Spain). In Romania, since the constiutional revision of 2003, art. 1 para. (4) of the Constitution provides that *"the state is organized according to the principle of separation and balance of powers – legislative, executive and judicial – in the frame of the constitutional democracy"*[12].

2.2. The consecration of the principle of separation of powers in the constitutions of the EU member states

In the following, we shall examine, in alphabetic order, the constitutions/fundamental laws/acts with constitutional value of all the European Union member states, in terms of existence of some specific *expressis verbis* regulations regarding the principle of separation of powers, respectively of an implicit regulation, in terms of the form of governement, as well as the mode of regulation in terms of organization, respectively the provision of exercise of the three powers in the state by the authorities consecrated by the fundamental law (the classic functions of the three powers.

Republic of Austria[13]

The Constitution of Austria consecrates *expressis verbis* the principle of separation of powers. Therefore, art. 94 para. (1) provides that "the judicial and the executive powers are separated at all levels of procedure".

Austria is a parliamentary republic (with federative structure), where the legislative power is exercised by the National Council (*Nationalrat*) together with the Federal Council (*Bundesrat*), the two of them forming the chambers of the Federal Assembly having the role of the Parliament of Austria (*Bundesversammlung*).

The executive power of the Federation is exercised by the Federal President (*Bundespräsident*) together with the Federal Government

[8] I. Muraru, E.S. Tănăsescu et al., *Constitution of Romania. Comments on articles*, 13.
[9] Ion Deleanu, *Constitutional law and political institutions*, 98.
[10] I. Muraru and E.S. Tănăsescu, *Constitutional law and political institutions*, 8-10.
[11] I. Muraru, E.S. Tănăsescu et al., *Constitution of Romania. Comments on articles*, 15.
[12] Ștefan Deaconu, *Political institutions* (Bucharest: C.H. Beck Publishing House, 2nd edition, 2015), 18.
[13] Ștefan Deaconu et al., *Constitutional Codex. Constitutions of the European Union member states. Vol. I* (Bucharest: Official Monitor Publishing House, 2015), 11-21.

(*Bundesregierung*), and the judicial power is exercised by the Supreme Court, as well as by other courts established by the law. The Constitutional Court of Austria has a broader range of competences than those that are traditionally established in the attributions of a constitutional court.

Kingdom of Belgium[14]

The Constitution of Belgium does not expressly consecrate the principle of separation of powers, thus implicitly resulting from the constitutional provisions and the method of structuring the constitutional text.

The Kingdom of Belgium is a hereditary constitutional monarchy, characterized by the fact that the legislative power is collectively exercised by the King, the Chamber of Representatives and the Senate, and the executive power is bicephalous, represented by the King and his ministers.

On the top of the judicial system is the Supreme Court, which ensures a unitary practice, followed by the High Council of Justice, respectively by the administrative jurisdictions. The Constitution, in its current form, also consecrates a Constitutional Court which realizes the control of constitutionality. In order to characterize the relationship between the public authorities, the doctrine specifies that the Belgian institutions are dominated by the principle of separation of powers.

Republic of Bulgaria[15]

The Constitution of Bulgaria consecrates *expressis verbis* the principle of separation of powers. Therefore, art. 8 provides that "the power of the state is divided between the legislative power, the executive and the judicial one".

Bulgaria is a parliamentary republic, having a bicephalous executive – President and Government. The legislative is exercised by the Parliament, and the judicial activity by the Supreme Court of Cassation, together with the Supreme Administrative Court, courts of appeal, departamental tribunals, military tribunals and district tribunals.

Czech Republic[16]

The Constitution of the Czech Republic does not expressly consecrate the principle of separation of powers, thus implicitly resulting from the constitutional provisions and the method of structuring the constitutional text.

The Czech Republic is a parliamentary republic in which the legislative function is exercised by the Senate and the Chamber of Deputies, while the executive function is exercised by the President of the Republic together with the Government.

In the Czech Republic, the judicial power consists of judges and prosecutors, these having the role of making justice, respectively of representing the state in the activity of protecting the public interest. The Constitutional Court of the Czech Republic is, according to the Constitution, the judicial body responsible for the defense of the constitutionality.

Republic of Cyprus[17]

The Constitution of Cyprus does not expressly consecrate the principle of separation of powers, thus implicitly resulting from the constitutional provisions and the method of structuring the constitutional text.

It is a presidential republic where the President is also the head of the Government (the Council of Ministers). At the moment, the country is almost completely governed after the model conferred by the English law.

The executive power is ensured by the President and the Vicepresident, together with the Council of Ministers consisting of seven Greek ministers and three Turkish ministers, and the legislative power of the Republic is held by the House of Representatives in all matters, excepting those matters reserved for the Greek chamber, respectively for the Turkish one, related to their communities. The Supreme Court has the role of the last recourse court and is competent in civil, criminal and administrative matter. Also, it exercises the attributions of a constitutional court.

Republic of Croatia[18]

The Constitution of Croatia does not expressly consecrate the principle of separation of powers, thus implicitly resulting from the constitutional provisions and the method of structuring the constitutional text.

Croatia is a parliamentary republic, where the legislative power is exercised by the unicameral Parliament, and the executive power is exercised by the Governement consisting of the Prime-minister and the ministers. The attributions of the head of the state mainly regard the defense and the international relations of the state.

The judicial power is exercised by the courts, hierarchically organized and under the coordination of the Supreme Court, respectively by the National Judicial Council (having an administrative role for the proper functioning of the Justice), an independent organ which ensures the autonomy and the independence of the judicial power. The Constitutional Court of Croatia is an institutional entity distinctly regulated by the Constitution, with attributions specific to this form of special jurisdiction, consisting of 13

[14] *Idem*, 143-148.
[15] *Idem*, 207-216.
[16] *Idem*, 257-263.
[17] *Idem*, 293-300.
[18] *Idem*, 389-395.

judges. A particularity of the Croatian constitutional court competences is its attribution to verify the constitutionality of the rulings pronounced by the common law courts, namely the right to control the judicial power in terms of constitutionality of its acts.

Kingdom of Denmark[19]

The Constitution of Denmark consecrates *expressis verbis* the principle of separation of the judicial power from the executive one. Therefore, art. 62 provides that "the administration of the justice act is always made independently in relation to the executive power".

It is a constitutional monarchy in which the legislative power is divided between the Parliament (*Folketing*) and the King, who has the supreme authority to rule, which he exercises through his ministers. They are appointed and dismissed by the King, including the Prime-minister. The executive power is exercised by the King (symbolically), the King having in reality only a decorative role of representing the Danish state. As a consequence, the King exercies the executive function only formally, because the attributions of the executive power are effectively exercised only by the Government and the public administration. According to the Constitution of Denmark, the judicial power is exercised by the courts established by the law, namely by professional judges.

Hellenic Republic[20]

The Constitution of Greece does not expressly consecrate the principle of separation of powers, thus implicitly resulting from the constitutional provisions and the method of structuring the constitutional text.

The Hellenic Republic is organised by the model of the parliamentary republics. Although it is not expressly mentioned in art. 26 of the Constitution (which consecrates the powers in the state), Greece is organized and governed in accordance with the principle of separation and collaboration of powers in the state, as the legislative power is exercised by the Parliament together with the President of the Republic (who has certain limited attributions regarding the promulgation of laws and the right to resend for analysis to the Parliament some laws to which he has objections), the executive power belongs to the President of the Republic (who is obviously part of the executive power, considering the majority of his constitutional attributions) and to the Government. The judicial power is exercised by the courts organised by the law.

Republic of Estonia[21]

The Constitution of Estonia consecrates *expressis verbis* the principle of separation of powers. Therefore, art. 4 provides that "the activities of the Parliament, of the President, of the Government and of the courts are organized according to the principle of separation and balance of the powers".

Estonia is a parliamentary republic in which the Parliament represents the legislative power, and the Government represents the executive power. The justice is exclusively made by the courts, while the Supreme Court is the exclusive constitutional jurisdiction.

Republic of Finland[22]

The Constitution of Finland does not expressly consecrate the principle of separation of powers, thus implicitly resulting from the constitutional provisions and the method of structuring the constitutional text.

The three classic powers of the Finnish parliamentary republic are expressly delimited by the Constitution. The legislative power is thereby exercised by the unicameral Parliament, and the executive power is exercised by the President of the Republic together with the Government. The judicial power is exercised by independent courts, the Supreme Court and the Supreme Administrative Court being the highest courts. Regarding the constitutionality control, it is exercised only *a priori* by the Commission for Constitutional Law.

Republic of France[23]

France is a semi-presidential republic, its Constitution effectively consecrating the separation of the executive and legislative powers – with the typical french block of constitutionality, which reunites norms of the Declaration of the Rights of Man and of the Citizen (1789), respectively the Preambles of the Constitutions of 1946 and 1958 proposed by the president Charles de Gaulle (general, hero of France during the World War II), currently in force. Therefore, in an illustrative manner of ample symbolism, art. 16 of the Preamble provides that "any society in which the guarantee of rights is not ensured, and the separation of powers is not realized, has no Constitution"[24].

The specific of the regulations of the French Constitution is the lack of the classic hierarchy of the public authorities (the legislative, the executive, the judicial power), but another order is regulated, namely the President of the Republic, the Government and the Parliament. The dominant position of the executive is obvious, purpose openly declared by the authors of the Constitution. The text of the fundamental law

[19] *Idem*, 439-443.
[20] *Idem*, 465-475.
[21] *Idem*, 543-549.
[22] *Idem*, 587-593.
[23] *Idem*, 631-635.
[24] Ștefan Deaconu, *Constiutional law*, 46.

consecrates only the judicial authority as terminology, this being in accordance with the French conception about the separation of powers, and the French Constitutional Council was a source of inspiration for the Romanian constitutional regulations of 1991.

Federal Republic of Germany[25]

The Constitution of Germany does not expressly consecrate the principle of separation of powers, thus implicitly resulting from the constitutional provisions and the method of structuring the constitutional text.

Two mentions characterize the German constitutional order: the structure and the functions of the public authorities correspond to the federal structure of the state and the application of the classic principle of separation and balance of powers is obvious. The legislative power is represented by the Parliament consisting of two assemblies, namely the *Bundestag* (the representative body of the people) and the *Bundesrat* (the public authority through which the lands collaborate for the enactment of the laws and for the administration of the Federation, as well as for the European Union businesses), at the level of the whole state.

The Federal Government, together with the *Bundestag*, rules the state, consisting of the Federal Chancellor, who is liable for the establishment of the great political orientations, and the federal ministers. The Federal President does not hold decision-making functions, having an integrator role in political matters and a representation role in the international relations. The judicial power is exercised by the judges, independent and subordinated only to the law, and the supreme jurisdiction in the state is exercised by the Federal Constitutional Court.

Ireland[26]

The Constitution of Ireland does not expressly consecrate the principle of separation of powers, thus implicitly resulting from the constitutional provisions and the method of structuring the constitutional text.

Ireland is a parlamentary republic in which the legislative power is exercised by a unicameral Parliament, in collaboration with the President of the state. The executive power is exercised *„by or on the basis of the authority of the Government"*, attributions specific to this power belonging, however, to the President of the Republic, assisted by the Council of State. The Government is represented by the Prime-minister and ministers.

The judicial system of Ireland consists of first instance tribunals, court of appeal and court of final appeal. The court of final appeal is the Supreme Court and is competent in the recourse phase regarding the decisions of the High Court. In Ireland, the constitutionality control of the laws is realised by two courts: the Supreme Court and the High Court.

Republic of Italy[27]

The Constitution of Italy establishes the parliamentary republic system and does not expressly consecrate the principle of separation of powers, thus implicitly resulting from the constitutional provisions and the method of structuring the constitutional text.

In the democractic parliamentary republic of Italy, the legislative power is exercised by the bicameral Parliament (*Parlamento*) consisting of the Chamber of Deputies (*La Camera dei Deputati*) and the Senate of the Republic (*Il Senato della Repubblica*), the executive power is exercised by the collegial body represented by the Council of Ministers (*Il Consiglio dei Ministri*), ruled by the President of Council of Ministers (*Il Presidente del Consiglio dei Ministri*), and the judicial power is exercised by the Court of Cassation and the other courts established by the law. The Constitutional Court consists of 15 judges.

Republic of Latvia[28]

The Constitution of Latvia does not expressly consecrate the principle of separation of powers, thus implicitly resulting from the constitutional provisions and the method of structuring the constitutional text.

Latvia is a parliamentary republic characterized by the fact that, while the members of the Parliament are directly elected by the people, the President is elected by the Parliament. The Government is appointed by the President on the basis of the vote of confidence granted by the Parliament. The Prime-minister is appointed by the President, and the ministers by the Prime-minister.

Latvia uses a judicial system with three levels: district courts (municipal), regional courts and the Supreme Court. The Constitutional Court cannot take notice, thus acting only at the request of the persons (subjects of seisin) provided by the law.

Republic of Lithuania[29]

The Constitution of Lithuania does not expressly consecrate the principle of separation of powers, thus implicitly resulting from the constitutional provisions and the method of structuring the constitutional text.

The particularity of the parliamentary republic of Lithuania is represented by the fact that both the Parliament and the President of the Republic are institutions elected by the people through vote, while the Prime-minister is appointed and dismissed by the

[25] *Idem*, 677-680.
[26] *Idem*, 751-758.
[27] *Idem*, 803-809.
[28] Ştefan Deaconu et al., *Constitutional Codex. Constitutions of the European Union member states. Vol. II* (Bucharest: Official Monitor Publishing House, 2015), 9-15.
[29] *Idem*, 37-44.

President of the Republic, with the agreement of the Parliament, and the ministers are apppointed and dismissed by the President of the Republic on the basis of the proposal of the Prime-minister. The courts are the classic ones, namely the Supreme Court, the Court of Appeal, the regional courts and the local courts. The Constitutional Court consists of nine judges, each of them being appointed for a single mandate of nine years. Every three years, a third of the members of the Constitutional Court are renewed.

The Grand Duchy of Luxembourg[30]

The Constitution of Luxembourg does not expressly consecrate the principle of separation of powers, thus implicitly resulting from the constitutional provisions and the method of structuring the constitutional text.

Luxembourg is a hereditary monarchy in which the executive power is exercised by the Grand Duke together with the Government consisting of the Prime-minister and more ministers. The legislative power belongs to the Chamber of Deputies. A second body, *„Conseil d'État"* (Council of State), consisting of 21 citizens appopinted by the Duke, has a consultative role for the Chamber of Deputies in the elaboration of laws.

In terms of judicial power, there are the courts (as first grade of jurisdiction) and tribunals (courts of judicial control), at the top being the Superior Court of Justice. The main attribution of the Constitutional Court is the prerogative to decide with regard to the compliance of the laws with the Constitution.

Republic of Malta[31]

The Constitution of Malta does not expressly consecrate the principle of separation of powers, thus implicitly resulting from the constitutional provisions and the method of structuring the constitutional text.

Malta is a parliamentary republic ruled in accordance with the principle of separation and collaboration of powers in the state. The legislative power is thereby exercised by the President of the Republic together with the unicameral Parliament, the executive power is exercised by the President of the republic with the support of the Government, and the judicial power is exercised by the courts which are independent in relation to the other two powers in the state. The judicial system is represented by the superior courts, ruled by judges, and inferior courts, chaired by magistrates. The superior courts include the Supreme Court and the Constitutional Court.

The United Kingdom of Great Britain and Northern Ireland[32]

The Constitution of the United Kingdom does not expressly consecrate the principle of separation of powers, thus implicitly resulting from the constitutional provisions and the method of structuring the constitutional text.

The United Kingdom of Great Britain and Northern Ireland is a hereditary constitutional monarchy, which operates on the basis of the principle of separation and collaboration of powers in the state and of the rule of laws adopted by the Parliament. Formally, the British monarch still rules not only the United Kingdom, but the whole Commonwealth, an association of states united under the British Crown. In fact, the executive power, which belonged to the absolute monarchs in the past, is exercised today by the Government still named „of Her Majesty's", ruled by a Prime-minister who is the head of the winning political party in the general election. The loss of the confidence of the Parliament (consisting of the House of Lords and the House of Commons) often has the consequence of losing the position of Prime-minister. It is that important for the legislative and executive powers to collaborate so that the British political regime operates at its best.

The collaboration and balance of the powers in the state binds the Prime-minister and the members of the Government to be members of the Parliament as well, otherwise they cannot hold executive functions of governance, thus excluding their vocation to hold the quality of ministers. Considering that the Great Britain does not have a written and formally supreme Constitution, there is no formally consecrated control of constitutionality or Constitutional Court.

United Kingdom of the Netherlands[33]

The Constitution of the United Kingdom of the Netherlands does not expressly consecrate the principle of separation of powers, thus implicitly resulting from the constitutional provisions and the method of structuring the constitutional text.

It is a hereditary monarchy in which the legislative power belongs to the bicameral Parliament (General State) and the executive power to the Government (King and ministers). They enact laws in common, but the attributions of executive power are separated from the legislative ones, so that the Government enforces the laws enacted by the bicameral Dutch Parliament. The control of constitutionality is not explicitly identified in the constiutional provisions, this being specific to the Dutch legal system which allows, by not regulating in any form, the law – as legal act of the Parliament – to establish the regulations in this matter. The

[30] *Idem*, 89-95.
[31] *Idem*, 119-125.
[32] *Idem*, 205-214.
[33] *Idem*, 263-265.

Constitution forbids, however, the courts of common law, namely the judicial power, in art. 120, the autonomy to arrogate by jurisprudential way the competence of exercising the control of constitutionality over laws and treaties.

Polish Republic[34]

The Constitution of Poland consecrates *expressis verbis* the principle of separation of the judicial power from the other two powers. Therefore, art. 173 provides that "the courts and tribunals constitute a separated and independent power in relation to the other powers in the state".

The Parliament (National Assembly) is bicameral, consisting of the Diet (*Sejm*) and Senate, and exercises the whole legislative power. The President of the Polish Republic and the Council of Ministers exercises the executive power.

In Poland, the justice is made by the Supreme Court, the courts of common law, the courts of administrative contentious and the military courts, while the judicial procedure contains at least two grades of jurisdiction. The Constitutional Tribunal is a court specialized in constitutional contentious, consisting of 15 judges individually appointed by the Diet for a mandate of nine years, from the persons acknowledged for their legal competences.

Portuguese Republic[35]

The Constitution of Portugal does not expressly consecrate the principle of separation of powers, thus implicitly resulting from the constitutional provisions and the method of structuring the constitutional text.

The political powers in the semi-presidential republic of Portugal are exercised by the President, the Assembly of the Republic, the Government and the courts. They are separated, but interdependent. The President, among others, chairs the Council of State (the political body which advises the President of the Republic in the state problems) and summons the extraordinary meetings of the Assembly of the Republic. The Parliament (the Assembly of the Republic) is unicameral.

Besides the Constitutional Court, which is part of the national system of courts, there also exist the Supreme Court of Justice and the courts of first grade of jurisdiction and of second grade, the Supreme Administrative Court and the Court of Audit, as well as administrative and fiscal courts.

Slovak Republic[36]

The Constitution of Slovakia consecrates *expressis verbis* the principle of separation of the judicial power from the legislative and executive powers. Therefore, art. 141 para. (2) provides that "at all levels, the justice is separately exercised in relation to the other bodies of the state".

Slovakia is a parliamentary republic in which the legislative power is represented by the National Council of the Slovak Republic, a unicameral Parliament. The executive power is exercised by the President together with the Government ruled by the Prime-minister. The judicial power is represented by the Supreme Court of the Slovak Republic, the Constitutional Court, the courts and the Judicial Council of the Slovak Republic.

Republic of Slovenia[37]

The Constitution of Slovenia consecrates *expressis verbis* the principle of separation of powers. Therefore, art. 3 provides that "in Slovenia, the power belongs to the people. The citizens directly exercise this power" (the principle according to which the people are the unique holders of the national soverignty, and the public authorities exercise the sovereignty in the name of the people). „The people exercise this power through universal, free and periodic elections, and the essential authorities operate with the observance of the principle of separation of powers in the legislative, executive and judicial one.".

The legislative power is exercised by the National Assembly, and the executive power is exercised by the President of the Republic together with the Government. The judicial system of Slovenia is represented by ordinary courts. The Supreme Court is the highest court of the state, deciding on the ordinary and extraordinary appeals. The Constitution of Slovenia also regulates the establishment and the functioning of a constitutional court having only the role of exercising the control of constitutionality and consisting of nine judges.

Kingdom of Spain[38]

The Constitution of Spain does not expressly consecrate the principle of separation of powers, thus implicitly resulting from the constitutional provisions and the method of structuring the constitutional text.

At the top of the executive power of the parliamentary monarchy of Spain is the Government represented by ministers and ruled by the Prime-minister, while the Chamber of Deputies and the Senate form the two chambers of the Parliament. The King is the head of the state, the symbol of the unity and permanence of Spain, his role being more of a symbolic one. The General Council of the Judicial Power is the body which ensures the governance and the representation of this power (art. 122 of the

[34] *Idem*, 297-307.
[35] *Idem*, 365-375.
[36] *Idem*, 477-485.
[37] *Idem*, 541-548.
[38] *Idem*, 591-600.

Constitution of Spain). It consists of the President of the Supreme Court, who chairs the Council, and 20 members appointed by the King for a five-year period. The Constitutional Court consists of 12 judges and mainly exercises the typical attributions of law constitutionality control.

Kingdom of Sweden[39]

The Constitution of Sweden does not expressly consecrate the principle of separation of powers, thus implicitly resulting from the constitutional provisions and the method of structuring the constitutional text.

Sweden is a constitutional parliamentary monarchy, characterized by the fact that the Head of the Swedish state is the King, and the executive power of the King is realized by the Government which is liable to the the unicameral Parliament, known as *Riksdag*. The King has a symbolic role, having some attributions of appointing high dignitaries, the Government, other important positions in the state, although the legal mechanism of exercising these attributions by the King moves, in reality, these decisions to the main public institutions and authorities, those that formulate the proposals for the head of the state.

The judicial activity is ensured by the Supreme Court (the highest court), the courts of appeal and district courts/tribunals, and in the administrative contentious matter there are regulated the Supreme Administrative Court, courts of appeal and administrative tribunals. The control of constitutionality is realized by the administrative jurisdictions or the courts of common law (especially by the Supreme Court of Sweden) and is focused on the causes which are effectively being judged. Although it may seem an attribution easy to be exercised by the courts of common law, in reality, this mechanism of judicial control on the constitutionality of the laws is rarely used in practice. A diffuse and preliminary control of constitutionality is firstly realized by the Parliament (*Riksdag*) during the stage of elaboration and adoption of laws, when the constitutional analyses are strictly realized. This system of preliminary diffuse control is traditionally used in all the other states which do not have special constitutional courts, the parliamentary assemblies paying increased attention to the compatibility of the laws from the project with the constitutional norms. It must be mentioned that the fundamental law of Sweden, together with the one of Austria and of other european states as well (the most recent fundamental laws or with the most recent significant changes), have an ample volume of legal norms, regulating in detail numerous areas of activity which are generally considered to be part of the competence of the Parliament in terms of adoption.

Hungary[40]

The Constitution of Hungary consecrates *expressis verbis* the principle of separation of powers. Therefore, art. C para. (1) of the Foundations provides that "the functioning of the Hungarian state is based on the principle of separation of powers in the state".

Hungary is a parliamentary republic in which the legislative power belongs to the National Assembly (*Országgyűlés*), which consists of a single chamber, and the executive power is exercised by the President, Prime-minister and Government.

The judicial power is exercised by the courts, namely *Curia* (the Supreme Court of Hungary), regional courts of appeal, district courts, administrative courts and labor law courts. Regarding the Constitutional Court, it consists of 15 members, elected with the vote of two thirds of the members of the National Assembly for a twelve-year mandate, from the legal experts with high professional preparation.

Romania

The Constitution of Romania consecrates *expressis verbis* the principle of separation of powers. Therefore, art. 1 para. (4) provides that "the state is organized according to the principle of separation and balance of powers – legislative, executive and judicial – in the frame of the constitutional democracy".

The legislative power is exercised by the bicameral Parliament. The executive power is exercised by the President together with the Government – chaired by the Prime-minister appointed by the President on the basis of the vote of confidence granted by the Parliament. The judicial power is exercised by the courts, tribunals, courts of appeal and the High Court of Cassation and Justice. The constitutional jurisdiction belongs to the Constitutional Court which consists of nine judges appointed for a nine-year mandate.

3. Conclusions

The main result obtained by realizing this study consists of proving the fact that the relationship which we had as a premise does not exist, namely the one between the express or implicit constitutional consecration of the principle of separation of powers in the state, its form of government, the manner in which the three powers belong to the public authorities that exercise them, as well as the effective observance of the principle.

The constitutions of ten European Union member states, out of all 28, expressly consecrate the principle of separation of powers in the state, namely: Austria, Bulgaria, Denmark, Estonia, France, Hungary, Poland, Romania, Slovakia and Slovenia. These are ten states with different levels of social, economic and political

[39] *Idem*, 653-660.
[40] *Idem*, 775-782.

development, with different democratic and constitutional traditions, as well as with different forms of government. The other 18 states have constitutional norms which indirectly, implicitly or diffusely consecrate, in fact, the separation of powers, indicating the attributions of each classic public authority, on the basis of the functions which compose the principle of separation of powers: the legislative function given in the competence of the parliamentary assemblies, the executive function assigned to the Government and to the head of the state, respectively the judicial function granted to the courts consisting of judges.

Therefore, if we could talk about a common factor having the potential to consolidate the observance level of the principle of separation of powers in the state, that factor remains the general education of the society, the historical accumulations, all of these contributing to the formation of a generation of responsible citizens, among whom will be recruted the specialists of the essential state authorities which were previously analyzed, respectively the political class especially during the stage preliminary to the electoral process, citizens who shall make correct and grounded decisions, capable to understand the meaning and the basic content of the principle of separation of powers in the state, as a defining element of a democracy, as well as the importance of the supremacy of the Constitution over the whole state regulatory system.

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THE PRINCIPLE OF SEPARATION OF POWERS - CONSTITUTIONAL GUARANTEE

Emilian CIONGARU*

Abstract

The principle of ensuring the legal bases of the State functioning is the fundamental principle of law which actually settles down the principle of separation of powers: legislative, executive and judicial power. Over the time, the principle of separation of powers, although in practice its enforcement experienced more than two centuries, it hasn't expressed itself in a pure form, not even in the most advanced democracies. Whether it is approached the thesis of a more flexible or more rigid separation of powers or the thesis on certain exceptions to those two situations specific to certain political regimes, the principle of separation of powers is the fundamental mechanism in ensuring a balance of powers and preventing the establishment of a dictatorial or authoritarian regime. The complex content of the rule of law consists of: the rule of law regency; the capitalization on the actual size of the fundamental rights and freedoms; the achievement of the balance/mutual cooperation of public authorities and the performance of free access to justice. If the form of State organization of the political power of the people is done by several groups or categories of State bodies with functions and features clearly defined and characterized by organizational and functional autonomy, as well as mutual balance and collaboration, it is emerging the principle of separation of the State powers balance.

Keywords: *fundamental principle; principle of ensuring legal bases; principle of separation of powers; balance of powers.*

1. Introductory elements regarding the concept of rule of law*

In current democracies, the rule of law became the foundation of society. In a brief definition which contains the idea one must start from, the rule of law means subordination of the State to the rule of law. Likewise, Léon Duguit shows that *the State, by making the law, is obliged to observe it as long as it exists. The State may amend or repeal it, but as long as it exists, it can not do an act contrary, an administrative or jurisdictional act only within the limits set by this law and so the State is a rule of law. The State, under the same idea, is the litigant of its own courts. It may be a party to a suit; it can be convicted by its own judges and is kept as a simple individual to enforce the judgment given against it*[1].

The rule of law was the criterion for the classification of States in of law and despotic, in legislator State, administrator State or judge State. The rule of law must not be confused with the principle of legality, because it is more than that.

The complex content of the rule of law consists of: the rule of law regency; the capitalization on the actual size of the fundamental rights and freedoms; the achievement of the balance/mutual cooperation of public authorities and the performance of free access to justice.

The rule of law must be accompanied by a guarantee scheme, which has as final purpose the self-limitation of the State by the law. This guarantee scheme is based on the following main rules: the amendment of the Constitution to be carried out only by an expressly authorized assembly, elected on democratic bases and to carry out the review procedure; the review itself should not impact on the fundamental values of the constitutional democracy; the existence of a constitutional control; the confinement of the exercise of rights and fundamental freedoms by the law only if necessary, but in proportion to the situation that caused it, without prejudice to the right or freedom and for the grounds expressly provided in the Constitution and the non-limitation of the free access to justice.

2. General considerations regarding the historical evolution of the principle of separation of powers

If the form of State organization of the political power of the people is done by several groups or categories of State bodies with functions and features clearly defined and characterized by organizational and functional autonomy, as well as mutual balance and collaboration, it is emerging the principle of separation of the State powers balance, a state that is specific to the coherence of juridical systems[2] of the democratic system of government.

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[1] Léon Duguit, *Traité de droit constitutionnel*, (Tome II, Paris, 1923).

[2] Serban Alexandrina. *Law - as system*, (Hamangiu Publishing House. Bucharest. 2012), 51-54.

Over the time, the principle of separation of powers[3], although it experienced in its enforcement a practice of more than two centuries, it was not expressed in a pure form not event in the advanced democracies.

The principle of separation of powers was set for the first time by Aristotle in his work *Politics* and was later developed by the *school of natural law* - Grotius, Wolff, Puffendorf - and then by John Locke, but finding crowning in Montesquieu's work.

Aristotle in his work, *Politics, in Book IV*, speaks of segregation of powers in the State, asserting that: *In every State, there are three parties, which the legislature shall deal with if it's wise to appoint them as best as possible, given first any individual interests. These three parties once well organized, the whole State is necessarily well organized itself, and States can not effectively distinguish than by different organization of these three elements. The first of these parties is the general assembly that deliberates on political affairs, the second is the body of magistrates, which must decide the nature, the competences and the mode of appointment, the third is the body of judges*.[4] The general assembly was the deliberate body, that is, the real sovereign of power. The body of judges included officials and formed the executive power. As per the courts, Aristotle shows they are made up of judges, and these judges make up the body of judges - the judiciary power.

John Locke argued in his book *Essay on Civilian Government* the existence of three powers in the State, namely the legislative, the executive - which oversees law enforcement, the federative, which represents the State in external relations, prerogative which included powers that remain available to the executive. Arguing the idea of separation of powers, the English philosopher John Locke pointed out that *the temptation to seize power would be too high if the same persons who have the power to make laws would also have in their hands the power to enforce them, because they could exempt themselves to obey the laws which they make*[5].

Therefore, in his opinion, in a well-organized State, the power to make laws should be vested in an assembly specially convened for that purpose, but after the laws have been adopted, assemblies should separate and obey the laws they have adopted.

Taking up and developing the ideas of John Locke, the true theoretician of this theory, Baron Charles Montesquieu and then all the liberal State theorists *have seen the separation of powers the effective means to weaken the omnipotence of the State, spreading its prerogatives*[6].

Whether discussing of a flexible or rigid separation of powers, by certain exceptions in both cases (specific to a regime or other), the principle of separation of powers - is the main mechanism to ensure a balance and to prevent a dictatorial regime.

In terms of terminology, the doctrine attributed two meanings to *the separation of powers* theory[7]:

- In a first meaning, also called original meaning - being the non-despotic form of political organization, in which not all powers are assigned to the same person or authority.
- In a second meaning that is emphasized by the modern doctrine, reference is made to the need for separation and independence of powers, specialized authorities of the State, to ensure the balance between them, to prevent a despotic governing and thus to secure the individual rights and freedoms.

Montesquieu expressed particularly eloquent this need: Because there is no possibility of abusing power, power must be defeated by power. When in one hand there is joint legislative and executive power, there is no freedom"[8].

For these reasons, the separation of powers is intended to provide a guarantee in the normal functioning of the relationship and the balance between them, representing one of the fundamental principles of the rule of law and with the purpose to satisfy of the national interest[9].

Even though between the three powers - legislative, executive and judicial there is no full separation, they must work together in the words of the principle - they must concert.

What is essential in these *cooperation* relationships between powers is to keep their independence and the separation of their judicial functions, also motivated by the need to exercise a mutual control.

According to another author[10], the separation of functions between the legislative and the executive is the most critical because of the interference and the emergence between them of a *new trinity of mutual control and balance of powers: Parliament, Government and President*.

This point of view, of the author mentioned above, can be estimated to be entirely justified and we might add, in support, the fact that this *trinity*, of which he is speaking, really contains a *fragility* to ensuring the balance between powers.

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[3] Mircea Tutunaru, *Constitutional Law and political institutions*, ("Scrisul Romanesc" Publishing House, Bucharest, 2015), 253-255.
[4] Aristotel, *Politics*, Book IV, Chapter XI, (Bucharest, 1996).
[5] John Locke, *Two Treatises of Civil Government*, ("Antet" Publishing House. Edite by Peter Laslett. Bucharest, 2011), 123-124.
[6] Paul Negulescu, George Alexianu, *Public Law Treaty*, ("Casa Scoalelor Publishing House, Bucharest, 1942), 243.
[7] Sofia Popescu, *Rule of Law in Contemporary Debates*, (Romanian Academy Publishing House, Bucharest, 1998), 84-86.
[8] Charles Montesquieu, *Spirit of law*, vol.1, ("Stiintifica" Publishing House, Bucharest, 1964), 195-196.
[9] Mihaela Adina Apostolache, *The national interest and the cooperation, between the romanian president, the Parliament and the government in the field of european affairs*, (Journal of Law and Administrative Sciences Issue 6/2016, Petroleum and Gas University Publishing House of Ploiești), 9-11.
[10] Sofia Popescu, *work cited*, 85.

Although in this regard many examples of the lapse can be given, we can remind and submit to reflection only the present situation that characterizes the Romanian political life and the *original way* in which, quite often, these powers get to *work*...

Therefore, it is considered justified to emphasize that, regardless of the degree of flexibility of the cooperation relationships between powers for maintaining the separation and balance, it is necessary to drive a wedge primarily by any overlapping of functions conferred to every power, any substitution, and secondly - to distinguish between *cooperation*, *mediation* and *interference.*

3. Constitutional regulation of the principle of the separation and balance of powers

To be able to find a rationale for the title of this paper, we need to study the ways that can be used to argue whether, how much and how it is applied and observed the principle of separation and balance of powers. It would be appropriate if before any concrete examples of factual situations, we would first undertake an analysis in terms of the provisions governing this principle, starting with the Constitution provisions.

The Constitution, as any normative act, must keep up with social developments, adapt to the social, political, economic context and be able to respond to both internal and international trends[11].

Thus, in the Constitution, art. 1 para. (4) - entitled The Romanian State, there are mentioned three powers - legislative, executive and judicial - and that the State is organized on the principle of separation and balance - in the framework of the constitutional democracy.

In subsequent provisions - specifically Chapter VI, it can however be seen that one of the powers, namely the judicial power, becomes *authority*?

Before any opinion on the compliance or breaches of this principle of separation and balance of powers, mentioned in the Art. 1, to be first stated - to what extent these constitutional provisions are consistent with each other.

In particular, reference is made to the provisions of the Constitution[12] - headed *The Prosecutors' Status*, stating inter alia that their work is carried out *under the authority of the Minister of Justice* and under the *hierarchical control* principle.

So it would appear appropriate to make some observations on this text, motivated by the fact that, as it is well known, almost all members of the Government headed by Prime Minister were and are politically enlisted or politically controlled.

Consequently, the minister of justice, who should enjoy a maximum independence, in fact becomes an instrument of the executive, regardless of acknowledgement of party affiliation or *declaration* as *independent*.

Another remark: the text of this article speaks only of legality, impartiality and hierarchical control, the authority of the minister of justice, the principle of *independence*, accidentally or not - being absent.

Then the question is inherent: if this principle would have been found alongside the other principles previously mentioned, would have been inconsistent in terms of terminology with the *hierarchical control*, or the latter no longer justifies its existence?

It would seem so. To discuss about an independence to be *hierarchically controlled* is an antagonistic approach to the problem, or at least illogical.

Could this be the explanation for *the omission* to mention in the text of the principle of independence, or it was thought to be understood?!

Discretions can exist in this regard and one might conclude that in reality, the political decision-makers did not want the independence of this institution, for the simple fact that the Public Ministry is still an important leverage of power and the political forces could not do without so far.

This is why the Public Ministry's position within the judicial power was and still is a controversial and unresolved issue.

As per the wording *under the authority of the Minister of Justice* - it is hypothesized that this is not in fact than some apparent *sweetening* and a masking through substitution or avoidance of the term *subordination*.

The assumption can arise that any provision given to prosecutors by a State official, among other powers, is in total contradiction with the principle of *impartiality* and represents a serious threat to democracy.

Not infrequently, for the *impartiality* of a prosecutor, the question arose of how they can be impartial, given that not only they must obey the law, but also the mandatory provisions given by the Minister of Justice[13].

No less controversial is the status of *magistrate* given to the prosecutor, and on the other hand, the position and the role of the Public Ministry within the judicial power.

Referring to the institution it is clear that, in agreement with and with that title they bear - *Prosecutor's Office attached to...* - it continues to be *attached* to all courts at all levels - factually, within the

[11] Mihai Cristian Apostolache, The review of constitutional norms concerning local public administration in the view of the European Commission for Democracy through Law (Venice Commission), (Journal of Law and Administrative Sciences Issue 3/2015, Petroleum and Gas University Publishing House of Ploieşti), 105.

[12] In the Art. 132 para. (1) of the Constitution it is stated that: ″Prosecutors operate according to the principle of legality, impartiality and hierarchical control, under the authority of the Minister of Justice″.

[13] Nicolae Cochinescu, Organization of the Judicial Power in Romania (Courts - Public Ministry - Special Jurisdictions), ("Lumina Lex" Publishing House, Bucharest, 1997), 406-431.

judicial power, operating according to the same principle: that of *hierarchical control*...

Also relevant is that they are still conferred identical powers to those of the judicial power, instead of this institution to be on an equal footing with the defence. It is envisaged regarding this *inequality* not only the status, duties and powers conferred to the prosecutor, but including their physical position in the court proceedings. In a plastic expression, the prosecutor stands at an *altitude difference* in relation to the defence.

A final example in finding the answer to the question:

In the Constitution[14] regulating the *Structure* of the Constitutional Court, it is stated that of the nine judges making it up, three are appointed by the Chamber of Deputies, three by the Senate and three by the President.

What conclusion could be drawn from the content of this text?

- In firstly that this prerogative of appointing judges to the Constitutional Court does not return equally to all the powers listed in Art. 1 of the Constitution.
- The only power of the three, being only the legislative power - which is represented by the two Chambers of Parliament.
- That the executive and judicial powers - were ″less equal″ in relation to the legislative power;
- That instead of the other two *omitted* powers, *another power* appeared - that conferred to the President to the detriment of the executive and judicial powers, which have been substituted.
- Equally true is the fact that increasingly more the executive power - by the multitude of ordinances and legislative packages - more or less assumed, came to substitute in turn the legislature, which it turned into a *body of review*. As it has been said in a more than elegant manner: *Given that on average, the Governments of Romania have adopted annually in the last decade about 2,000 emergency ordinances, it is understood that our State passed all this time by 2,000 extraordinary situations, in other word, almost every day*[15].

Undoubtedly this situation is actually the political will and thinking existing in the adoption of the Constitution 1991, including the time of the review.

In the spirit of separation, equality and balance between powers, an enshrined and thus constitutionally guaranteed principle, it can be asked whether still in line with these principles - wouldn't have been more equitable that the legislative power represented by the two chambers to submit only three proposals, not six, the executive in its turn to make three proposals - and instead of the president, the judicial power to make its three proposals...?! Of course, controversies existed, are and will still be, and the only regulatory document that might clarify, largely, or at least should begin to clarify these controversies would be the Constitution itself.

The Constitution is the supreme regulatory document that regulates the State organization and the exercise of national sovereignty and the holder of the sovereign power is the Romanian people and only the people exercises this power in two ways: through representative bodies and by referendum. Thus, these provisions confer a clear and limited mandate to the representative bodies that are entrusted with the exercise of power only, so certain powers and not the absolute power. It is not devolution of power but delegation of some power functions, and the only holder of power is and shall remain the Romanian people, resulting in significant legal consequences, including those relating to the responsibility of all public authorities before the people, responsibilities that can get clarified only under the legal provisions, specific to the rule of law.

4. Conclusions

In conclusion, as per the facts mentioned above, we may point out that the principle of separation and balance of powers in the State is the fundamental principle of the right guaranteed unequivocally by the Constitution as the supreme will of the people, as sovereignty specifically set by the people in and for the people's interest. To achieve this principle, a permanent and continuous cooperation of the State structures should exist in achieving the people's will, cooperation which entails clear delimitation of competences by Constitution, the existence of an organizational and functional autonomy, mutual control without the interference of a power in the duties and powers of the other, categorical constitutional guarantees of the commission fulfilment and the observance of the fundamental rights and freedoms of citizens, as supreme values of existence of any civilized society. The separation of powers does not mean their isolation because each branch of power participates in the functioning of the other through a system of mutual control and balancing. Thus, the separation between the legislative, the executive and judiciary powers aims to prevent the establishment of a dictatorial, tyrannical or totalitarian regime.

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[14] Art. 142 para. (2) of the Constitution: ″The Constitutional Court consists of nine judges, appointed for a term of nine years, which can not be extended or renewed″.
Art. 142 para (3) of the Constitution: ″Three judges are appointed by the Chamber of Deputies, three by the Senate and three by the President″.

[15] Gheorghe Mihai, Fundamentals of Law - Objective Law Theory Springs (volume III), ("All Beck" Publishing House, Bucharest, 2004), 169.

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ASSESSMENTS REGARDING THE LEGAL NATURE OF AN ACT BETWEEN A LABOR LAW ACT, A NORMATIVE ADMINISTRATIVE ACT OR AN INDIVIDUAL ADMINISTRATIVE ACT

Marta-Claudia CLIZA*

Abstract

This article aims to establish the legal nature of a regulation, using an analysis of the characteristics and specific criteria of each type of act and concluding with the determination of the legal nature of such a regulation, either as a labor law act, a normative administrative act, or an individual administrative act.

Keywords: *legal nature, normative act, individual act, labor law act, regulation.*

1. Introduction

This study aims to analyze the features of the normative administrative acts, individual administrative acts, but also of those belonging to labor law.

Over the time, both the lawmaker and the doctrine have contributed to the shaping of certain criteria for distinguishing between the acts issued by the authorities, so that the qualification of an act as having an administrative nature (either normative or individual), or as belonging to the area of the labor law does not raise interpretation issues.

Notwithstanding the aforementioned, there are situations when the courts face difficulties, so that an uneven practice was reached, the decisions of the High Court of Cassation and Justice which established boundary lines in the interpretation of the legal regulations being completely justified.

Given that the theory has the desired results when combined with a case study, we will refer to a specific case, namely Sentence no. 225/January 30th, 2015 ruled by the Court of Appeal Bucharest, Division of Contentious Administrative and Fiscal, published as an extract on site juridice.ro[1].

2.1. Therefore, the Financial Supervisory Authority (former National Securities Commission[2]) requested before the courts the annulment of Regulation no. 4/2013. The criticized regulation introduced the right to an indemnity equivalent to 9 net salaries, upon the termination of the membership to the authority, in what concerns the personnel employed within the offices of NSC members.

It should be noted that in order for the aforementioned indemnity to be grated, the employed personnel was required not to choose to continue the employment relationships with the institution or not to had received another compensation, respectively a receivable right.

Therefore, Regulation no. 4/2013 concerns a certain category of definable persons. They are the persons working within NSC, occupying the functions provided by the organizational chart.

The position of the author of the article is interesting; firstly the author performs an authentic analysis of the criteria for distinguishing between normative administrative acts and individual administrative acts, by getting to admit the existence of the appearance of administrative act of individual nature of the Regulation. Notwithstanding, in the end, the author classifies Regulation no. 4/2013 as being an administrative act of normative nature.

Therefore, on the one hand, we will analyze whether or not the challenged act could belong to the labor area, as well as the considerations which led to the wrong conclusion of the author, in our opinion.

2.2. Does the challenged act envisage, by means of its content, the relationships which fall under the scope of the labor law?

A public authority is not engaged only in administrative law relationships (case in which the respective authority operates as a public authority according to Law no. 554/2004 of the Contentious Administrative[3]), but also in legal relationships belonging to other branches of law, such as labor law. In the latter case, the respective authority falls outside the scope of LCA.

In its turn, the case law of the contentious administrative courts, including of the Supreme Court, includes rulings whereby the administrative nature of

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[1] The article we refer to was published on site juridice.ro on December 14th, 2016, with title „The annulment of normative administrative acts on the granting of the bonuses to the NSC members, amounting to 9 times the higher gross month income throughout their term of office, upon the termination of the term of office, regardless of the reason. The proceedings of the Financial Supervisory Authority", available on: https://www.juridice.ro/483350/anularea-actelor-administrative-normative-de-acordare-membrilor-cnvm-la-incetarea-mandatului-din-orice-motiv-a-primelor-in-valoare-de-9-ori-venitul-brut-lunar-cel-mai-mare-din-perioada-exercitarii-man.html, accessed on February 15th, 2017.

[2] Hereinafter referred to as the „*NSC*".

[3] Hereinafter referred to as „*LCA*".

an act issued by a state authority was not acknowledged, whenever it was found that the issuer did not act according to the special public power authorities it was empowered with[4].

It could be argued that the legal relationships established between NSC and the persons who work within this authority would be labor law relationships, based on the following grounds:

In what concerns the employed personnel art. 15 para. (1) NSC Articles of Organization provides that „NSC personnel shall be employed according to the provisions of Law no. 53/2003 – Labor Code, as further amended and supplemented".

In what concerns the relationship established between NSC and the member of the authority – even if this relationship is not carried out under an employment agreement – it is interesting to note that it falls under the scope of the employment relationships, under art. 1 para. (2)[5] and art. 278 para. (2)[6] of the Labor Code.

The relationship established between NSC and NSC member fulfills the main features of the employment relationships, as they are provided by the case law and the labor law doctrine:

a) the legal relationship established between NSC and NSC member is *intuitu personae*, as the designation in this position is performed *intuitu personae*;
b) NSC member is obviously a natural person;
c) NSC member is subordinated to the authority, the decisions of the NSC being mandatory for any member, the regulations issued by NSC on the organization and functioning of this institution not being exempted from this rule[7];
d) NSC member continuously carries out his activity during his term of office within an institutionalized organizational framework according to the working program established by means of the documents issued by NSC on the functioning of this authority;
e) NSC member receives a monthly remuneration for the activity carried out in his capacity within NSC; the income gained by the NSC member is considered salary income.

The administrative authority which is served by the NSC member and which the NSC member is subordinated to behaves as the employer of the member. The behavior of NSC institution towards NSC member is similar to the behavior of any employer towards its employees.

In the relation established with the NSC member, the institution acts as any other employer, respectively benefits from the provision of services, organized according to own regulations and procedures, and for this services, the institution pays the NSC member a monthly remuneration / indemnity and other rights established according to own regulations.

Taking into account all the aforementioned, we would be tempted to consider that, in what concerns the NSC member, we would find ourselves in the presence of a labor law relationship.

Although we cannot deny the connection of the labor law with the administrative law, we cannot ignore that these two branches of law are correlated, but in what concerns the settlement of employment disputes, professional reintegration of unemployed persons, as well as their social protection[8], not being able to extend the nature of act belonging to the labor law to any similar act of the authority.

Therefore, we cannot accept the argument according to which Regulation no. 4/2013 of NSC belongs to the labor law area, this being an administrative act, issued under public power terms, by an administrative authority.

Hereinafter, we will establish the appropriate nature of this administrative act, against the considerations of the Court of Appeal of Bucharest.

2.3. The arguments according to which (i) the publication special procedural forms would not have been fulfilled and (ii) the law qualifies an act in a certain way are not standalone.

Indeed, the concept of „*publication*" of the administrative acts represents the guarantee of the fulfillment of the lawfulness and transparency of the local government authority.

Notwithstanding, we cannot mandatorily extend this concept over all administrative acts. Therefore, it is important to analyze whether the act is normative or individual, by the full analysis of the effects it produces, as well as of the content of the act, therefore by means of the features of each of the two category of acts.

None of the aforementioned issues was analyzed, therefore the grammatical enforcement of the law was not reached. We believe that we cannot conclude on the nature of an administrative act as being normative or individual, only based on the classification provided by the law, without a thorough analysis of the content of the act.

Therefore, as it is well known in what concerns the normative administrative act, publishing[9] is an

[4] In this respect, see Ovidiu Podaru, „*Drept administrativ. Practică judiciară comentată. Vol. I. Actul administrativ (II) Un secol de jurisprudență (1909-2009)*", Hamangiu Publishing House, 2010, Bucharest, p. 51-67.

[5] *This code also applies to employment relationships regulated by special laws, unless they contain specific derogating provisions.*

[6] *The provisions of this code are applicable on the common law basis to those legal employment relationships which are not based on an individual employment agreement, unless special regulations are complete and the application thereof is incompatible with the specifications of the respective employment relationships*.

[7] As resulting from the provisions of art. 3 para. (8) of the NSC Articles of organization, published in Official Journal no. 226 of Aprilie 4th, 2002.

[8] Alexandru Țiclea, „*Tratat de dreptul muncii. Legislație. Doctrină. Jurisprudență*", Edition X, updated, Bucharest, 2016, p. 68.

[9] According to art. 11 para. (2) letter b) of Law no. 24/2000 on the legislative technique regulations for the normative acts issuance: „*The following shall not be subject to the regime of publication in the Official Journal of Romania: (...) b) normative acts classified according to*

essential condition for its validity, unlike the absence of this obligation towards the individual act; the latter only has to be communicated to the recipients, even verbally. The most effective way to communicate an individual act is the handling of the act[10].

Therefore, an individual administrative act cannot be conditioned, according to its current legal framework, to take a certain form, except the written one, as a principle of the administrative acts. Furthermore, the doctrine[11] provides that *an individual act can* rarely have *a verbal form*, if the law expressly provides so.

Therefore, the argument according to which certain publishing special procedural forms were not fulfilled must not be applied *ad litteram* and this argument cannot represent a standalone ground for the classification of an administrative act as a normative one.

Such a classification would have been reasonable if the content of the act had been analyzed, in order to find if the features of a normative were met or it was rather about an individual act; all the more so as the fact that the act was published or not has no consequence on the lawfulness of an act and, therefore, it cannot change the nature of individual administrative act.

Despite the fact that the provisions of art. 7 para. (4) of the NSC Articles of organization list the individual acts of the authority, among which the regulations are not present, the court of law should have exercised more caution in the decision-making process. Therefore, the examination of the entire content of the document was required. The automatic application of the law, strictly by analyzing its grammatical regulations, without the content of the challenged act being granted the required attention, can only lead to a mechanical interpretation, denying the unitary nature of the act itself.

In this respect, the case law of the High Court of Cassation and Justice established that the classification of an infra-legislative act in one of the two aforementioned categories CANNOT be performed by „cutting" certain provisions of that act, thus affecting the unitary nature of the act, but by the full examination of its content, in the light of the features of each of the two categories of acts. In this regard, the High Court held that Government Resolution no. 349/2005 on waste storage is a normative one since it contains general rules, with repeated application, and its recipients are represented by an undetermined number of subjects (...)[12].

If the content of the act had been analyzed, it would have been noted that Regulation no. 4/2013 met the features of an individual administrative act, and not of a normative act. Therefore, according to the doctrine[13], the features of a *normative administrative act* are marked by the fact that the act includes *general impersonal rules of conduct with repeated applicability, in order to be applied to an undetermined number of subjects*.

The individual administrative act, on the other hand, shall not meet these features, a confusion between these two types of acts being impossible, if these defining features are taken into account.

Therefore, the extent of the legal effects, the nature of the measures provided by its content, the recipients of the act, and not the name of the act shall be the elements which have to be taken into account when establishing the legal nature of an administrative act[14].

The normative act includes general and impersonal rules of conducts, as the laws[15]. Instead, the individual act can be addressed to a sole person, as easy as it can consider hundreds, even thousands definable recipients[16]. Therefore, one of the most important criteria for distinguishing between the two types of administrative acts is represented by the definable feature of the persons which it is applied to.

The individual act becomes effective for a limited and determined / definable number of beneficiaries, a manifestation of will which creates, modifies or extinguishes rights and obligations in the benefit of or which are incumbent on its recipients[17].

Therefore, Regulation no. 4/2013 refers to changes on indemnities, salaries, various allowances, benefits, prizes, bonuses and other emoluments, vacations and additional vacations. All these elements are determined by reference exclusively to the persons employed within NSC, on various functions provided by the organizational chart of this authority.

Therefore, it has an internal nature, being applied only within the institution, in the relationships established between NSC as authority, on the one hand, and the persons activating within it, on the other hand.

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the law, and the individual nature acts, issued by the independent administrative authorities and by the bodies of the specialized local government authorities".

[10] In this respect, see *Decision no. 1718/2013 of the High Court of Cassation and Justice*, available on www.scj.ro, accessed on February 15th, 2017.

[11] D. A. Tofan, „*Drept administrativ, vol. II*", ed. 3, C.H. Beck Publishing House, Bucharest, 2015, p. 33.

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[13] A. Trăilescu, „*Drept administrativ*", All Beck Publishing House, edition no. 2, Bucharest, 2005, p. 4.

[14] Gabriela Bogasiu, „Legea contenciosului administrativ. Ediția a II-a. Comentată și adnotată. Cuprinde legislație, jurisprudență și doctrină", Universul Juridic Publishing House, Bucharest, 2015, p. 128.

[15] D. A. Tofan, *op. cit.*, p. 21.

[16] O. Podaru, „*Drept administrativ. Vol. Actul administrativ (I) Repere pentru o teorie altfel*", Hamangiu Publishing House, Bucharest, 2010, p. 61: „*(...) there can be an „individual" act with hundreds of recipients: for instance, the list of candidates who passed / failed the exam for admission to magistracy*".

[17] In order to substantiate the importance of the criterion on the definable nature of the administrative act recipients, see the following decisions of the High Court of Cassation and Justice: *Decision no. 2110/2012; Decision no. 1718/2013; Decision no. 6926/2013*.

As a matter of fact, the High Court of Cassation and Justice established the legal nature of individual administrative act in what concerns the acts issued by certain public authorities and institutions. The common feature of these acts is that they contemplate various matters of domestic organization of the respective authorities and produce effects exclusively in connection with the persons who carry out their activity within the authorities.

Therefore, the High Court of Cassation and Justice noted the nature of individual act in the following cases, on different acts, namely: *Decision no. 1367 of March 18th, 2014*[18]*; Decision no. 3366 of September 23rd, 2014*[19]*; Decision no. 5632 of June 7th, 2013*[20]*; Decision no. 3263 of June 3rd, 2011*[21].

Therefore, the challenged regulation took the shape of a regulation that considers determined subjects, produces its effects only in connection with its staff, civil servants or contractual agents, being, basically, an internal act of the authority[22]. Therefore, it should have been qualified as an administrative act with individual nature.

3. Conclusions

The challenged regulation does not belong to the area of the labor law and does not meet the aforementioned conditions in order to be deemed a normative act, as follows: it does not establish a general and impersonal rule of conduct, as it has limited applicability, the persons falling under the scope of this regulation being determined.

It can not be claimed that the regulation has general applicability, namely *erga omnes*, as long as the other employees of the other authorities do not benefit from the same rights. Furthermore, as we have already shown, in what concerns the assessment of the legal nature of the administrative act, the effects it produce, the nature of the measures provided by it and the recipients of the acts are the essential elements, and not the form or the name of the act.

Given all the aforementioned, we hereby conclude that Regulation no. 4/2013 of NSC meets the features of an administrative act of individual nature, and it cannot be legally qualified as having another legal nature.

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- www.juridice.ro;
- www.scj.ro.

[18] Order no. 2365/June 30th, 2011 and no. 2180/June 3rd, 2011 of the President of the National Agency for Fiscal Administration, the following being motivated „*it is addressed to a limited and well defined number of law subjects, respectively to civil servants of D.G.F.P (General Directorate of Public Finances)*".

[19] Order no. 2551/C/July 26th, 2012 of the Minister of Justice on the organization of the competition or examination for admission to public profession of bailiff by motivating that it is addressed to a determined category of subjects.

[20] Resolution no. 189/2004 of the Superior Council of Magistracy on the establishment of certain divisions within the Court of Appeal of Craiova by motivating that it envisages the internal organization of the institutions to which it relates.

[21] Order no. 2100/2009 for the approval of the Regulation for the organization and functioning of the Ministry of Culture, Religions and National Heritage by motivating that the regulation „*concerns the structure and powers of this ministry, it does not establish legal regulations to regulate legal situations of general, impersonal nature*", and that the regulation „*produces effects only for a body of the local government" and that „the effects are produces in an area determined and limited by social relationships*".

[22] D. A. Tofan, *op. cit.*, p. 20.

CONFLICT OF INTERESTS' REGULATION ON ELECTED OFFICIALS

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Abstract

This article sheds an overview of the different perspectives that judicial courts grant regarding the same concept, namely the conflict of interest in relation to the elected officials. We will also analyze the ambiguous and contradictory interpretations that the Romanian legislation has to offer on the issue.

Keywords: *conflict of interests, elected officials, local council, personal interests, patrimonial interests.*

1. Introduction

This study aims a short analysis of the concept of conflict of interest in what concerns local elected officials. We will take into account the types of conflicts and the expression of the interest, according to its personal or patrimonial nature.

Furthermore, we will refer including to the relevant case law of the courts, in order to show the ways in which one can interpret the law applicable to the concept of conflict of interest.

The legislation applicable to local elected officials who find themselves in the situation of a conflict of interest is the following: Law no. 215/2001[1] of the local public administration, Law no. 161/2003[2] and Law no. 393/2004[3].

The aforementioned normative acts were adopted in order to establish the general framework for corruption preventing and combating, by establishing special measures, of substantive and procedural law, both in terms of incompatibility and in terms of the concept of conflict of interest[4].

It is indisputable that persons who may be in conflict of interest or incompatibility situation will have either to avoid such a situation or to undergo legal sanctions[5]. Public interest shall always prevail, therefore private interest of a person shall suffer a „censorship" at least psychologically and morally.

The purpose is to ensure the exercise of public functions and publicly appointed offices by using impartiality, integrity and transparency, while observing the primacy of public interest[6].

Therefore, the lawmaker sought the protection of social relationships in what concerns the good performance of the activities of local elected officials, activity which requires a fair and transparent conduct.

Notwithstanding, we cannot accept broader interpretations of the legislation even in situations where the existence of personal and/or patrimonial interest cannot be proved, in the end, the targeted person undergoing the penalties provided by the law.

2.1. The concept of conflict of interest.

Unlike the state of incompatibility, which is more clearly defined and explained by the lawmaker, the conflict of interest requires a special attention from the National Integrity Agency, and especially from the courts of law.

Therefore, according to the legislation in force[7], the *conflict of interest* represents the situation where the person exercising a publicly appointed office or a public function has a personal interest of patrimonial nature, which could influence the objective fulfillment of the duties incumbent on him/her, according to the Constitution and to other normative acts.

Furthermore, Recommendation 10/2000[8] of the Committee of Ministers of the Council of Europe includes a similar definition of the conflict of interest

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[1] Published in Official Journal no. 123 of February 20th, 2007, as further amended and supplemented.

[2] on certain measures to ensure transparency in the exercise of publicly appointed offices, public functions and in business environment, to prevent and sanction corruption, published in Official Journal no. 279 of April 21st, 2003, as further amended and supplemented.

[3] on the Status of local elected officials, published in Official Journal no. 912 of October 7th, 2004, as further amended and supplemented.

[4] Aspects which result not only from the content of the legislation, but also from the related recitals, material available on the following internet address, in pdf format:
http://www.cdep.ro/proiecte/2004/400/80/4/em484.pdf, site consulted on March 10th, 2017.

[5] See **Verginia Vedinas**, "*Drept administrativ*", edition IX, revised and updated, Universul Juridic Publishing House, Bucharest, 2015, p. 481 and the following: there are several types of liability of the local officials, namely: administrative –disciplinary liability, administrative – patrimonial liability and criminal liability. Furthermore, several disciplinary sanctions for councilors were introduced by Law no. 393/2004, such as warning, removal from the meeting, temporary exclusion from the works of the council and of the specialized commission, as well as the withdrawal of the meeting allowance for a term between 1-2 months.

[6] These are the principles underlying the prevention of conflict of interest, according to art. 71 of Law no. 161/2003.

[7] *Idem*, art. 70.

[8] Recommendation no. 10/2000 of the Committee of Ministers of the Council of Europe, document available on the Council of Europe site: https://wcd.coe.int/wcd/ViewDoc.jsp?id=353945&Site=CM, site accessed on March 1st, 2017.

in what concerns public officials: *Conflict of interest arises from a situation in which the public official has a private interest which is such as to influence or appear to influence the impartial and objective nature of his or her official duties*[9].

This notion was required to be included in the legislation, in order to sanction private interests, which is usually contrary to the public interest. Private interest varies, so that it can include a benefit for himself/herself, family, close relatives, friends, persons or organizations with whom he or she has business or political relations. In what concerns personal interest, this one can refer to any obligations against the aforementioned persons.

Therefore, following the assessment of art. 70 of Law no. 161/2003, two conditions have to be fulfilled in order to have a conflict of interest:

1. the participation in the making of a decision
2. the existence of a personal interest or a patrimonial interest[10].

We believe that these conditions should be met cumulatively, so that the mere participation in the adoption of a resolution does not lead to the sanction provided by the law, if personal and/or patrimonial interest did not exist, was not expressed and could not be proved.

2.2. Types of conflict of interest.

The legislation in force does not provide a classification of the conflicts of interest, but they can be of different types, namely: *potential, actual and real,* according to the National Integrity Agency[11].

Therefore, if a local official has interests likely to cause a conflict of interest, if a public decision would have to be made, it could be deemed as a potential conflict of interest.

The actual conflict of interest can occur if the local official finds himself in the situation to make a decision that would create advantages either for himself or for another person, regardless if we talk about a business partner or a close person of the official.

The third type of conflict of interest is the real one, highlighted by the situation where the local official participate in the making of a decision on which he/she has a personal interest, thus violating the legal provisions.

Similarly, even if concerning public officials and not local elected officials, Recommendation no. 10/2000 of the Committee of Ministers of the Council of Europe provides a similar classification in what concerns the concept of conflict of interest. Therefore, art. 8 reveals these types of conflicts as being actual, potential or apparent.

We believe that the category of persons for which the conflict of interest is regulated is not relevant, due to the fact, from the conceptual point of view, this notion has the same defining features, regardless of where it is expressed, either in local public administration, or at central level.

For example, although the provisions of art. 87 – 91 of Law no. 161/2003 take into account the incompatibilities on local elected officials, since they fall in the section on incompatibilities, these provisions are also applicable in case of public functions[12].

Notwithstanding, we believe that the differences between the modalities of expression of the conflict of interest should be based only on the social danger level, depending on the position conferred to the concerned person. It is obviously more serious the existence of a conflict of interest at the level of a minister or parliamentary, than at the level of a local councilor or mayor.

Therefore, in the assessment of the de facto situation and the reality of the existence or inexistence of an expression of the conflict of interest, the elements of mitigating circumstances shall not be omitted, so that an improper application of the legislation in the field is not reached.

Given the aforementioned classifications, we believed that they should be developed and assessed by the lawmaker, and included in the legislation *de lege ferenda*, in order to avoid abuses. On the contrary, an uneven and inconsistent interpretation of the purpose of the law can be reached, both from the National Integrity Agency[13], and from the courts of law called to rule on the lawfulness of the assessment reports of NIA, due to the fact they have so great discretion that it can become subjective.

2.2. Personal interest and patrimonial interest, related to the relevant case law.

After reading the legal incident texts, it can be noted that there is a mismatch, two notions being included in the relevant legislation, namely: patrimonial interest, respectively personal interest.

In this respect, on the one hand, Law no. 215/2001 of the local public administration uses the term of „*patrimonial interest*", while, on the other hand, Law no. 161/2003 uses the expression of „*personal interest of patrimonial nature*". Furthermore, Law no. 393/2004 uses the term „*personal interest*".

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[9] According to art. 13 of Recommendation no. 10/2000.

[10] The legislation provides a variant at least interpretable, by cumulating two notions, namely, personal interest, respectively patrimonial interest, the following expression resulting: „*personal interest of patrimonial nature*". We believe that the two types of interest should be treated separately, because there is no reason to require such an overlap.

[11] According to „*Guide on incompatibilities and conflict of interest*", edition 2016, issued by the National Integrity Agency. The document is available in pdf. format on the following internet address: https://www.integritate.eu/Files/Files/Ghiduri%20utile%20alegeri%202016/GhidIncompatibilitatile &Conflicte%2010.10.2016.pdf, site accessed on March 1st, 2017.

[12] Ovidiu Podaru, „*Drept administrativ. Practică judiciară comentată. Vol. I. Actul administrativ (II) Un secol de jurisprudență (1909-2009)*", Hamangiu Publishing House, Bucharest, 2010, p. 203 and the following.

[13] Hereinafter referred to as „*NIA*".

Therefore, we want to show that the lawmaker is not constant in defining, respectively in using these notions. Therefore, they end to be capable of various interpretations.

Therefore, if we were to place related laws in chronological order, the first regulation of this kind was Law no. 215/2001, the concept of "*patrimonial interest"* being found for the first time in its content.

Notwithstanding, although the concept of patrimonial interest was initially used, about 2 years later a second regulation emerges, the latter enshrining the concept of „*personal interest of patrimonial nature*", namely Law no. 161/2003.

Subsequently, the notion is restricted again to the formulation of personal interest in Law no. 393/2004, the lawmaker giving up the notion of „*personal interest of patrimonial nature*".

In what concerns the local elected officials, they have a personal interest in a certain matter, if they have the possibility to anticipate that a decision of the public authority they are part of could represent a benefit or an advantage for themselves or for other categories of persons, according to the law[14].

As it can be noted, due to the fact they have to anticipate and not to effectively participate in the making of a decision, the legislation is rather related to a potential conflict of interest.

Notwithstanding, this interpretation modality can also be used against persons to whom the existence of a personal / patrimonial interest cannot be proved, for the mere reason that a potential benefit / advantage could have been anticipated by them.

Furthermore, the case law showed that, in certain situations, the simple presence of a local elected official is sufficient in order for the court to consider that the person in question finds himself/herself in a conflict of interest, even if there is no personal and/or patrimonial interest proved by ANI.

It is true that the incidence of the conflict of interest is obvious, therefore there is no other way to interpret correctly the legislation and the de facto situation.

For example, the High Court of Cassation and Justice[15] showed that, in what concerns the provisions of art. 70 of Law no. 161/2003 and of art. 75 of Law no. 393/2004, the appellant, in the capacity of local councilor, found himself in a conflict of interest, provided that he participated in the approval of certain decisions of the local council whereby the lease, by public tender, of certain assets belonging to public and private domain of the city by a company in which he is shareholder, was decided.

The High Court of Cassation and Justice noted that, in this case, the party had a personal interest of patrimonial nature which could have influenced the objective fulfillment of the duties incumbent on him as local councilor, the claims of the plaintiff having no legal relevance, namely that the specialized department within the city hall established the rent for the disputed space and that a public tender was organized for the award of the use of this commercial space[16].

Furthermore, HCCJ also develops the concept of conflict of interest in relation to patrimonial interest. Therefore, the case law[17] of the Supreme Court notes that there have to be reasons that can be taken into account when establishing not only the existence, but also the possibility to influence the decisions of a person.

Art. 72 of Law no. 161/2003, provides that „the person exercising the function of member of the Government, secretary of state, deputy secretary of state or functions assimilated to them, shall be bound not to participate in the making of a decision in the exercise of the authority public function which cause a material benefit for himself/herself, for his/her spouse or first degree relatives".

Following the corroboration of the aforementioned provision with art. 70 of the same normative act, in order to have a conflict of interest, the condition on „*personal interest of patrimonial nature*" or „*material benefit*" for himself/herself, for his/her spouse or first degree relatives has to be fulfilled. This interpretation is the vision of the HCCJ, substantiated by Decision no. 5036 of April 18th, 2013.

Notwithstanding, the legislation grants the courts of law the possibility to appreciate that there is a conflict of interest if the targeted person physically takes part in the meetings where certain decisions/resolutions are adopted.

Although it could be argued that by means of the mere presence, even if the person abstained from voting, the person could influence the decision of the other members of the collegial body, it is required to make a distinction.

Therefore, there are cases where the existence of a personal or patrimonial interest or of other benefits which could result following the adoption of a resolution cannot be proved.

Therefore, we believe that we cannot equate such a circumstance (*physical participation followed by voting abstention*) and the situation where the existence

[14] See the list of art. 75 of Law no. 393/2004: „a) husband, wife, relatives or up to second degree relatives including; b) any natural person or legal entity they have engagement relation with, regardless of the nature; c) a trading company where they have the capacity of sole shareholder, director or they derive income from; d) another authority they belong to; e) any natural person or legal entity, other than the authority they belong to, which performed a payment to them or which incurred any expenses of them; f) an association or foundation they are members of".

[15] Hereinafter referred to as „HCCJ".

[16] Decision no. 451 of January 31st, 2014 pronounced in second appeal by the Division of contentious administrative and fiscal of the High Court of Cassation and Justice.

[17] Decision no. 5036 of April 18th, 2013 pronounced in second appeal by the Division of contentious administrative and fiscal of the High Court of Cassation and Justice.

of a conflict of interest is clear, the benefits being obvious.

Therefore, on the one hand, we take into account aforementioned decision no. 451/2014 of the HCCJ, where the allegations of NIA and the deductions of the courts are fully justified. On the other hand, Civil sentence no. 152/F of June 26th, 2014 pronounced by the Court of Appeal of Galați shows different interpretation of the conflict of interest in what concerns local elected officials.

In the aforementioned case, the existence of a conflict of interest of a local councilor could not be proved by reliable and credible evidence, as regulated by art. 70 – 71 and art. 77 of Law no. 161/2003.

Furthermore, there are no elements which fall under the scope of the legal definition of the conflict of interest, which refers to a personal interest of material nature or personal material benefit.

Notwithstanding, the court did not take into account the de facto actual situation or the personal circumstances of the case, noting the applicability of art. 75 letter f) of Law no. 393/2004: „*Local elected officials have a personal interest in a certain matter, if they have the possibility to anticipate that a decision of the public authority they belong to could represent a benefit or an advantage for themselves or for: (...) lit. f) – an association or foundation they are members of*".

In what concern the incident legal text, we would like to show the following:

We cannot equate the capacity of representative of the Local Council in a non-profit foundation, and a situation where a local elected official is a shareholder in a company, by benefiting directly or indirectly, by representatives, from the decisions he took part in.

The court of merits noted the participation of the local councilor in the meetings of the Local Council where two decisions on the increase of public contribution to the foundation budget were discussed and approved unanimously.

Notwithstanding, one of the founding members of the foundation is the Local Council, the function of vice-president being honorary, without any impact on the actual activity of the foundation. If he had been a member on own behalf and not by means of the capacity of local councilor, we would have accepted the thesis on the existence of the conflict of interest.

We hereby mention that, according to art. 75 of Law no. 393/2004, the conflict of interest exists if the local councilor votes in favor / against a foundation he is a member of in own behalf and not in the capacity of the representative of an entity, such as the Local Council.

A plurality of capacities results from the recitals of the resolution, namely the one of local councilor, respectively the one of vice-president of the foundation. However, this capacity is held under the office of local councilor and ends with the completion of the term of office.

The scope of the respective foundation is to support young talented, special skills people, inclined towards one of the following areas: education, culture, arts and sports.

Furthermore, art. 35 of the foundation by-laws provides the following: „The capacity of representative within the Foundation is lost with the de jure termination of the elected official's term of office".

It is interesting that the conflict of interest was not noted in connection with a potential capacity of member of the foundation, but only in relation to the function of vice-president, a function held in the capacity of representative of the Local Council[18], as a founding member[19] within the respective foundation.

This assumption does not meet the legal requirements, as the noted conflict of interest concerns the plurality between the function of local councilor and vice-president of the foundation, in which respect the local councilor would have participated in the adoption of certain decisions.

As we have already mentioned, the finding of the participation in the adoption of a decision is not sufficient, as long as the expression of personal and/or patrimonial interest is not proved, all the more so as the existence of any type of interest had not be proved in any way.

In case of incompatibilities, the existence of a plurality of capacity is sufficient. Therefore, an important aspect in what concerns the statute of councilor is the concept of incompatibility itself[20]. In this regard, the legislation21 is certainly clearer compared to the regulation of the conflict of interest.

Incompatibilities affect the principle of transparency and integrity of public authorities and institutions, there being a high risk that decision-making powers are exercised under non-impartiality, bias, under the violation of equal and non-discriminatory treatment principle. They represent obvious, serious situations, which cannot be said in case of conflict of interest.

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[18] See **Anton Trăilescu**, "*Drept administrativ*", edition 4, C.H. Beck Publishing House, Bucharest, 2010, p. 42: "Local councils are deliberative authorities of public administration through which local autonomy is achieved, having the role of managing public affairs in communes and cities, under the terms of the law". We believe that the appointment of a representative within a philanthropic foundation fits to the idea of managing "public affairs", aiming to develop and help talented people from the respective commune and not to raise a conflict of interest.

[19] See **Ioan Alexandru**, "*Drept administrativ*", Lumina Lex Publishing House, Bucharest, 2005, p. 253: "*The Local Council has the initiative and decides in all matters of local interest*", unless otherwise provided by law. Besides that the foundation has a philanthropic nature, it does not perform economic activities, the Local Council is one of the founding members, therefore it is natural to have decision power on the allocated budget. The fact that one of the councilors is the representative of the Local Council in the respective foundation, in our opinion, cannot fall under the scope of the concept of conflict of interest, regardless we speak about potential, actual or real conflict of interest.

[20] See Verginia Vedinaș, *op. cit.*, p. 477.

[21] Section IV, Chapter III, Title IV, Book I of Law no. 161/2003.

If in case of incompatibilities the mere plurality of capacities is sufficient to apply legal penalties, conflict of interest requires special attention, meaning that the existence and expression of personal and/or patrimonial interest are required to be proved, by noting the elements of mitigating circumstances of a situation which corresponds to reality.

Given the aforementioned, we consider that there are no preconditions likely to threaten social values in the case where it was noted that a local council would have been in conflict, due to the fact it held the function of vice-president of a foundation, in the capacity of representative of the Local Council, the latter being one of the founding members of the respective foundation.

Another matter which will have to be subject to a short analysis is the penalty provided by the law for the ascertainment of the conflict of interest in what concerns the person in question. Art. 25¹ of Law no. 176/2010[22] provides that the person who was found in conflict of interest or incompatibility shall be deprived of the right to perform a public function or a publicly appointed office which is subject to the provisions of this law, except the electoral ones, for a term of 3 years as of the removal from the respective function or publicly appointed office or as of the de jure termination of the term of office.

There were different opinions and interpretations in what concerns this sanction, leading ultimately to their „*cutting*" by means of Decision no. 418 of July 3rd, 2014[23], pronounced by the Constitutional Court of Romania[24].

Phrase „*same function*" of art. 25 para. (2) thesis II of Law no. 176/2010 raised totally different interpretations. Therefore, on the one hand, it could be considered that the phrase concerned only the function on which the conflict of interest was ascertained, respectively the state of incompatibility. On the other hand, according to another opinion, if things had been so, the respective sanction would have been meaningless. Therefore, the limitation of the exercise of the right to be elected, both in case of the conflict of interest, and especially in case of incompatibilities, would consider all electable functions[25].

The reasoning of CCR consist in the following: „in the interpretation according to which a person on whom the state of incompatibility or conflict of interest was found can held another electable function than the one which generated the state of incompatibility or conflict of interest, the legal text is obviously contrary to the meaning contemplated by the lawmaker, who, by means of Law no. 176/2010, aimed to ensure the integrity and transparency in the exercise of all functions and publicly appointed offices and the scope of whom is to sanction the person in question by establishing the prohibition to hold any other electable functions[26]".

Notwithstanding, we consider that the interpretation according to which by means of phrase „same function", the lawmaker would have considered any electable function is contrary to the will of the lawmaker. Therefore, not only that the right of a person to be elected is unduly restricted, but it is added to the law.

In conclusion, these provisions should not have benefited from an extensive interpretation, therefore, we consider that a genuine constitutional control was not performed[27].

3. Conclusions

Although a conflict of interest does not mean *ipso facto* corruption, there is an increasingly acknowledgment of the fact that the occurrence of certain conflicts between personal interests and public obligations can lead to corruption[28].

Notwithstanding, given all the aforementioned, one of the most important consequences of the conflict of interest acknowledgment is the sanction itself, namely the limitation of the exercise of the right to be elected for three-year term.

Given the severity of the restriction for the violation of the conflict of interest regime, we consider that the applicable legislation consists in the interpretation of the facts.

Therefore, there are several approach possibilities. On the one hand, the theory on the existence of personal and / or patrimonial interest can be applied, in order to establish whether a person was in a conflict of interests. Therefore, it might be possible to resort to the analysis of the case subject to judgment by means of the existence of actual premises which effectively threaten the defended social values.

On the other side, the lawmaker could provide a clarification or development of the criteria based on which the persons in question are punished, in order not

[22] on the integrity in the exercise of public functions and publicly appointed offices, for the amendment and supplementation of Law no. 144/2007 on the establishment, organization and functioning of the National Integrity Agency and for the amendment and supplementation of other normative acts, published in Official Journal no. 621 of September 2nd 2010, as further amended and supplemented.

[23] Published in Official Journal no. 563 of July 30th, 2014, available on: https://www.ccr.ro/ccrSearch/MainSearch/SearchForm.aspx., site accessed on March 12th, 2017.

[24] Hereinafter referred to as „*CCR*".

[25] For a detailed perspective on the restrictive, and extensive interpretation, see Elena Mădălina Nica, "*Considerații despre efectul constatării incompatibilității instituit de art. 25 alin. (2) teza a II-a din Legea nr. 176/2010 asupra exercitării dreptului de a fi ales*", article published on site www.universuljuridic.ro on March 8th, 2017, site accessed on March 12th, 2017.

[26] Paragraph no. 39 of Decision no. 418 of July 3rd, 2014.

[27] See Elena Mădălina Nica, *op. cit.*, last but one paragraph.

[28] OECD Guide for the settlement of conflict of interest in public administration, drawn up by the Organization for Economic Co-operation and Development, in June 2003, material available in pdf format on internet address https://www.oecd.org/gov/ethics/2957377.pdf, site accessed on March 5th, 2017.

to exist cases where the persons in question are punished, but cases are significantly different.

Therefore, as an intermediate way, both the courts of law and the National Integrity Agency shall refrain from the unduly extension of legal text interpretation.

It would neither be appropriate to apply them mechanically, therefore it is required that the actual circumstances of the case subject to judgment are taken into account.

In this way, the pronunciation of contrary rulings, which do not take into account the actual facts of the case, the elements of mitigating circumstances, thus causing damage to the persons in question by means of the prohibition to exercise a public function or a publicly appointed office for three-year term, will be avoided.

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- Law no. 393/2004 on the Status of local elected officials;
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- Law no. 215/2001 of local public administration;
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- www.integritate.eu;
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HEALTH CLAIMS` NOTION IN THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE

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Abstract

Although an area traditionally reserved to the Member States, health policy is increasingly influenced by European Union regulatory framework and by the Court of Justice of European Union case law. This article surveys the Court of Justice of European Union jurisprudence that clarifies the health claims concept, in the light of the interactions with fundamental rights, public health and consumer protection.

Keywords: *health claims, Court of Justice of European Union, consumer protection, health policy, food law.*

1. Introduction

Health policy is traditionally an area with no or very little EU involvement. It is an area where the national interests prevails, and where member states have been reluctant to transfer competences to EU. Increasingly, however, member states 'health policy are influenced by EU, especially when the policy is linked to the single market[1].

The concept of "health claims" is one area where we can spot the interaction between the consumer interests, public health, free movement of goods and the interest of food and pharmaceutical business sector. This article surveys the Court of Justice of European Union jurisprudence that clarifies the health claims concept, in the light of this interactions.

Certain studies suggest that a multidisciplinary approach need to be carried out, using insights from food technological and medical, economic, legal and managerial sciences. The main finding is that the costs and uncertainties attached to health claims are important factors impacting the innovation efforts of companies, the willingness-to-pay of consumers and the effectiveness of public policy[2].

Besides, the field of European Union competences is closely related to the concept of supra-nationality[3].

Moreover, some analyses asserts that European legislation on foods and medicine has failed to keep pace with the developments in nutrition and medical science that now recognise many important contributions that diet and individual foods may make to the promotion and maintenance of health. EU food law prevents the communication of these benefits to consumers, whilst the law on medicinal products is established on a very broad basis that also encompasses foods making preventive, therapeutic or curative claims[4].

The opportunities for product innovation arising from this new legislation combined with protection of consumer interest in respect of controlling misleading advertising, while at the same time promoting public health, are noteworthy. Whether this legislation is driving product innovation and the development of health and nutritional food or whether it is a barrier to such developments is an area in need of investigation[5].

The present paper will place the concept of health claims in the framework of European Union (EU) legislation (Capitol 2) and then will survey the Court of Justice of European Union jurisprudence that attempts to clarify the issue (Capitol 3).

2. Regulatory framework

Rules for nutrition and health claims made on foods across the European Union are harmonized by the Regulation No1924/2006 ("The Regulation") of the European Parliament and of the Council of 20 December 2006. According to the Regulation, the Commission can authorises different health claims provided they are based on scientific evidence[6]. The European Food Safety Authority (EFSA) is responsible for evaluating the scientific evidence supporting health claims.

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[1] Carsten Stroby Jensen in Cini, Michelle, and Nieves Pérez-Solórzano Borragán. 2016. *European Union Politics*. Oxford University Press, pg.58.

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[6] Commission Regulation (EU) No 432/2012 established the list of permitted health claims, which is regularly updated.

The Regulation No1924/2006 is part of an extensive legal framework governing food[7], such as labelling, presentation and advertising of foodstuffs [8], food supplements[9], the addition of vitamins and minerals and of certain other substances to foods[10], foods intended for use in energy-restricted diets for weight reduction[11], exploitation and marketing of natural mineral waters[12], drinking water[13] or foodstuffs intended for particular nutritional uses[14].

Art. 2(5) of the Regulation provides the following definition for health claims: "any claim that states, suggests or implies that a relationship exists between a food category, a food or one of its constituents and health".

The Regulation distinguishes between three types of health claims which has to follow different procedures for authorization.

First, *the Article 13 claims* ('Function Health Claims') [15] are health claims describing or referring to: the growth, development and functions of the body; psychological and behavioral functions and slimming or weight-control[16].

Second, *Article 14(1)(a) claims (*'Risk Reduction Claims') [17] are health claims on reducing a risk factor in the development of a disease. The 'reduction of disease risk claim', definition provided by art.2(6) of the Regulation, means any health claim that states, suggests or implies that the consumption of a food category, a food or one of its constituents significantly reduces a risk factor in the development of a human disease.

The last one are the claims provided in *Article 14(1)(b)* (Health 'Claims referring to children's development')[18].

3. Case law

The Court of Justice of European Union case law considering health claims concept is approached pointing on the impact on fundamental rights, consumer protection and the definition of health claims.

3.1. Fundamental rights

In the case *Deutsches Weintor*[19], the reference to the Court has been made in proceedings between Deutsches Weintor, a German winegrowers' cooperative, and the department responsible for supervising the marketing of alcoholic beverages in the *Land* of Rhineland-Palatinate concerning the description of a wine as 'easily digestible' ('bekömmlich'), indicating reduced acidity levels. The German authority objected to the use of the description 'easily digestible' on the ground that it is a 'health claim', which, pursuant to the regulation 1924/2006, is not permitted for alcoholic beverages.

The court was asked to interpret whether the prohibition from using a health claim for alcoholic beverages, is compatible with Article 15(1) of the Charter, according to which everyone has *the right to engage in work and to pursue a freely chosen or accepted occupation*, and to Article 16 of the Charter, which guarantees the *freedom to conduct a business*.

In this regard, the court pointed out that a *high level of human health protection* has to be ensured in the definition and implementation of all the European Union's policies and activities, according to Article 35 of the Charter. It also underlies that health protection is among the principal aims of regulation 1924/2006, as this is present in recitals 1 and 18 in the preamble.

It follows that, the Court needed to reconcile the requirements of the protection of those various fundamental rights protected by the Union legal order, and striking a fair balance between them[20].

Accordingly, the Court determines, first, that the total prohibition of a health claim of the kind at issue is regarded as being necessary to ensure compliance with the requirements of human health protection provided in the Charter.

Secondly, as regards the freedom to choose an occupation and the freedom to conduct a business the

[7] Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety.

[8] Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004.

[9] Directive 2002/46/EC of the European Parliament and of the Council of 10 June 2002 on the approximation of the laws of the Member States relating to food supplements.

[10] Regulation (EC) No 1925/2006 of the European Parliament and of the Council of 20 December 2006 on the addition of vitamins and minerals and of certain other substances to foods.

[11] Commission Directive 96/8/EC of 26 February 1996 on foods intended for use in energy-restricted diets for weight reduction.

[12] Directive 2009/54/EC of the European Parliament and of the Council of 18 June 2009 on the exploitation and marketing of natural mineral waters.

[13] Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption.

[14] Regulation (EU) No 609/2013 of the European Parliament and of the Council of 12 June 2013 on food intended for infants and young children, food for special medical purposes, and total diet replacement for weight control and repealing Council Directive 92/52/EEC, Commission Directives 96/8/EC, 1999/21/EC, 2006/125/EC and 2006/141/EC, Directive 2009/39/EC of the European Parliament and of the Council and Commission Regulations (EC) No 41/2009 and (EC) No 953/2009.

[15] For example: "Walnuts contribute to the improvement of the elasticity of blood vessels".

[16] Without prejudice to Commission Directive 96/8/EC of 26 February 1996 on foods intended for use in energy-restricted diets for weight reduction.

[17] For example: "Sugar-free chewing gum helps reduce tooth demineralisation. Tooth demineralisation is a risk factor in the development of dental caries".

[18] For example:"Vitamin D contributes to the normal function of the immune system in children".

[19] Judgment of 6 September 2012, Deutsches Weintor, Case C–544/10, ECLI:EU:C:2012:526.

[20] Judgment of the Court (Grand Chamber) of 29 January 2008, *Promusicae*, Case C-275/06, ECLI:EU:C:2008:54.

courts indicates its case-law, underling the possibility to restrict *the exercise* of those freedoms, if those restrictions correspond to objectives of general interest pursued by the European Union and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights[21]. The courts affirms that the prohibition at issue does not in any way affect the *actual substance* of the freedom to choose an occupation or of the freedom to conduct a business[22].

In *Neptune Distribution*[23], the national court is asking essentially whether EU law must be interpreted as meaning that it precludes packaging, labels or advertising for natural mineral waters from containing claims or indications leading consumers to believe that the waters concerned are low or very low in sodium or salt[24]. Neptune Distribution sells and distributes the natural sparkling mineral waters denominated 'Saint-Yorre' and 'Vichy Célestins'. French authorities asked Neptune to remove any statement leading the consumer to believe that the waters in question are low or very low in salt or in sodium.

The court examines whether the need to ensure that the consumer has the most accurate and transparent information possible concerning the characteristics of goods is closely related to the protection of human health. The court concludes that *protection of human health is a question of general interest which may justify limitations on the freedom of expression and information of a person carrying on a business or his freedom to conduct a business*[25].

3.2. Consumer protection

Consumer protection was the main question in the case *Verband Sozialer Wettbewerb*[26], which concerned health claims communication addressed exclusively to health professionals. In this case, Innova Vital marketed a nutritional supplement in Germany known as 'Innova Mulsin® Vitamin D3' which is administered in the form of drops. Innova Vital sent exclusively to named doctors a written document presenting the nutritional supplement.

The request has been made in proceedings between the Verband Sozialer Wettbewerb eV, a German association safeguarding competition, and Innova Vital GmbH concerning the applicability of Regulation No 1924/2006 to nutrition or health claims made in a written document addressed exclusively to health professionals.

The Court ruled for the first time that the Regulation applies to nutrition and health claims made in commercial communications exclusively addressed to health professionals. This was interpreted as a major breakthrough as food business operators will need to take further precautionary steps to ensure that any information they communicate to health professionals either qualifies as non-commercial or complies with the Regulation[27].

Thus, the Court first analyzed the concept of a 'commercial communication' as the regulation does not contain a definition. For this purpose, the court used definitions present in other areas of EU law, used as a guide in order to ensure consistency of EU law[28]. The court conclude that the concept of a 'commercial communication' within the meaning of Article 1(2) of Regulation No 1924/2006, must be understood as covering, inter alia, *a communication made in the form of advertising foods*, designed to promote, directly or indirectly, those foods[29]. Such a communication may also take the form of an *advertising document which food business operators address to health professionals*[30]. In addition, the court affirmed that the regulation *makes no distinction according to whether that addressee is a final consumer or a health professional*[31].

Another reason was that health professionals risk forwarding, in all good faith, incorrect information on foods which are the subject of a commercial communication to final consumers[32].

Consequently, the application of that regulation to the nutrition or health claims made in a commercial communication addressed to professionals contributes to a high level of *consumer protection*, in the context of the internal market[33].

Some authors question whether it is possible to communicate scientific information without falling foul of Regulation No 1924/2006? Although the judgment in question allows economic operators to communicate objective information about new scientific advances to health professionals if such communications are of a non-commercial nature, it does not offer any criteria for use in defining the meaning of "objective information", or in which cases

[21] Judgment of 6 September 2012, Deutsches Weintor, Case C–544/10, ECLI:EU:C:2012:526, para 54.
[22] Ibid, para. 58.
[23] Judgment of 17 December 2015, Neptune Distribution, Case C-157/14, ECLI:EU:C:2015:82.
[24] Ibid para 37.
[25] Ibid. para 74.
[26] Judgment of 14 July 2016, *Verband Sozialer Wettbewerb eV v Innova Vital GmbH*, C-19/15, ECLI:EU:C:2016:563.
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[28] Judgment of the Court of 14 July 2016, Innova Vital GmbH, Case C-19/15, ECLI:EU:C:2016:563, para.25.
[29] Ibid, para.29.
[30] Ibid, para.30.
[31] Ibid, para.31.
[32] Ibid. para 45.
[33] Judgment of the Court of 14 July 2016, Innova Vital GmbH, Case C-19/15, ECLI:EU:C:2016:563, para.47.

industry communications to health professionals are of a "commercial nature"[34].

Thus, the EU regulation is regarded as focusing relatively strongly on precaution and consumer understanding. The extent to which this hampers food innovations is in dispute[35].

In the case *Herbaria Kräuterparadies*[36], the relevant question was whether the EU law required minerals and vitamins to be *added to foodstuffs labelled as having a specific nutritional and health function*.

Herbaria manufactures 'Herbaria Blutquick — Eisen + Vitamine', a fruit juice mixture with herbal extracts which contains, in addition to plant ingredients of organic agricultural origin, non-organic vitamins and ferrous gluconate. Blutquick is advertised and marketed as a food supplement containing iron and vitamins, and its label bears a reference to organic production, together with the claim: 'Iron supports the normal formation of red blood cells and haemoglobin'.

The competent Bavarian authorities ordered Herbaria to remove the reference to organic farming in the labelling, advertising and marketing of Blutquick[37]. Herbaria took the view that Regulation No 1924/2006, required minerals and vitamins to be added to foodstuffs labelled as having a specific nutritional function. The stated purpose of a food supplement was the basis for the legal obligation to achieve the corresponding minimum values and that if those values could be achieved only by addition of substances, the addition was legally required[38].

However, the Court decide that it is for economic operators to determine the composition of their products and to decide how they want to portray them for marketing purposes. If they wish to market those products as a food supplement coming under Directive 2002/46, with nutrition or health claims as covered by Regulations 1924/2006 and 432/2012, or as a foodstuff intended for a particular nutritional use coming within the scope of Directive 2009/39 and Regulation No 953/2009, they must fulfil the relevant obligations laid down by the applicable EU rules. EU law does not guarantee that an economic operator will be allowed to market its products using any terms it finds to be most advantageous for promoting them[39].

In the light of the fact that the marketing of a foodstuff as a food supplement with nutrition or health claims is optional the Court rejected Herbaria arguments.

3.3. Definition of health claims

The definition of health claims was examined in cases *Deutsches Weintor*[40], *Green-Swan Pharmaceuticals*[41]*and Nelsons v. Ayonnax Nutripharm, Bachblütentreff*[42].

It is worth noting that the court sets as the starting-point for the definition of a 'health claim' within the meaning of that regulation the *relationship* that must exist between a *food or one of its constituents and health*.

On the one hand, that definition provides no information as to whether that relationship must be direct or indirect, or as to its intensity or duration. In those circumstances, the court understand the term '*relationship*' in a broad sense[43]. On the other hand, the concept of a 'health claim' must cover not only a relationship implying an *improvement* in health as a result of the consumption of a food, but also any relationship which implies the absence or reduction of effects that are adverse or *harmful* to health and which would otherwise accompany or follow such consumption, and, therefore, the mere preservation of a good state of health despite that potentially harmful consumption[44].

Accordingly, the concept of a 'health claim' is deemed to refer not only to the *effects* of the consumption – in a specific instance – of a precise quantity of a food which is likely, normally, to have only *temporary* or fleeting effects, but also to those of the *repeated, regular, even frequent* consumption of such a food, the effects of which are, by contrast, not necessarily only temporary and fleeting[45].

In case *Green-Swan Pharmaceuticals*, the court considered that a 'health claim' within the meaning of Article 2(2)(5) of Regulation No 1924/2006 on nutrition and health claims made on foods is the relationship that must exist between a food or one of its constituents and health; that definition provides no information as to whether that relationship must be direct or indirect, or as to its intensity or duration, so that the term 'relationship' must be understood in a broad sense.

In that context, in order to be considered a 'reduction of disease risk claim', a health claim need

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[34] Luis González Vaqué, Silvia Bañares Vilella And Sebastián Romero Melchor. 2016. "The European Court of Justice Declares That Regulation No 1924/2006 Applies to Health Claims Directed at Health Professionals: The Verband Sozialer Wettbewerb eV Judgment (Case C-15/19)." *European Food and Feed Law Review* 11 (6): 508–19.

[35] Aschemann-Witzel, Jessica. 2011. "The EU Health Claim Regulation in International Comparison: Review of the Possible Impact on Food Marketing and Consumer Protection." *CAB Reviews: Perspectives in Agriculture, Veterinary Science, Nutrition and Natural Resources* 6 (33): 1–7.

[36] Judgment of the Court of 5 November 2014, *Herbaria Kräuterparadies*, Case C-137/13, ECLI:EU:C:2014:2335.

[37] Ibid, para 19-21.

[38] Ibid, para 22.

[39] Judgment of the Court of 5 November 2014, Herbaria Kräuterparadies, Case C-137/13, ECLI:EU:C:2014:2335, para 46.

[40] Judgment of 6 September 2012, Deutsches Weintor, Case C–544/10, ECLI:EU:C:2012:526.

[41] Judgment of the Court of 18 July 2013, Green-Swan Pharmaceuticals, Case C‑299/12, ECLI:EU:C:2013:501.

[42] Judgment of 23 November 2016, Nelsons v. Ayonnax Nutripharm, Bachblütentreff, Case C 177/15, ECLI:EU:C:2016:888.

[43] Judgment of 6 September 2012, Deutsches Weintor, Case C–544/10, ECLI:EU:C:2012:526, para. 34.

[44] Ibid, para. 35.

[45] Judgment of 6 September 2012, Deutsches Weintor, Case C–544/10, ECLI:EU:C:2012:526, para. 36.

not necessarily expressly state that the consumption of a category of food, a food or one of its constituents 'significantly' reduces a risk factor in the development of a human disease[46].

4. Concluding remarks

It is evident form the Court case law, that in striking a fair balance between various fundamental rights protected by the Union legal order, it favors both health and consumer protection. As regards the freedom to choose an occupation and the freedom to conduct a business the court reveals the possibility to restrict *the exercise* of those freedoms, if those restrictions correspond to objectives of general interest pursued by the European Union and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very *substance* of those rights.

Moreover, the court concludes that protection of human health is a question of general interest which may justify limitations on the freedom of expression and information of a person carrying on a business or his freedom to conduct a business

In one interesting decision, the court affirmed that the regulation makes no distinction according to whether that addressee is a final consumer or a health professional. Accordingly the EU regulation is regarded as focusing relatively strongly on precaution and consumer understanding.

It is worth noting that the definition of a 'health claim' within the meaning of that regulation is the relationship that must exist between a food or one of its constituents and health. The definition provides no information as to whether that relationship must be direct or indirect, or as to its intensity or duration In those circumstances, the court understand the term 'relationship' in a broad sense.

The literature affirms that the application of EU law to areas traditionally reserved to the Member States may produce a spillover effect[47] Member states have carefully isolated health services and policy from the EU since its inception, granting only narrow responsibilities and weak tools relevant to marginal areas of policy. Yet, today, the EU is emerging as one of the formative influences in health policy. The result is systematic encroachments on health policy by the EU, driven by the Court and justified by internal market rules and decisions.[48]

The case law in the field of health claims can be consider a contribution to the analysing of the theories of European integration and the role the Court plays.

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[46] Judgment of the Court of 18 July 2013, Green-Swan Pharmaceuticals, Case C‑299/12, ECLI:EU:C:2013:501, operative part 1.

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WHAT IS THE PRICE FOR BREAKING EU LAW?

Ioana-Mihaela DIMITRIU[*]

Abstract

Financial sanctions, as lump sum and penalty payments, can be imposed to Member States that failed to implement a judgement establishing an infringement. This mechanism was introduced by the Maastricht Treaty and further developed by the Lisbon Treaty. This paper is an analysis of Article 260 TFEU and examines the evolution of the mechanism, the principles for applying sanctions, the method of calculating sanctions, but also the limits of this procedure.

Keywords: *infringement, financial sanctions, lump sum, penalty payments, EU law*

1. Introduction

Implementation of European Union law is not by far perfect, a standard that is neither realistic, nor reasonable. Although one of the fundamental values of the European Union is the rule of law, it becomes difficult, if not impossible to establish the degree of conformity[1]. Over time a system was developed that could track the degree of conformity, especially through coercive measures initiated by the European Commission and through decisions of the European Court of Justice[2].

Thus, assuring the implementation of European Union Law requires passing through 3 distinct stages: the collection of data by the Commission, the initiation of an infringement action under article 258 TFEU and application of financial sanctions. *The first stage* of the process[3] is also the most effective, since over 90% of procedures initiated by the Commission ends at this stage. *The second stage* consists of an infringement action initiated by the Commission before the ECJ asking the Court to declare that a Member State failed to fulfil its obligations. Should the Court agree with the Commission, it will issue a declaratory judgement stating the breach. *In the third stage*, and only if the Member State does not comply with the Court's judgement, the Commission can initiate a follow-up action against the Member State demanding, on the basis of art. 260 (2) TFEU, that financial sanctions be imposed[4].

Of crucial importance for the functioning of the European Union is for Member States to fully comply with the ECJ decisions. Otherwise, legal security, citizens' rights, equal treatment between member states, as well as the balance between rights and obligations of member states become questionable.

2. Regulatory developments in the Treaties

The **Rome Treaties** provided in article 171 that member states failing to fulfil their obligations should take the necessary measures to comply with the Court decision. If the state failed to implement a judgment establishing an infringement there were no sanctions provided. There was, though, in this situation, the possibility to introduce a new infringement action, the pressure on the state being quite limited in this scenario[5]. The small number of infringement actions and the lack of a sanction made this procedure inapplicable and inefficient[6].

The **Maastricht Treaty** amended article 171, thus including a sanctioning mechanism for Member States that did not comply with a previous decision of the Court of Justice which declared, on the basis of article 169, the existence of an infringement. The possibility of imposing a financial sanction, as lump sum or penalty payment, on a Member State that did not comply with a decision was thus introduced. The purpose of such sanctions was not to compensate for damages caused by a Member State, but to put economic pressure to bring the infringement to an end, to bestow the infringement procedure with coercive force and to offer member states a strong incentive to enforce decisions of the European Court of Justice[7]. Unfortunately, the instrument of imposing financial

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[1] Phedon Nicolaides, Anne-Marie Suren, The rule of law in the EU: what the numbers say, EIPASCOPE 2007/1, p. 33.

[2] See article 17 TFEU.

[3] The main purpose of the procedure is to force a Member States who breached a provision of EU law to comply. This pre-litigation stage is dedicated to the dialogue between the Commission and the Member State concerned on the possible infringement. A significant aspect of these mechanisms is to prevent excessive recourse to the judicial system.

[4] Financial sanctions can be imposed even from the second stage of the procedure, based on article 260 (3) TFEU, in cases concerning failure to notify measures to transpose directives.

[5] See Case 169/87, Commission v France. The duration of the infringement between the first judgement of the Court and the second one being 5 years.

[6] See Case C-334/94, Commission v France. The duration of the infringement between the first judgement of the Court and the second one being more than 20 years.

[7] Paul Craig, Grainne de Burca, Dreptul Uniunii Europene. Comentarii, jurisprudență și doctrină, ed. IV, Editura Hamangiu, București, 2009, p. 567.

sanctions was very rarely used because there were still very few cases brought before the Court,[8] as the Commission only asked for penalty payments, making publicly available just the method for calculating these penalties, but not those of lump sums[9].

Through the **Amsterdam Treaty** amendments were brought to TEU and TEC, as well as a renumbering of articles, article 171 became article 228, with no modification to the content of the article[10].

An important amendment to the new article 260 of the Treaty on the Functioning of the European Union (former article 228 of TEC) was brought by the **Lisbon Treaty**, which consolidated two aspects of the mechanism: *(i)* it eliminates the reasoned opinion (the Commission has to carry out only one pre-litigation procedural stage, namely the sending of a letter of formal notice requesting the Member State to submit its observations), the procedure thus being accelerated in practice[11]; *(ii)* a new paragraph (3) was added to article 260 which creates a new instrument for non-compliance with the obligation to notify measures transposing a directive adopted under a legislative procedure (when it deems appropriate, the Commission makes a proposal to the Court to impose a sanction, a lump sum or a penalty payment, in the same judgement that declares the infringement).

3. From the Commission proposal to the decision of the Court

Both the Commission and the Court acts in the common interest of the European Union, trying to determine the most appropriate sanction and its amount, taking into consideration the circumstances of the case.

The procedure provided by article 260 has a specificity – a hybrid between adversarial and investigation nature[12]. *Firstly*, the Commission has a discretionary competence to notify the Court[13], but also proposing a sanction,[14] the Commission takes part in the procedure before the Court, the arguments in the letter of formal notice (reasoned opinion provided by article 258) provide the circumstances of the purpose of the procedure, and also the burden of proof is attributed to the Commission. All these elements provide a adversarial nature to the procedure. *Secondly*, the Commission has an important role in evaluating data in the pre-litigation stage, its role not being limited to submit the infringement, but also having to argue the necessity of imposing financial sanctions based on the information collected.

The Commission's proposals on financial sanctions are not mandatory for the Court, but are a useful point of reference[15]. Neither the guidelines such as those contained in the Commission's communications cannot bind the Court, but contribute to ensuring that the action taken by that institution is transparent, foreseeable and consistent with legal certainty[16], when submit its proposal to the Court[17].

In the contentious stage, the Court has the main role, although more limited than that of the Commission, since it does not have the possibility to collect information. The Court also has the possibility of imposing a penalty or not, this being an exclusive prerogative[18], and the obligation to fix the appropriate financial sanction and its amount (appropriate to the circumstances and proportionate both to the breach that has been found and to the ability to pay of the Member State concerned), on the basis of its discretionary competence[19].

Analysing the provisions of article 260 (3) "If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission", compared with article 260 (2), this limitation refers not only to the amount of the sanction chosen by the Commission, but also to the type of sanction. In other words, if the Commission were to request the Court to oblige a Member State to pay a penalty payment, the Court can't impose a bigger amount nor to apply a lump sum[20].

The Commission also has the possibility to reduce the amount of the initial penalty, or to limit the extent of its application, or even withdraw the action, taking into consideration the progress made by the

[8] Since the entry into force of the Treaty of Maastricht only 3 cases were brought before the Court on the basis of article 171: Case C-387/97, Commission v Greece.; C-278/01, Commission v Spain; C-304/02, Commission v France.

[9] See European Communications from 1996 (OL C 242, 21.8.1996) and 1997 (OJ C 63, 28.2.1997).

[10] Between 1997-2006 there were 22 cases ruled under article 228 TEC, of which more than 50% against France (7), Germany (4) and Luxembourg (3).

[11] The mechanism provided by article 260 (2) TFEU is structurally similar to the non-litigation procedure in two steps from article 258 (letter of formal notice and reasoned opinion).

[12] Hans Smit, Peter Herzog, Christian Campbell, Gudrun Zagel, The Law of the European Union. Article 260, LexisNexis, 2011, p. 260-8.

[13] See Paul Craig, Grainne de Burca, op. cit., p. 545; A. Evans, The enforcement procedure of article 169 EEC: Commission Discretion, 4 ELRev. 442, 1979, p. 445.

[14] For example, the Commission may invoke certain circumstances that justify the lack of a financial sanction (minor infringements or when there is risk that such infringement can be repeated).

[15] Case C-387/97, Commission v Greece, para. 89.

[16] Opinion of Advocate General Juliane Kokott delivered on 25 February 2016 in Case C-557/14, Commission v Portugal, para. 22 and the cited case-law.

[17] See C-177/04, Commission v France, para. 70; Case C-557/14, Commission v Portugal, para. 69.

[18] Damian Chalmers, Gareth Davies, Giorgio Monti, European Union Law: Cases and Materials, second edition, Cambridge University Press, 2010, p. 348.

[19] Case C-278/01, Commission v Spain, para. 41; C-177/04, Commission v France, paras. 58, 63.

[20] See, in this regard, the Opinion of Advocate General Melchior Wathelet delivered on 11 December 2014 in case C-320/13, Commission v Poland, paras. 154-155.

Member State towards conforming with the initial decision (the case of partial compliance)[21].

4. The effects of Court's decisions

Should the Court find a violation in the context of a procedure based on article 258, the Court simply declares that the Member State failed to fulfil its obligations, and its decision does not have any effect over the contested national provision[22]. Also, the Court held that it has no jurisdiction to impose to a Member State to comply with its decision in a specified period of time. Although article 260 TFEU does not provide a timeframe for complying with the Court's decisions, according to the case law[23] the process of complying with an infringement ruling must be initiated at once and completed as soon as possible[24].

The decision issued on the basis of article 260 TFEU has two different functions: *firstly*, establishes a positive obligation to take the necessary measures to comply with the judgment of the Court and, *secondly*, enables a different mechanism of coercion, namely imposing financial sanctions.

The decisions of the European Court of Justice have *res judicata status* and in case of difficulty of interpreting the meaning and scope of a judgment, the Court has the jurisdiction to interpret its decision, upon request of one of the parties or of a EU institution which can justify interest[25].

5. Determining the sanction

5.1. Two types of sanctions

The two types of financial sanctions that can be imposed upon a Member State that has not complied with its obligations are **payment penalty** and **lump sum**.

If payment penalties have a persuasive role, having the potential to determine the Member State to end as soon as possible the violation, the lump sum sanction has a deterrent role, having the potential to affect the public and private interests by not abiding with the initial decision, for the effective prevention of future violations of EU law, similar to the one in question[26].

Determining the sanction in the case of state who do not enforce decisions of the European Court of Justice need to rely on the purpose of applying the measure, specifically ensuring the application of EU law. Thus, if the lump sum reflects the Member State's failure to comply with previous decisions (especially if there was a prolonged delay), penalty payments sanctions act as an incentive for the Member State to end the violation as soon as possible[27].

Determining the sanction is important for two reasons: on one hand, which of the sanctions will be applied or if they will be applied cumulatively and, on the other hand, the amount of the sanction.

5.2. The criteria for determining the sanctions

The three fundamental criteria, such as developed by the Commission since 1996, are: *the seriousness of the infringement, its duration and the need to ensure that the penalty itself is a deterrent to further infringements*. Commission subsequently added further criteria which have emerged from the development of jurisprudence: the necessity of a "clear and uniform method" (Commission must justify its calculation of the amount to the Court) and that respects both the principle of proportionality[28] and the principle of equal treatment among the Member States.

In applying those criteria, the Court must take into account the impact of the infringement on general and particular interests, and the urgency of getting the Member State to comply with its obligations[29]. Although the Court does not quantify individual coefficients when determining financial sanctions, it does admit that the method of calculation proposed by the Commission is helpful in rendering the calculation of penalties comprehensible[30].

The seriousness of the infringement. The premise is that an infringement concerning non-compliance with a judgment *is always serious*. When determining the coefficient of seriousness the Commission will also take account of two parameters closely linked to the basic infringement which gave rise to the judgment for non-compliance, namely: the importance of the EU rules breached[31] and the impact of the infringement on general and particular

[21] Case C-177/04, Commission v France, paras. 15-17.

[22] Paul Craig, Grainne de Burca, op. cit., ed. IV, p. 573.

[23] See Case C-131/84, Commission v Italy, para. 7; Case C-169/87, Commission v France, para. 14; Case C-334/94, Commission v France, para. 31, Case C-387/97, Commission v Greece, para. 82

[24] The Commission must leave sufficient time, a longer or shorter period according to the case, for the Member State to complete the process of compliance (2005 European Commission Communication, para. 22). See also Case C-387/97, Commission v Greece, paras. 82 and 92.

[25] See article 43 of the Statute of ECJ and article 158 (1) of the Rules of Procedure. Such a request for interpretation was made by Italy in Case C-496/09 INT.

[26] See Case C-378/13, Commission v Greece, para. 37.

[27] Lorna Woods, Philippa Watson, Steiner and Woods EU Law, ed. 12, Oxford University Press, 2014, p. 258.

[28] A sanction should be appropriate to the circumstances and proportionate both to the breach found and to the ability to pay of the Member State concerned (see Case C-387/97, Commission v Greece, para. 90 and Case C-278/01, Commission v Spain, para. 41).

[29] Case C-610/10, Commission v Spain, para. 5.

[30] Opinion of Advocate General Juliane Kokott delivered on 25 February 2016 in Case C-557/14, Commission v Portugal, para. 41.

[31] It will take into consideration the nature and extent of the EU provisions, the existence of established case law, the clarity and precision of the rule breached (see Case C-392/93, British Telecommunications, para. 42), the behaviour of the State onto the measures to comply with the judgment, non-cooperation with the Commission (see Opinion of Advocate General Geelhoed delivered on 18 November 2004 in Case C-304/02, Commission v France, para. 92).

interests[32]. The coefficient of seriousness is listed on a scale between a minimum of 1 and a maximum of 20[33].

The duration of the infringement. Given the specific purpose of each kind of sanction, the Court of Justice has confirmed that the duration of the infringement must be taken into account both for the penalty payment and for the lump sum payment[34].

Regarding the *duration*, for the purpose of determining the sanction but also for calculating the amount we should take into consideration several parameters: the coefficient of duration, the number of days the infringement persists, date of entry into force of the payment obligation and the date the obligation to pay comes to an end.

- The coefficient for duration used in calculating the amount of the penalty payment

For *article 260 (2)* the period taken into account is the duration of the infringement from the date of the first Court judgment up to the date the Commission decides to refer the matter to the Court[35].

For *article 260 (3)* the period taken into account is the duration starting from the day following the expiry of the deadline for transposition in the directive in question up to the date the Commission decides to refer the matter to the Court[36].

This period will be taken into account by applying a multiplier (minimum 1 and maximum 3) to the basic lump sum[37]. However, the Court held in its case-law that the duration of the infringement must be assessed taking into account when it considers the facts and not the date the Commission decides to refer the matter to the Court,[38] its discretion not being limited by the scale of 1 to 3.

- The number of days the infringement persists used in calculating the lump sum

For *article 260 (2)* is calculated between the date of delivery of the judgment under article 258 and the date the infringement comes to an end, or, failing compliance, the date of delivery of the judgment under article 260 (2) TFEU.

For *article 260 (3)* is calculated between the day after the time limit for transposition set out in the directive expires and the date the infringement comes to an end, or, failing compliance, the date of delivery of the judgment under article 258 and article 260 (3) TFEU.

The deterrent effect. The sanction must be sufficiently high to ensure that: *(i)* the Member State decides to rectify its position and bring the infringement to an end (it must therefore be higher than the benefit that the Member State gains from the infringement); *(ii)* the Member State does not repeat the same offence[39].

The member state's ability to pay. In determining the amount of the sanction a "n" factor is taken into account defined as the geometric mean based, in part, on the gross domestic product (GDP) of the Member State in question and, in part, on the weighing of voting rights in the Council. In conclusion, since the country is bigger and economically stable, the "n" factor will be higher, so the ability to pay of each Member State[40].

5.3. Method of calculation

The method of calculation is the same for financial sanctions requested on the basis of article 260 (2), as well as for those requested on the basis of article 260 (3), taking into consideration that financial instruments are identical.

Moreover, the purpose of both types of sanctions is the same: to encourage a Member State to comply with an infringement judgment and, thus, to ensure the effective application of EU law – para. (2), and to strongly encourage Member States to transpose directives in the time period established by the legislative, thus ensuring the efficiency of the EU legislation – para (3). Also, the use by the Commission of an identical methodology is part of a coherent administration of the means that the Treaty put at its disposal, thus leading to more predictability for Member States.

The Commission will start calculating with a lower basic rate for the lump sum than for penalty payments.[41] In fact, it seems only fair that the daily amount of the penalty payment should be higher than the lump sum payment, since the behaviour of the Member State concerned is more reprehensible once the article 260 ruling has been delivered, since that involves a persistence of the infringement despite two consecutive judgments by the Court[42].

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[32] The purpose of using this parameter is not to gain reparation for damages suffered by the victims of the infringement, but to consider the effects of an infringement from the point of view of the individuals or economic operators concerned (for example, the effects are not the same if infringement concerns a specific case or interests of an entire profession).

[33] 2005 European Commission Communication, para. 16. The value of the coefficient of seriousness is the same for calculation of both sanctions.

[34] See 2005 European Commission Communication, para. 17 and Case C-304/02, Commission v France, para. 84.

[35] 2005 European Commission Communication, para. 17.

[36] See the Opinion of Advocate General Melchior Wathelet delivered on 11 December 2014 in case C-320/13, Commission v Poland, para. 176.

[37] On April 4, 2001 the European Commission adopted a new method to calculate the coefficient of duration at a rate of 0.10 per month from the date the article 258 judgment was delivered (http://ec.europa.eu/transparency/regdoc/rep/10061/2001/FR/10061-2001-1517-FR-F-0.Pdf). See also, Case C-177/04, Commission v France, para. 69.

[38] See Case C-177/04, Commission v France, para. 71, Case C-70/06, Commission v Portugal, para. 45, Case C-610/10, Commission v Spain, para. 120, Case C-378/13, Commission v Greece, para. 57, Case C-196/13, Commission v Italy, para. 102, Case C-557/14, Commission v Portugal, para. 43.

[39] See 2005 European Commission Communication, paras. 18-19.

[40] The value of "n" factor is the same for calculating both sanctions.

[41] Basic flat-rate amount "lump sum payment" is corresponding to one third of the of basic flat-rate amount "penalty payment".

[42] The action brought by the Commission on December 4, 2014 against Portugal (OJ C 46, 9.2.2015).

Although in the majority of cases the Commission details and justifies the method of calculating the sanctions proposed, the Court is not required to submit details of its calculation. If for determining penalty payments there are several decisions where the Court nevertheless details its method of calculation, for establishing lump sums the Court seems to refuse to justify its decision in report to the method proposed by the Commission.

6. Periodic penalty payments

Definition. Periodic penalty payments are "the amount, calculated in principle by day of delay – without prejudice to any different reference period in specific cases – penalising non-compliance with a judgment of the Court, the penalty running from the day when the second judgment of the Court was served on the Member State concerned up to that on which the Member State brings the infringement to an end"[43].

Application. The imposition of a penalty payment is particularly suited to induce a Member State to put an end to an infringement which, in the absence of such a measure, tends to persist[44]. In other words, the imposition of a penalty payment is justified only if the Member State fails to comply with an earlier judgment of the Court at the date of the second ruling, given that full implementation is possible even on the day that the Courts delivers the article 260 judgement[45].

Penalty payments can be imposed on a daily[46], semester[47] or annual[48] basis. The amount of the penalty can be progressively reduced, depending on the evolution in the execution of the first judgment of the Court establishing the breach of obligations. Thus the periodic penalty payment has a degressive nature[49].

The first decision to impose the penalty payment. In 2000, the Court ruled for the first time that a Member State was required to pay periodic penalty payments. In the judgment of 4 July 2000, the Commission v Greece[50], Greece was called before the Court for failure to fulfil its obligations in the matter of waste collection centre in Crete and to ensure compliance with directives that regulate in this field.[51] Since it did not implement all the measures necessary to comply with the judgment of the Court of 7 April 1992, Greece was ordered to pay a penalty payment of EUR 20.000 per day of delay.

The method of calculating the daily penalty payment[52]. According to the Commission, fines should always be deterrent and never symbolic. The calculation of the amount of the daily penalty payment has two stages: 1. multiplication of a standard flat-rate amount[53] by a coefficient for seriousness and a coefficient for duration; 2. multiplication of the result obtained by an amount fixed by country (the "n" factor) taking into account the capacity of the Member State to pay and the number of votes it has in the Council.

Values. Daily penalty payments so far range from EUR 2.800 per day[54] to EUR 57.761.250 per semester[55].

7. Lump sum

Definition. The lump sum is a sanction "penalising the continuation of the infringement between the first judgment on non-compliance and the judgment delivered under article 260"[56].

Application. All the legal and factual elements surrounding the failure to fulfil obligations established constitute an indication that the effective prevention of future similar repeat infringements of EU law requires the adoption of a deterrent such as an order for payment of a lump sum[57].

The purpose of imposing a lump sum is to penalize the infringement for the period prior to the Court of Justice's decision under article 260 and thus to

[43] 2005 European Commission Communication, para. 14.

[44] Case C-304/02, Commission v France, para. 81.

[45] Case C-378/13, Commission v Greece, para. 47 read together with para. 51.

[46] The Court imposed in most cases penalty payments on a daily basis. For example, in case C-177/04, Commission v France, the Court opted for a periodic penalty imposed on a daily basis, given that enforcement involved the adoption of a legislative amendment.

[47] For example, in case C-378/13, Commission v Greece, the penalty payment was set on a semi-annual basis and was considered appropriate to enable the Commission to assess the Member State progress in enforcing the measures imposed.

[48] For example, in case C-278/01, Commission v Spain, paras. 45-46, the penalty payment was imposed annually following the Member States submission of the annual report on the implementation of the directive, and thus to avoid the situation when Member State could be forced to pay the fine for periods in which the infringement would actually have ceased.

[49] C-378/13, Commission v Greece, paras. 40, 60 and 61. In this case, the Court considered that reducing the penalty payment could only take place if Greece communicates to the Commission evidence which, beyond any doubt, proved to be in conformity.

[50] Case C-387/97, Commission v Greece.

[51] Directive 75/442/EEC on waste (JO L 194, 25.7.1975, p. 39) and Directive 78/319/EEC on toxic and dangerous waste (JO L 84, 31.3.1978, p. 43).

[52] An example of calculation proposed by the Commission under article 260 (2) TFEU and the Court's reasoning can be found in Case C-109/08, Commission v Greece. Similarly, in case C-320/13 Commission v Poland, such a calculation was done under article 260 (3) TFEU, although the case was removed from the register of the Court because the Commission withdraw its action following the adoption by Poland of the necessary measures to comply with the first decision of the Court. So far, there is no case where the Court has used or interpreted the possibility of imposing financial sanctions from the first ruling of the Court. See, however, the Opinion of Advocate General Melchior Wathelet delivered on 11 December 2014 in case C-320/13, Commission v Poland.

[53] The standard flat-rate amount penalises the violation of principle of legality and the failure to comply with the judgments of the Court. On the method of determining this amount, see point 15 of the 2005 European Commission Communication.

[54] Case C-576/11, Commission v Luxemburg.

[55] Case C-304/02, Commission v France.

[56] 2005 European Commission Communication, para. 10.3.

[57] Case C-184/11, Commission v Spain, para. 47.

strengthen the authority of the Court's judgments. The imposition of a lump sum is based more on assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations, in particular where the breach has persisted for a long period since the judgment which initially established it[58].

According to its initial view on this matter, the Commission's practice was systematically to ask for daily penalty payments and never for a lump sum to be imposed. The consequence was that Member States were often comply with the first ruling of the Court only at a late stage of the procedure, and sometimes only at the very end of the article 260 procedure, and so this late compliance not being sanctioned in any way. However, the Commission did not rule out the possibility of asking only for a lump sum to be imposed in certain situations[59], although there are no cases till today where the Commission only claimed for a lump sum payment pursuant to article 260 (2) or (3) TFEU.

There are cases where only a lump sum payment was imposed when the Member State's compliance with the first judgment was recorded in the course of the proceedings before the Court, even though the Commission asked for both a lump sum and a daily penalty payment. In assessing this progress, the Commission may consider that it is no longer necessary to impose a daily penalty payment and therefore withdraw that claim[60].

The first decision to impose this sanction. In 2005, the Court imposed this sanction in its judgment of 12 July 2005, Commission v France[61], where the cumulative penalty payment and lump sum payment was also imposed for the first time. According to the Court's decision, by fixing the amount of the lump sum, a fair assessment was made of the particular circumstances of the case. The French Republic was ordered to pay a lump sum of EUR 20.000.000.

The method of calculating the lump sum takes into account two values:[62] **1.** minimum fixed lump sum;[63] **2.** a daily amount multiplied by the number of days the infringement persists. This amount will apply when the result exceeds the minimum fixed lump sum. The condition for calculating such an amount is that at the time of its imposition (date of the judgment) this calculation is possible and the Court can decide on a fixed amount.

The method of calculating the *daily amount* that composes the lump sum is similar to setting the daily amount applicable for the daily penalty payment: multiplying a standard flat-rate amount by a coefficient for seriousness and then by the "n" factor, taking into account both the capacity of the Member State to pay and the number of votes it has in the Council.

A daily amount is determined first. Secondly, this daily amount is multiplied by the number of days the infringement persists in order to obtain the total amount of the lump sum. Therefore, it becomes necessary to compare, on the one hand, the cumulative total of the daily amount for determining the lump sum calculated until the Commission's decision (referral to the Court under article 260 TFEU) and, on the other hand, the minimum fixed lump sum established for the Member State concerned. Daily amount will be proposed by the Commission when the calculation result exceeds the minimum fixed lump sum.

Values. The largest lump sum imposed on a Member State as a result of the failure to comply with a judgment of the Court is EUR 40 million for Italy in Case C-196/13. In this case the Court ruled in over 20 waste cases where the Member State has failed to fulfil its obligations under European Union law. The infringement in question was characterized as of a general and persistent nature, the coefficient of gravity proposed by the Commission being 8 and, in terms of the duration of the infringement; it lasted for more than seven years, which is a considerable period.

The lowest lump sum is EUR 250.000 and it was imposed on the Czech Republic in case C-241/11, as a result of the non-enforcement of the judgment finding a breach of obligations following the partial transposition of Directive 2003/41/EC. The circumstances that led the Court to the imposition of a reduced amount were: (i) the Member State cooperated in good faith with the Commission; (ii) 19 months elapsed between the date of delivery of the first judgment and the date when the Czech Republic fully transposed Directive 2003/41 into domestic law and, consequently, brought its national legislation into conformity with that judgment; (iii) late compliance, by that Member State, with the first judgment had a limited effect on the internal market for occupational retirement provision and, therefore, on private and public interests.

8. The possibility to cumulate sanctions

The first decision to impose this sanction. The Court of Justice confirmed for the first time in its judgment of 12 July 2005, in Commission v France[64],

[58] Case C-304/02, Commission v France, para. 81.

[59] 2005 European Commission Communication, para. 10.5.

[60] See Case C-184/11, Commission v Spain; Case C-241/11, Commission v Czech Republic; C-270/11, Commission v Sweden (the Commission stated that it had partially withdraw its claim with regard to daily penalties in the light of the transposition of Directive 2006/24 and the communication of the transposition measures in the course of the procedure before the Court, but retains its claim for the lump sum payment and the amount thereof).

[61] Case C-304/02, Commission v France. This sanction was imposed even though the Commission only asked for a daily penalty payments.

[62] For an example of calculation proposed by the Commission under article 260 (2) TFEU see Case C-557/14, Commission v Portugal.

[63] This amount is set for each Member State according to the "n" factor. From 2010, these amounts are communicated annually by the Commission and are revised in line with inflation and GDP of each Member State.

[64] Case C-304/02, Commission v France.

the possibility of imposing cumulatively two kinds of financial sanction (penalty and lump sum) in cases where the infringement persisted for a considerable time and still tends to persist.

The judgment is of importance from two points of view: first, because it is the first decision where both types of sanctions were applied cumulatively and, second, because it demonstrates that the Commission's proposals are not binding the Court, the latter having full jurisdiction to impose the appropriate type of sanction and the amount thereof[65].

The Commission, Denmark, the Netherlands, Finland and the UK[66] supported the Court's arguments in favour of cumulative sanctions because of their common objective, of inducing a defaulting Member State to comply with a judgment establishing a breach of obligations and thereby of ensuring that EU law is in fact applied.[67] Both sanctions are complementary, in that each of them respectively seeks to achieve a deterrent effect.

Therewith, a combination of those measures should be regarded as one and the same means of achieving the objective laid down by article 260 TFEU, not only to induce the Member State concerned to comply with the initial judgment but also to reduce the possibility of similar infringements being committed again[68].

The active role of the Court in the application of sanctions. Although the Commission did not proposed a lump sum, the Court of Justice rejected the argument that it would need "political legitimacy" to impose financial sanctions unsolicited by the Commission and stated that the financial penalties imposed "must therefore be decided upon according to the degree of persuasion needed in order for the Member State in question to alter its conduct"[69].

From a procedural point of view, the principles of civil procedural law valid in all Member States, namely the principle of availability and the principle of the right to defence, have been invoked, according to which the courts cannot exceed the limits of the parties' claims. However, the Court has invoked the special nature of the article 260 TFEU procedure, the imposition of sanctions not having the purpose to compensate the damages caused by the wrongful Member State but to exert sufficient economic pressure to put an end to the infringement[70].

Implementation of article 260 (2) TFEU. In the last 5 years, the Court has ruled in 18 cases under article 260 (2), of which only one was rejected by the Court[71].

Implementation of article 260 (3) TFEU. The provisions of article 260 (3) TFEU represent the innovation of the Lisbon Treaty, which aims to give a stronger incentive to Member States to transpose directives within the deadlines laid down and hence to ensure real effectiveness in European Union law[72]. This new instrument creates a derogatory situation from the application of article 258 TFEU, namely the possibility for the Commission to suggest to the Court to impose a lump sum or penalty payment in the same judgment which finds that a Member State has failed to fulfil its obligation to notify measures transposing[73] a directive adopted under a legislative procedure[74].

The Commission announced in its 2011 Communication[75] that it will, in general, ask the Court to impose only a penalty payment, but depending on what the Member States do, the Commission will not hesitate to adjust its approach by seeking a lump sum in all cases. Subsequently, in its 2016 Communication[76], in the light of experience[77], the Commission stated that it tighten its practice and would systematically ask the Court to impose both a lump sum and a periodic penalty payment.

9. Conclusions

The European construction was founded on the basis of cooperation between Member States and the institutions of the European Union and on an automatic compliance with the rules of the new institutional construction. The accession of new Member States and the enlargement of attributions have triggered a lower and lower rate of conformity, making it necessary for

[65] The Court imposed a cumulative penalty, although the Commission only requested a penalty payment of EUR 316.500 for each day of delay in implementing the measures necessary to comply with the judgment in Case C-64/88.

[66] Case C-304/02, Commission v France, para. 76.

[67] Ibid, para. 80.

[68] Ibid, para. 77.

[69] Ibid, para. 91.

[70] Ibid, para. 95.

[71] According to the Commission's reports on the monitoring of the application of EU law (2011-2015).

[72] See European Commission Communication on the implementation of article 260 (3) TFEU (OJ L 12, 15.1.2011). The introduction of this procedure was motivated by the widespread problem of late transposition of directives.

[73] Concerns both the total failure to notify any measures to transpose a directive and cases in which there is only partial notification of transposition measure (paras. 16 to 19 of the abovementioned Commission Communication). See http://eur-lex.europa.eu/collection/n-law/mne.html?locale=en.

[74] The Commission points out in the abovementioned Communication that article 260 (3) TFEU cannot be used when non-legislative directives are not transposed. The Commission will therefore have to continue referring matters to the Court first by virtue of a procedure under article 258 and, in the event of failure to comply with a judgment, then by a second referral to the Court pursuant to article 260(2).

[75] OJ C 12, 15.1.2011.

[76] OJ C 18, 19.1.2017.

[77] The Commission has registered an upward trend in 2015 with regard to failure to fulfil obligations due to late transposition, representing a 19% increase over 2014.

an intervention for ensuring the functionality of the Union[78].

Considering the fact that the decisions of the European Court of Justice are declaratory, from a juridical point of view they are redundant, since the Court has no jurisdiction to intervene in the legal order of the Member State or to impose a specific conduct in order to force the Member State to comply with the European Union law[79]. The financial sanctions imposed do not seem to have the expected deterrent effect, taking into consideration that, in certain cases, Member States do not take measures to transpose a directive until is very late, more specifically during judicial procedures initiated against them by the Commission and even late compliance before the ruling does not result in any sanction and so is not effectively discouraged.

We can say that non-compliance with EU law is very cheap especially in light of the fact that Member States may obtain such additional time, substantially nearly 10 years, to fulfil their obligations[80]. Of course the real economic costs of such behaviour of Member States is actually much higher counting the cost of human resources invested in such a process, the risk of awarding damages before national courts, and the cost of failing to reap the benefits of integration and common EU policies[81].

Practice has demonstrated that imposing financial sanctions has some limits that surpass its main purpose, that of ensuring the efficient application of EU law: (i) compliance only after the infringement procedures is in an advanced stage, often in the final stage; (ii) late execution, just before the Court deliver a judgement, does not lead to any sanctions and, thus, is not efficiently discouraged; (iii) after the Court has declared that a Member State has not complied with its obligations, the same Member State could allow the situation to continue; (iv) there is no mechanism for collecting payment in case a Member State refuses to comply and there is no express possibility to solicit an imputed notice or to impose upon a Member State to take specific measures.

Of course that the quantity of European provisions is not negligible, the EU legislative corpus that Member States need to comply with, transpose[82] or implement, is considerable, each corresponding to at least one possibility of non-compliance and accordingly to one infringement action[83].

We believe that the possible solutions that can be taken into consideration for consolidating the sanctioning system and thus ensuring the efficient implementation of EU law are:

1. Increasing the amount of the sanctions imposed, especially for Member States with a 'subscription' for non-compliance;
2. The possibility of imposing financial sanctions from the moment the Court finds that an infringement has occurred (this will enable the Commission to propose fines already in the article 258 procedures);
3. Reducing the timeframes in the infringement procedure;
4. Development of the Commission's support programs for Member States in transposing and implementing the legislation.

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[78] Interestingly, no new member states are leading with the infringement actions. From 1952 to 2015, the six founding states (France, Germany, Italy, Belgium, Luxembourg, and Netherlands) comprise a 56% of all actions, placing Italy on the first place with 642 out of a total of 3859. See the Court of Justice 2016 Report, p. 112.

[79] Hans Smit, Peter Herzog, Christian Campbell, Gudrun Zagel, The Law of the European Union. Article 260, LexisNexis, 2011, p. 260-3.

[80] Phedon Nicolaides, Anne-Marie Suren, The rule of law in the EU: what the numbers say, EIPASCOPE 2007/1, p. 37.

[81] Ibid, p. 38.

[82] For example, at the beginning of 2016 Romania registered a total of 90 directives that have a transposition deadline and notice for 2016-2018 (http://www.cdep.ro/presa/Anexa%20Directive%20UE.pdf).

[83] Phedon Nicolaides, Anne-Marie Suren, The rule of law in the EU: what the numbers say, EIPASCOPE 2007/1, p. 35.

THE IMPACT OF PRELIMINARY RULINGS PRONOUNCED BY THE COURT OF JUSTICE OF THE EUROPEAN UNION ON THE ACTIVITY OF THE ROMANIAN COURTS OF LAW

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Abstract

The creation of an area of freedom, security and justice represented an important project of building an Europe without frontiers where the citizens can enjoy the same rights, applied uniformly by the national courts, following the uniform interpretation thereof. The European law interpretation cohesion is ensured by the Court of Justice of the European Union by the mechanism of the preliminary procedure, which establishes cooperation between national courts of law and the European Court.

Keywords: *national courts of law, European Union Court of Justice, European law, preliminary procedure, European court*

1. Introduction

The integration of European law in the rule of law of the European Union Member States was made possible by the essential contribution of the Court of Justice which, by means of a law creative case law, established the founding principles of European law.

The jurisprudential establishment of these principles occurred in 1963, when the Court, by the ruling pronounced in case *Van Geen en Loos*[1], stated the principle of direct effect of European law in the national legal systems of the Member States. In 1964 the ruling in case *Costa*[2] was pronounced, whereby the Court established the principle of the primacy of European law over domestic law, according to which the Union represents a new rule of law which is autonomous and the originality of which is determined by the permanent transfer of powers from the Member States to the Union.

The principle of the primacy of European law, according to the Court, entails the non-application of the national regulation which is not consistent with the European regulation, and the role of the national court is to remove the former in favor of the latter. The European regulation replaces the domestic regulation, thus enabling the direct effect of European law.

Subsequently, in 1978, by ruling *Simmental*[3], the Court outlined that the principle of direct effect is the corollary of the principle of the primacy of European law. The direct effect and the primacy of European law are two complementary principles since the first represents the guarantee of the primacy of European law. If European law regulations were not applied directly in the national law, the principle of its primacy over domestic law would have no effect. On the same reasoning line, the case law of the Court provided the principle of the direct effect of European law previous to the principle of the supremacy of European law.

The integration of these principles and, through them, of the European regulations, in the domestic law of the Member States shall be incumbent on the Member States' courts of law[4].

These national courts judge the cases they acquired jurisdiction on under the procedural law specific to the national legislation of every state. As the procedural rules are different from one state to another, it is obvious that the principles of European law are different in what concerns procedural means used from one state to another. The Court agreed to grant these principles a principle value, thus establishing the procedural autonomy of the national courts by means of its case law. But procedural autonomy must ensure the full effectiveness of European law by means of effective national procedural means[5].

The procedural autonomy principle is a creation of the case law of the Court which, in case *Luck* decided that „the provisions of the treaty do not limit the right of the national competent courts to apply, from various procedural means provided by the national law system, those which are appropriate to guarantee the rights granted by community law[6]". In the same respect, in

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[1] ECJ, 05.02.1963, *Van Gend el Loos*, C-26/62.

[2] ECJ, 15.07.1964, *Costa/Enel*, C-6/64.

[3] ECJ, 09.09.1978, *Simmental*, C-70/77.

[4] N.Popa, E.Anghel, C.Ene-Dinu și L.C.Spătaru-Negură, *Teoria Generală a Dreptului. Caiet de seminar*, CH Beck Publishing House, Bucharest, 2014, p. 154.

[5] R. Kovar, *Voies puvertes aux individus devant les instances nationales, en cas de violation des normes et decisions du droit communautaire*, Institut d'etudes europeennes, ULB, Bruxelles, Larcier Publishing House, p. 262.

[6] ECJ, 04.04.1968, *Luck*, C-34/67, p. 360.

case *Salgoil*[7] the Court provided that „the domestic courts are bound to ensure rights protection, given that the role of the rule of law of each Member State is to indicate the powers of the courts and the legal classification of these rights under the criteria laid down by the domestic law".

In the same respect, by case *Rewe,* the Court provided that, according to the legal system „established by the provisions of the treaty, as the one provided by art. 177, national courts can use any procedural mean provided by the national law in order to guarantee the fulfillment of the direct effect of community law under the same conditions concerning admissibility and judgment procedure regulated by the national law in order to ensure its compliance"[8].

According to the ruling pronounced in case *Rewe*, the European law is applied in the exercise of the national procedural laws. Therefore, any national court can acquire jurisdiction on the settlement of cases where European law can be incident, but no court of law, regardless of its nature, can reject an European law ground by motivating the limits of its own competence.

Therefore, European law can be claimed in the context of all procedural stages provided by the national law, regardless of the branch of law or procedural stage of the case.

2. Content

The Romanian courts of law, in the context of the settlement of cases, shall be bound to apply the European law principles, there being many cases where they decided to apply art. 148 paragraph 2 of the Constitution which provides the principle of primacy of European law over the national law. According to the aforementioned constitutional text, „following the accession, the provisions of all constituent treaties of the European Union, as well as the other mandatory community regulations, shall take precedence over the contrary provisions of the domestic laws, under the fulfillment of the provisions of the Act of accession".

The impact of the European law in the settlement of cases by the Romanian courts of law can be structured as follows:

1. cases where the courts settle the cases without requesting a preliminary ruling and without applying previous European case law (theory of clear act);
2. cases where the courts apply the European law as it has already been interpreted by the Court (judicial precedent established by means of the case law of the Court)
3. the request for a preliminary ruling, the jurisdiction being acquired by the Court of Justice. Hereinafter, we will briefly present these three situations.

1) cases where the courts settle the cases without requesting a preliminary ruling and without applying previous European case law (theory of clear act);

In the judicial practice, this issue was raised in case of disputes substantiated on the provisions of art. 214^1-214^1 of the Tax Code, having as scope the annulment of the administrative fiscal act and the repayment of the special tax for the registration of second hand vehicles bought from other countries of the European Union.

On the merits, the plaintiffs claimed that the payment of this tax violates the provisions of former art. 90 of the Treaty establishing the European Community, currently art. 110 of the Treaty on the Functioning of the European Union, according to which no Member State shall apply directly or indirectly to the products of other Member States direct or other nature taxes higher than those applied, directly or indirectly, to similar national products. It was also shown that, in these cases, the principle of non-discrimination according to which imported and domestic products should be treated equally is violated due to the fact the tax is charged only for vehicles registered in the European Union and re-registered in Romania, while for the vehicles already registered in Romania this tax is not charged in case of a new registration.

The first court of law of Romania which ruled in such a case was the Tribunal of Arad, which noted the violation of the rights granted by the treaty, by contrary regulations of the national law and ordered, under art. 148 par. 2 of the Constitution, the direct application of the provisions of art. 110 of the Treaty (former art. 90), which is part of the Romanian rule of law as of January 1st, 2007[9].

Therefore, the plaintiff's petition was admitted, by establishing that the tax was illegally collected and ordered the defendant – the Public Finance Administration of Arad – to repay it.

Subsequently, other similar cases were registered on the dockets of other courts of law which pronounced similar rulings. The reasoning of the courts of law was sometimes more detailed, when the jurisdiction of the national court to interpret the provisions of the treaty was called into question.

Therefore, by analyzing the European incident provisions, a court of law noted the *clarity of the European provisions,* „not the issue on the interpretation of the provisions of art. 90 of the Treaty establishing the European Community was discussed in this case, *these being very clear*, but the direct application of the provisions of the Treaty"[10], which means claiming one of the conditions established by means of case law *Cilfit* by the Court of Justice.

[7] ECJ, 19.12.1968, *Salgoil/Ministry of Foreign Trade of Italy*, C-13/68, p. 675.
[8] ECJ, 17.07.1981, *Rewe-Handelsgesellschaft Nord mbH şi Rewe-Markt Steffen / Hauptzollamt Kiel*, C-158/80, p. 47.
[9] Tribunal of Arad, Civil Sentence no. 2563 of November 27th, 2007, not published.
[10] Court of Appeal of Cluj, Civil Decision no. 1145/2008 of May 14th, 2008, not published.

2) cases where the courts apply the European law as it has already been interpreted by the Court (judicial precedent established by means of the case law of the Court).

The cases having as scope the repayment of the special tax for the registration of second hand vehicles bought from other countries of the European Union were settled by certain courts of law by claiming the judicial precedent consisting in the case law of the Court of Justice (ruling of the Court of July 13th, 2006 pronounced in case Akos Nadasdi/Vam- es Penzugyorseg Eszak-Alfoldi Regionalis Parancsnoksaga, C-290/05 and ruling of the Court of December 11th, 1990 pronounced in case EC Commission against Kingdom of Denmark, C-47/88) and the obligation on the observance by the national courts of the interpretation of European law[11].

These disputes, settled in accordance with the Treaty of Accession and the case law of the European Court represent an example of unitary judicial practice based on the direct application of European law by national courts.

3) The request for a preliminary ruling, the jurisdiction being acquired by the Court of Justice.

The first request for a preliminary ruling addressed by a Romanian court to the European Court of Justice was formulated by Dâmboviţa Tribunal within a dispute which contemplated the limitation of freedom of movement abroad.

The disputes substantiated on Law no. 248/2005 on the free movement of Romanian citizens abroad – which contemplate the requests of the Passports General Directorate to prohibit the access of Romanian citizens on the territory of an EU Member State for a term of up to three years, state from which they were expelled before January 1st, 2007 for illegal residence – raised in practice the matter of knowing to what extent the provisions of the domestic law (law no. 248/2005), are compatible with European law on the free movement of persons, especially in relation to Directive 2004/38/EC of the European Parliament and the Council of April 29th, 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

The review of the European Union framework (art.27 para.1 of the aforementioned directive), highlights exhaustively only three grounds on which the state could restrict the freedom of movement of persons: *public policy, public security or public health*, while the domestic regulation (law no. 248/2005) provides the possibility to restrict the freedom of movement *if the Romanian citizen has been returned from a state based on a readmission agreement*, without making any distinction in what concerns the person of the citizen in question, respectively whether the person represents a danger for public policy, security or health of the state he has been returned from.

The application of this law led to the first request from Romania for a preliminary ruling. The request for preliminary ruling was filed by the Tribunal of Dâmboviţa, which requested to the European Court of Justice to pronounce on the interpretation of article 18 EC (European citizenship) and of article 27 of Directive 2004/38/EC of April 29th, 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

This request was formulated within a dispute between the Ministry of Administration and Internal Affairs (Passport Directorate of Bucharest) and Mister Gheorghe Jipa**.**

Mister Jipa left Romania in September 2006 to settle in Belgium, but he was repatriated due to the fact he did not fulfill the conditions of residence on the territory of Belgium.

The Ministry of Administration and Internal Affairs notified the Tribunal of Dâmboviţa by means of a petition whereby it requested, under Law. 248/2005, the limitation of the right of Mister Jipa to move abroad for a period of maximum 3 years. The preliminary ruling request was formulated by the Tribunal of Dâmboviţa on January 17th, 2007 and consists of the following aspects:

1. Does article 18 EC have to be interpreted as being contrary to articles 38 and 39 of Law no. 248/ 2005?
2.
   a) Do the provisions of aforementioned articles 38 and 39 represent an impediment for the free movement of persons provided by art. 18 EC?
   b) May an EU Member State restrict the free movement of its own citizens on the territory of another Member State?
3.
   c) Does the concept of „illegal residence" for the purpose of the agreement concluded between Romania and Benelux fall within the concepts of „public policy" and „public security" provided by article 27 of Directive 2004/38/EEC, so that the free movement of a person can be restricted?
   d) If the answer to the previous question is affirmative, does article 27 of Directive 2004/38/EC have to be interpreting in the meaning that Member States may automatically restrict free movement and residence of the European Union citizens on grounds of public policy and public security, without analyzing the „conduct" of the person in question?

The arguments of the Advocate General of the ECJ, Mister J. Mazak, provided in case C- 33/07[12], were the following:

[11] Tribunal of Alba, Civil sentence no. 1129/CAF/2008 of September 18th, 2008, Court of Appeal of Alba, Civil decision no. 974/CA72008 of September 17th, 2008, Tribunal of Sibiu, Civil Sentence no. 415/CA of July 1st, 2008, not published.

[12] http://curia.europa.eu/jurisp; http://eurojurnal.eu/?p=48.

- as of January 1st, 2007, Mr. Jipa is a citizen of the European Union, and may therefore, from that date, rely on the rights conferred by that status, including against his Member State of origin (item 30).
- article 18(1) EC is directly applicable in the national rule of law, therefore the EU citizens have the right to leave the territory of a Member State, including their Member State of origin, to enter the territory of another Member State (item 31).
- the fact that Mister Jipa has not exercised its right to free movement yet does not entail the assimilation of this situation to an internal situation (case law Chen et Zhu, C-200/02 is cited). On the contrary, the case has a direct link with European law (item 34).
- the right to move freely within the territory of the Member States guaranteed by article 18 (1) EC would be rendered meaningless if the Member State of origin could, without valid justification, prohibit its own nationals from leaving its territory to enter the territory of another Member State (item 35). The Advocate General claims the previous case law of the Court on the free movement of persons (Pusa, C-224/02, Singh, C-370/90), and of the right to settle (International Transport Worker's Federation et The Finnish Seamen's Union, C-438/05, Daily Mail and General Trust, 81/87, Bosman, C-415/93). Therefore, such impediments are prohibited both in the Member State of origin and in the Member State of destination.
- according to article 4 of Directive 2004/38/EC, all Union citizens shall have the right to leave the territory of a Member State to travel to another Member State.

Based on these arguments, the Advocate General of ECJ claims that such a national legislation (Law no. 248/2005) violates European law.

Hereinafter, article 27 of Directive 2004/38/EC is analyzed in order to reveal the conditions under which the right to leave the territory of a Member State can be restricted.

Although title VI where article 27 is included refers only to the right of entry and residence, the Advocate General considers that it is clear from the wording that it regulates restrictions on the freedom of movement and therefore includes the right to leave a Member State (item 40). Hereinafter, it is recalled that any exception from freedom of movement must be interpreted restrictively. Furthermore, the concept of public policy may vary from one country to another, and it is therefore necessary in this matter to allow competent national authorities an area of discretion (item 41).

Both based on article 27(2) of Directive, and on previous case law, grounds extraneous to the individual case or considerations of general prevention cannot be accepted. On the contrary, it is necessary „a genuine and sufficiently serious threat affecting one of the fundamental interests of society" (item 42) (claimed case law: Bouchereau, C-30/77, Rutili, C-36/75). Therefore, a Member State cannot restrict the right to leave the Member State of origin merely on the basis that the person in question was repatriated from another Member State due to his „illegal residence".

The threat must be to the state which takes the measure to restrict free movement and not to the state from which he was returned (Belgium). The measure has to be adopted in compliance with the principle of proportionality and based exclusively on the personal conduct of the individual concerned. The Advocate General of ECJ considers that Mister Jipa does not constitute a danger to the fundamental interests of Romanian society thereby necessitating the adoption of measure by Romania limiting his right to freedom of movement.

Lastly, the Advocate General of ECJ recalls that the measure must not be adopted automatically, but by analyzing the personal conduct of the person in question.

By examining the case, the Court noted that „article 18 EC and article 27 of Directive 2004/38/CE [...] are not contrary to a national regulation which allows the restriction of the right of a national of another Member Sate to move on the territory of another Member State, especially on the basis that he was previously returned from this state due to his „illegal residence", provided that, on the one hand, the conduct of this national represents a genuine and sufficiently serious threat affecting one of the fundamental interests of society and, on the other hand, the restrictive measure is able to guarantee the fulfillment of its scope and does not exceed the framework required for its fulfillment.

The court has to determine whether the aforementioned conditions are applicable in the case referred for settlement"[13].

The operative part of the judgment of the Court answers the question raised at the beginning of the recitals as follows: European law is not contrary to a national legislation which allows the restriction of the right of a national of another Member Sate to move on the territory of another Member State**,** provided that certain requirements are fulfilled (the conduct represents a threat and the measure is able to guarantee the fulfillment of the scope).

In this case, the domestic law is partially incompatible with European law due to the fact it contains exceptions from free movement of persons other than those concerning public policy, security and health, provided by European law.

Therefore, given that Romania was bound to transpose until January 1st, 2007 the provisions of the Directive in domestic law – but until the date the petition was submitted, law no. 248/2005 had not been amended in order to be harmonized with the provisions of the Directive – and given the principle of the primacy of European law, the law applicable in disputes where the restriction of the right of free movement of a Romanian citizen is requested is the European law,

[13] ECJ, 10.07.2008, Ministry of Administration and Domestic Affairs – Passports General Directorate of Bucharest/Gheorghe Jipa.

respectively art. 27 and the following of Directive 2004/38/EC.

The opinion expressed by the High Court of Cassation and Justice in its case law was the same, namely „Community law shall prevail over the national law, by producing actual effects in the rule of law of the Member States, national judge being the one called to punish the contrary"[14].

3. Conclusions

When national law grants the court of law the right to apply ex officio a domestic rule of law, this right represents an obligation if the application of European law is incident[15]. But the court is not bund to claim ex officio the exception on the violation of European law if it were to give up procedural passivity specific to the principle of availability, relying on other facts and circumstances than those that the party which would have had an interest in the application of European law relied its petition.

The case law of the Court proves its concern to maintain a balance between procedural autonomy, on the one hand, and the obligation of the courts to ensure justice seekers a direct, immediate and effective protection of their rights granted by European law.

In conclusion, the ex officio claiming of European law, although it is not an absolute obligation, represents in practice a cautious solution, taking into account the principle on the liability of the state if a court expressly ignores European law when pronouncing a definitive ruling.

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[15] N.Popa, E.Anghel, C.Ene-Dinu şi L.C.Spătaru-Negură, Teoria Generală a Dreptului. Caiet de seminar, CH Beck Publishing House, Bucharest, 2014, p. 43-44.

THE ECJ CASE-LAW ON THE ANNULMENT ACTION: GROUNDS, EFFECTS AND ILLEGALITY PLEA

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Abstract

For practitioners in the field, but also for academicians it is equally important to know that there exists, under certain circumstances, the possibility of bringing an action for annulment, having as object the legally binding EU acts. All questions concerning the action for annulment have their significance in the theory and practice of the field, but a consistent case-law is offered by the grounds for annulment, the plea of illegality and correlatively by the effects of the decision ruled within the action in for annulment, and these are some issues to which we shall refer further.

Keywords: *the ECJ case-law; annulment for action; grounds; effects; the plea of illegality.*

1. General aspects

The European Union's status of special subject of international law is given, in particular, by the atypical non-classic institutional system, special and different from the extremely known classic structure of Montesquieu type and its own legal order, by the legal system belonging to it, through its features that send to immediate, direct and imperative implementation of the rules of EU law. In the third place, especially in the latter stage of European construction, we notice a peculiar system of European diplomacy[1]. All the three issues above mentioned, taken as a whole, give a special character (status) to the European Union, as subject of international law. This special status is given equally by similarities of the European Union both to states and international organizations, and also by the differences between the European Union and states, respectively international organizations, in terms of their status as subjects of international law.

It is relevant for our analysis, the normative component which, at a closer look, has the same atypical and non-classic character, likely to confer, together with the other two, a special status to the European Union. Notable are the European Union's (ordinary and special) procedures for adopting rules of law, in terms of drafting (the initiative) and their adoption (institutions directly involved send, as bicameral rule, to the decision-making triangle - Commission, Council, Parliament) - and as an exception, we note the special procedures under which the executive, as an institution that owns the lead in the ordinary legislative procedure, is alternatively replaced either by the Council or the Parliament, in the special legislative procedure.

By symmetrically researching issues related to the adoption of rules of EU law, the annulment of the same rules is highlighting distinct features aimed at: acts that may be subject to an action for annulment; subjects of law that may bring an action for annulment (who may have active trial legitimisation); subjects of law against which an action for annulment (who may have passive trial legitimisation) may be brought; the time limit in which an action for annulment may be brought and the grounds (causes) for which an action for annulment may be brought. All these aspects are correlative with the effects of the decision ruled in the action for annulment to which other issues can be added.

For practitioners in the field, but also for academicians, it is equally important to know that there exists, under certain circumstances, such a possibility regulated in EU law, similar to the one existing in national law, with the cumulative fulfilment of certain conditions[2].

All questions listed above concerning the action for annulment have their significance in the theory and practice of the field, but a consistent case-law[3] is offered by the annulment grounds, the plea of illegality and correlatively by the effects of the decision ruled in the action for annulment, issues to which we shall refer further.

2. Grounds (causes) for annulment

The main and fundamental premises of the matter are provided by art. 263 TFEU, which in par.

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[1] Ion M. Anghel, *Diplomaţia Uniunii Europene (şi regulile acesteia)*, Universul Juridic Publishing House, Bucharest, 2015, p. 310.

[2] Elena Emilia Stefan, *Drept administrativ. Partea a II-a,*, University Course, second edition, revised and updated, Universul Juridic Publishing House, Bucharest, 2016, pp. 68-111.

[3] On the role of the EU Court of Justice jurisprudence in the development of EU law, see Mihaela-Augustina Dumitraşcu, *Dreptul Uniunii Europene şi specificitatea acestuia*, second edition, revised and enlarged, Universul Juridic Publishing House, Bucharest, 2015, pp. 182- 188; Laura-Cristiana Spătaru-Negura, *Dreptul Uniunii Europene – o nouă tipologie juridic,* Hamangiu Publishing House, Bucharest, 2016, pp. 156-165.

(1) states that the Court in Luxembourg (the Court of Justice of the European Union) „reviews the legality of legislative acts, of acts of the Council, the Commission and the European Central Bank, other than recommendations and opinions (only the legally binding acts, according to art. 288 TFEU) and of regulations of the European Parliament and the European Council intended to produce legal effects towards third parties. „According to the same paragraph, CJEU controls the „legality of acts of the bodies, offices or agencies, as entities operating in the EU, under the condition above formulated, namely that the acts in question" take legal effects (give rise to rights and obligations) to third parties".

Enlightening for our approach is the second paragraph of art. 263 TFEU according to which „the Court has jurisdiction to rule on actions brought (...), for reasons of lack of competence, infringement of essential procedural requirements, infringement of the Treaties or of any rule of law relating to its application, or abuse of power".

Summarized, we note that, according to the matter premises cited above, there are four grounds that can determine the action for annulment of a legal act of the European Union, namely: the absence/ lack of competence („non-competence"); the infringement of essential procedural requirements; the infringement of the Treaties or of any rule of law relating to its application and the abuse of power.

Even if we were inclined to operate with some similarities existing also in national law (with the unconstitutional actions, i.e. contentious matters in the competence of the administrative courts), we shall not do this, however we cannot stop the reader to have such thoughts. The compared look represents to us the subject of a future approach.

Having a rich case-law on the matter, we reserve the possibility to rely, for each situation, only on those decisions that we consider relevant, noting that the historical case-law[4] of the Court of Justice of the European Union is extremely generous.

The lack of jurisdiction. One of the reasons very well known in the field, which has been dating from 1994, but it is important also nowadays, refers to the quite controversial field of competition, which knows new approaches, especially after the presidential elections from 2016 which were held in the US and after the European Brexit. Specifically, in the case of *France v./ Commission*[5], the Luxembourg Court ruled the annulment of an act of the EU executive (European Commission), act through which the foundations were laid for an agreement with the US to enforce competition law. The reason given by the court referred to the absence of the EU executive's jurisdiction to conclude such an agreement. On substance, the agreement had the purpose of „promoting cooperation, coordination and reducing the risk of disputes between the parties in the application of laws concerning the competition or of reducing their effects"[6].

The EU executive found that the legal nature of the agreement was different, meaning that" in reality, an administrative arrangement for the conclusion of which it is[7] „competent and „the failure to comply with the agreement would not determine the liability of the Community, but simply the termination of the agreement"[8]. The Court in Luxembourg, on the contrary, said that „the agreement is binding on the Community and it creates obligations, this is why it cannot be qualified as administrative agreement"[9], which is why it decided to cancel it. The cause of cancellation of the agreement was based on the fact that the EU executive had no power to its conclusion, established expressly by the Treaties.

From the doctrine in the field[10], it results that the lack of jurisdiction may arise in the case of delegation of powers from the Council to the Commission or to the Member States, but this issue arises also in the case of making decisions in the Commission, through the empowerment procedure.

The infringement of essential procedural requirements. By adopting the same logic of presentation, we find that the premises of the matter are art. 296 and 297 TFEU.

According to art. 296 par. (1) TFEU, „in the case where the Treaties do not specify the type of act to be adopted, the institutions shall select it from case to case with the compliance of the applicable procedures and the principle of proportionality". This is the general framework, as the second paragraph of art. 296 TFEU customizes, by sending to an essential procedural requirement, namely: „legal acts shall be justified and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties". In this regard, the Court, in Case *Sytraval*[11], considered that „the Court of First Instance failed to draw the necessary distinction between the requirement to state reasons and the substantive

[4] The historical jurisprudence is made available to all, including in Romanian as official language of the European Union (according to the translation of the European Institute of Romania, for the jurisprudence until 2007, the year of Romania's EU accession and to the translations made at EU level, after 2007).

[5] Decision *French Republic v./ European Communities Commission*, C-327/91 ECLI:EU:C:1994:305.

[6] Ibid, pt. 5.

[7] Ibid, pt. 21.

[8] Idem.

[9] According to Roxana-Mariana Popescu, *Competențele Curții de Justiție a Uniunii Europene în materia controlului realizat cu privire la acordurile internaționale la care Uniunea Europeană este parte*, Post-doctoral Thesis, „Acad. Andrei Rădulescu" Legal Research Institute of Romanian Academy, Bucharest, 2015, p. 54.

[10] Gyula Fábián, *Drept instituțional al Uniunii Europene*, Hamangiu Publishing House, Bucharest, 2012, p. 376.

[11] Decision European Commission v./ Chambre syndicale des entreprises de transport de fonds et valeurs (Sytraval) and Brink's France SARL, C-367/95, ECLI:EU:C:1998:154, pt. 72.

legality of the decision. On the basis of an alleged insufficiency of reasoning, it criticised the Commission for a manifest error of assessment attributable to the inadequacy of the investigation carried out by that institution".

The doctrine of the field[12] is considerable, highlighting the following situations in which this plea may be invoked: 'non-compliance of rules with regard to drafting and adopting EU legal acts (e.g. how to vote in the institutions, the obligation to consult other institutions, bodies, agencies of the Union or Member States where the Treaties provide this); disregarding the rules concerning the compliance with the right of defence (it involves those rules ensuring the consultation with those concerned (...) before adopting a decision likely to seriously impair their interests); a failure of the obligation concerning the grounding of EU legal acts".

Article 297 section (1) para. 3[13] puts spotlight on the publicity issue, respectively on the notification of the Union's legal acts, which does not mean it is a breach of an essential procedural requirement, however, the consequences of the absence of publicity or notification in the field of bringing the action to court, lead to the ignorance of the date from which the deadline begins to run.

The infringement of the Treaties or of any rule of law relating to their application. There are two causes relevant for this ground of lack of competence, namely the case *Portugal v./ Council*[14] and *Germany v./ Council*[15].

The first cause for dismissal of an action, *Portugal v./ Council* aims at an important matter for that period, the '90s (more precisely 1996), but also for now, concerning the market access for textile products. The legal document that made the object of the invalidation claim, by Portugal to the Court, was Decision 96/386/EC of the Council, of 26 February 1996 on the conclusion of Memoranda of Understanding between the European Community and the Islamic Republic of Pakistan and between the European Community and the Republic of India on arrangements in the area of market access for textile products. The grounds that Portugal invoked, were related „on the one hand, to the infringement of certain fundamental WTO rules and principles and, on the other hand, to the infringement of certain fundamental rules and principles of the Community legal order"[16].

Contrary to previous decisions, in that particular case, the Court in Luxembourg said that „the claim of the Portuguese Republic according to which the contested decision was ruled by breaching certain rules and fundamental principles of the Community legal order, was unfounded"[17] and dismissed the action in its entirety[18].

In the second case, *Germany v./ Council*, the Court in Luxembourg annulled art. 1 para. (1) first indent of Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community concerning its fields of competence, of the agreements of multilateral negotiations of the Uruguay Round (1986-1994) according to the request of Germany, on the fields of competence of the Council. It's about the conclusion, on behalf of the European Community, of the agreements of multilateral negotiations of the Uruguay Round (1986-1994), the Council approving the conclusion of the Framework Agreement on Bananas with the Republic of Costa Rica, Colombia, Republic of Nicaragua and the Republic of Venezuela. Germany argued that „the regime established by the Framework Agreement affected the fundamental rights of operators in categories A and C, namely the right to free exercise of the profession and property rights and discriminated in relation with the operators of category B"[19].

The specialized literature[20], by resorting to systematizing these violations of Treaties or of any rule of law relating to their application, highlights the following: „the error of law (concerning the applicable rule of law, the misinterpretation of the rule, the absence of any legal basis); the error of fact (on the facts that affect the application of the rule or assessment of the facts); the error of the facts to which the rule of law applies".

The misuse of law. It is not the same as the misuse of dominance, governed by article 102 TFEU, as anti-competitive practice. The consecration of this cancellation ground belongs to the Court's case-law according to which such an abuse acquires real dimension if an institution of the European Union „pursued (...) through the lack of caution which is tantamount to breaking the law, purposes other than those for which it has been assigned powers provided by the Treaty"[21].

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[12] Sean Van Raepenbusch, Drept instituțional al Uniunii Europene, International Rosetti Publishing House, Bucharest, 2014, p. 506.
[13] „The legislation acts are published in the Official Journal of the European Union".
[14] Decision Portuguese Republic v./ Council of the European Union, C-149/96, ECLI:EU:C:1999:574.
[15] Decision the Federal Republic of Germany v./ Council of the European Union, C-122/95, ECLI:EU:C:1998:94.
[16] Decision the Portuguese Republic v./ Council of the European Union, ECLI:EU:C:1999:574, pt. 24 of the decision.
[17] Ibid, pt. 94 of the decision.
[18] For details see Roxana-Mariana Popescu, Competențele Curții de Justiție a Uniunii Europene..., op. cit., p. 55.
[19] Decision the Portuguese Republic v./ Council of the European Union, ECLI:EU:C:1999:574, pt. 48 of the decision.
[20] Sean Van Raepenbusch, op. cit., p. 506.
[21] Decision *Chambre syndicale de la sidérurgie française et autres v./ Haute Autorité de la CECA*, C-3/64, ECLI:EU:C:1965:72, pt. 4 of the Court's reasoning concerning the admission of the claim.

3. The effects of the decision ruled in an action for annulment

We are capitalizing, according to the research system followed, the legislation and case-law specific to the matter.

From the point of view of legislation, the primary premises of the matter are provided by art. 264 TFEU, article in which it is stated that „in the case where the action is well founded, the Court of Justice of the EU declares the act null and void". In other words, the legal act in question ceases its legal effects, even after the entry into force. The effects are to the past and also to the future (*ex tunc* and *ex nunc*).

The jurisprudence accompanies the effects of such a judgment, thus resulting that the „Community court decision to cancel the contested act produces the disappearance retroactively of the act, to all litigants. Therefore, the parties should be put in the state before the adoption of the act"[22].

On the same subject is the *P & O European Ferries decision (Vizcaya) SA v./ Commission*, where the Court states that „the annulment lead to the retroactive disappearance of the [act] (...) with respect to all litigants"[23]. Moreover, in this case, the court stated that „such an annulment decision takes *erga omnes* effect, which gives it res judicata authority"[24].

Other issues stemming from the interpretation of art. 264 par. (2) TFEU[25] refer to the fact that an annulment decision may result in the total or partial nullity of a legal act of the Union.

Regarding the temporal effects of such a decision, in order to avoid prejudices that could be caused to individuals, the Court can order, including the remaining in force of the attacked legal act until the entitled institution adopts another act likely to replace the annulled one[26].

As a corollary of these effects, for reasons of pragmatism and timely manner, in full compliance with art. 266 par. (1) TFEU, „the institution, body, office or agency issuer of the void act or of which failure was declared contrary to the Treaties, shall take measures to comply with the decision of the Court of Justice of the European Union".

4. The plea of illegality

The current premises of the matter are provided by art. 277 TFEU.

From conceptual point of view, we see that art. 277 TFEU establishes what the practice called „plea of illegality". Thus, „under the reserve of the deadline stipulated in art. 263, sixth paragraph [TFEU - two months - our note], in the case of a litigation concerning an act of general application adopted by an institution, body, office or agency of the Union, any party is entitled to grounds specified in art. 263, second paragraph, in order to invoke before the Court of Justice of the European Union, the inapplicability of that act". In term of procedure, although the 2 month term expired and the legal act cannot be challenged anymore by an action for annulment, under the circumstance of a litigation which has as object, a regulation, for example, the plea of illegality can be invoked at any moment. In this situation, the Court will not annul the contested act, but it can declare it inapplicable. Consequently, the plea of illegality „is not a self-contained action, but it depends on a main action within which it may be exercised. (...) it is an ancillary action and the dismissal of the main action entails the inadmissibility of the exception"[27].

Article 277 TFEU establishes „the possibility for the Union court, that in the case of a main legal contest over the legality of an enforcement measure of an act with general application, to exercise an incident control over the legality of the mentioned act. For this purpose, any party to the dispute can invoke - either through the appeal against the enforcement measure or as a means of defence - all grounds provided in the action for annulment, even after the deadline for bringing an action against the act with general application"[28]. However, the same article 277 TFEU „reinforces the principle according to which the illegality of a rule entails the illegality of the measures taken for the enforcement thereof"[29].

This time from the European Union's case-law, art. 277 TFEU „reflects a general principle conferring upon any party the right to challenge, to obtain the annulment of a decision directly and individually concerned, the validity of previous institutional acts which represent the legal basis of the contested decision, if the party has no right to

[22] Decision Centre d'exportation du livre français Centre (CELF) and Ministre de la Culture et de la Communication v./ Société internationale de diffusion et d'édition (SIDE), C-199/06, ECLI:EU:C:2008:79, pt. 61.

[23] Decision P & O European Ferries (Vizcaya) SA v./ Commission, C-442/03P, ECLI:EU:C:2006:356, pt. 43.

[24] Idem.

[25] Art. 264 par. (2) TFEU: „However, the Court shall indicate, if it considers it necessary, what are the effects of the void act that must be considered as definitive".

[26] For example, the Council of Ministers decided, in agreement with the unions for European civil servants, a pay rise by 10%. Finally, the Council adopted a regulation which stated only a 5% increase in salary. The Court therefore annulled the Council Act, but nevertheless it maintained it until the Council adopted an act which replaced it. Otherwise, the European civil servants would not receive any salary percentage (pt. 15 of the Decision Commission des Communautés européennes v./ Conseil des Communautés européennes, 81/72, ECLI:EU:C:1973:60).

[27] Gyula Fábián, op. cit., p. 380.

[28] Sean Van Raepenbusch, op. cit., p. 574.

[29] Gyula Fábián, op. cit. p. 380.

bring, under art. 230 TEC[30], a direct action against acts that have prejudiced, without being able to request cancellation (...). The article aims at protecting the individual against the application of an unlawful legislative act, provided that the effects of the decision finding its inapplicability, are restricted to litigants and that the ruling does not affect the content of the act itself"[31].

Trying a definition, the specialized literature shows that the plea of illegality is „an incident remedy that serves to implement a general principle that refers to due process, and when it is invoked before a national court, it acts to compensate for the absence of direct action for annulment brought by individuals, in principle, against acts of general application"[32].

After analysing **the documents that can be the object of the plea of illegality**, it is still the case-law that supports our approach.

Thus, according to the Court, to the extent that art. 277 TFEU „is not intended to enable a party to contest the applicability of any general act in favour of an action, the content of a plea of illegality must be limited to what is essential to resolving the dispute. Therefore, the general act, of which unlawfulness is claimed, must be applicable, directly or indirectly, in the case which represents the object of the action and there must be a direct relationship between the contested individual decision and the general act in question. The existence of such a connection may, however, be inferred from the finding that the contested decision is based essentially on a provision of the act whose legality is in dispute, even if the latter does not formally represent its legal basis"[33].

For practitioners, but not only, very important are the following two aspects: **the legal subjects that may determine the plea of illegality and the effects of the admission of the plea of illegality**.

Referring to the first point, according to art. 277 TFEU „any part" of a litigation that has as object to contest a mandatory legal act of the Union can introduce the plea of illegality.

Regarding the possibility of states to invoke the plea of illegality, the Court has initially ruled that they cannot resort to such a remedy against a *decision* (as a legal act of the EU) that they have not attacked within the deadline set by art. 263 TFEU: „to allow a Member State, addressee of a decision (...) to challenge its validity (...), without taking into account the time limit laid down in art. 173 par. (3)[34] of the Treaty, would not be compatible with the principles governing the remedies imposed by the Treaty and would undermine the stability of the system and of the principle of legal certainty on which it is based"[35]. Subsequently, the Court revised its opinion to the effect that „the trenchant position in the matter of not attacking the Court's decisions was" tamed „by other actions under art. 263 TFEU, where the court *ex officio* verified whether the decision whose failure was attributed to a Member State had failed or not, the scope of competence of the State, if there were legal grounds for its adoption in order to avoid that that decision would be non-existent from the legal point of view"[36]. Referring to the possibility of the state to invoke the plea of illegality against *a regulation*, the specialized literature[37] ruled that „Member States should have the right to invoke [it] (...) against [this legal act of the European Union] that was not attacked (...) but which, because of its generality reveals its „shortcomings" only at the moment of its concrete application. Thus, these shortcomings cannot be discovered immediately, as in the case of regulations with individual addressee".

For the second issue, regarding the effects of the admission of the plea of illegality, this time, both the doctrine[38] and the case-law are relevant. From the point of view of the doctrine, the act under the grounds of which, the decision has been ruled, will be declared inapplicable in those precise circumstances. From the perspective of the case-law, the inapplicability of the European Union's legal act, established by the plea of illegality „has binding effect only between the parties to the dispute"[39].

5. Conclusions

We conclude by assessing that the Court of Justice of the European Union, supplemented by the doctrine of the field, both based on the application of EU legislation, contribute, obviously, to understanding the status of EU member state of over 10 years, by our country, with all that this status implies, in terms of rights and obligations.

[30] The current art. 263 TFEU.
[31] Decision *Francesco Ianniello v./ Commission of the European Communities*, T-308/04, ECLI:EU:T:2007:347, pt. 32.
[32] Sean Van Raepenbusch, *op. cit*., p. 574.
[33] Decision *Francesco Ianniello v./ Commission of the European Communities* (ECLI:EU:T:2007:347), pt. 33.
[34] The current art. 263 TFEU para. (6).
[35] Decision *Commission v./ the Kingdom of Belgium*, 156/77, ECLI:EU:C:1978:180, pt. 23.
[36] Gyula Fábián, *op. cit*. p. 381.
[37] Idem.
[38] According to Sean Van Raepenbusch, *op. cit*., p. 578.
[39] Decision *EU Council v./ Busacca* et C-434/98, ECLI:EU:C:2000:546, pt. 26.

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- Decision Commission v./ the Kingdom of Belgium, 156/77, ECLI:EU:C:1978:180;
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- Decision French Republic v./ European Communities Commission, C-327/91, ECLI:EU:C:1994:305;
- Decision P & O European Ferries (Vizcaya) SA v./ Commission, C-442/03 P, ECLI:EU:C:2006:356;
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THEORETICAL AND PRACTICAL CONSIDERATIONS ON SELF-DEFENSE IN INTERNATIONAL LAW

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Abstract

*Attempts to legitimize war have been made since ancient times. In ancient Greece, for example, war was considered legitimate for the winners. Nowadays, the old Latin phrase "jus ad bellum"**, in whose name states have frequently engaged in warfare, has been abolished.*

As a result, the UN Charter has established a complex system for the sanctioning of the aggressor state, designed to ensure and restore the international rule of law by putting an end to acts of violence and minimizing their consequences.

Self-defense is a right the states may exercise under well-established conditions and limitations only.

With respect to nations that are dominated by foreign states and are therefore seeking to gain their independence and exercise their legitimate rights by all means, including by war, it has been established that the use of armed force by the dominator-states is an act of aggression forbidden by the international rule of law.

The non-aggression principle is basically the one that has turned international law from a law of war into a law of peace, to the point where war is considered today as the most serious international crime.

Keywords: *self-defense, aggression, principle, force, war, Article 51 of the UN Charter*

Introduction

The use of armed force in international relations is probably the most profound of the problems which confront mankind.

Accordingly, the question of what uses of force are aggressive is inevitably of paramount importance. This is recognized on all sides.

Yet the possibility, the desirability, the practicality and the efficacy of defining aggression caused and still cause extreme controversy.

The problem of defining aggression goes back at least to 1923. The arguments then advanced, in the early days of the League of Nations, have continued to recur in United Nations debates, as recently as March 1972.

However, the same States have not always come with the same arguments. The principal proponent of a definition of aggression over the years has been the Soviet Union - a fact which, for more than one reason, has not promoted the adoption of a definition.

However, at times (for instance, in 1923 and 1945), representatives of the Soviet Government have opposed the adoption of any definition.

The principal opponents of a definition of aggression over the years have been the United Kingdom and the United States.

Still, in 1945, at the Nuremberg Trials, the United States favored adopting a definition, and, in 1968, it took an unenthusiastic lead, together with the United Kingdom and four other States, in advancing a definition in the United Nations.

Aggression can certainly be defined. The question is not whether a definition is possible, but whether a definition is desirable.

A number of definitions have been submitted to the League and United Nations bodies over the years.

Some definitions have been adopted in transient treaties to which a restricted number of States are or were parties[1].

Therefore, clearly, a definition can be devised, which is or was acceptable at least to some States.

And it is not impossible that, within the next year or two, the United Nations may actually succeed in adopting a definition acceptable to the community of States.

But if it does, it would remain to be seen how valuable such a definition would really be.

Yet, it should be noted that, at times, certain States, international bodies, and distinguished scholars have maintained that a definition of aggression is not possible[2].

Thus the League of Nations Permanent Advisory Commission held in 1923 that, under the conditions of modern warfare, "it would seem impossible to decide, even in theory, what constitutes a case of aggression."

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** [from latin - "right to war"] - is a set of criteria that are to be consulted before engaging in war in order to determine whether entering into war is permissible, that is, whether it is a just war - https://en.wikipedia.org/wiki/Jus_ad_bellum.

[1] A. W. Sijthoff - Lectures at The Hague Academy of International Law; first published in Receuil des Cours 197211(1973), 136. Leiden.

[2] Stephen M. Schwebel – Justice In International Law, Cambridge University Press, 1994.

Content

Self-defense[3] is a universally accepted exception[4] from the principle forbidding the use of force in international law, and has been subject to a careful scholarly scrutiny over time.

In the current international political context, it is of great significance for the international order that states understand clearly the relevance and application of force in international law.

The relevant dispositions in the UN Charter are sufficient for approaching the whole range of threats to international peace and security.

For these purposes, the UN Security Council may order a number of coercive actions in order to maintain and restore international peace and security.

However, even when a state has the legal right to use force, there may be prudence and principle related reasons for it not to exercise such right.

In international law, this basic normative intuition is codified for states in the UN Charter, Article 51. Article 51 is an exception to the Charter's general prohibition on the use of force, as set forth in Article 2 (4).

The prohibition on the use of force is at the heart of the Charter, given that the fundamental aim of the Charter and the UN organization created by the Charter is to "save succeeding generations from the scourge of war." It stands to reason that any right to use force as an exception to the general prohibition on resort to force would be narrow.

Article 51 permits a state to act in unilateral or collective self-defense only "if an armed attack occurs".

UN Charter Article 51 is not the only UN sanction of self-defense[5] to be disregarded by the ICJ. The Court also chooses to ignore a number of highly relevant United Nations Resolutions, passed by the General Assembly and the Security Council, addressing the legitimate and lawful use of force in self-defense by Member States.

For instance, the rationale behind General Assembly Resolution 3314 – "Definition of Aggression" – is highly relevant to the case at hand.

It states: "Convinced that the adoption of a definition of aggression ought to have the effect of deterring a potential aggressor, would simplify the determination of acts of aggression and the implementation of measures to suppress them and would also facilitate the protection of the rights and lawful interests of, and the rendering of assistance to the victim".

The reading of Article 51 shows that several requirements must be cumulatively fulfilled in order for the use of force in self-defense[6] to be legally permissible:

- Force may be used in self-defense only in relation to an 'armed attack', whether imminent or ongoing;

The 'armed attack' may include not only an attack against a state's territory, but also against emanations of the state, such as embassies and armed forces;

It means that the use of force is permissible only if there is a direct act of aggression against the state, article 51 of the UN Charter becoming thus applicable;

- The performed act of aggression, or the armed attack, has to be serious. The Charter empowers the Security Council[7] to decide whether the attack in question is a serious armed attack;
- The right of self-defense is activated only in case an unlawful act is committed.

Member states are not allowed to invoke the right of self-defense in order to implement the coercive measures imposed by the UN (for example: it is illegal to use force in order to impose peace and security when no armed attack has been previously committed);

- The exercise of the right of self-defense must comply with the criterion of 'proportionality' and 'necessity'.

Force is used to retaliate against the attacker, and it should stop when the threat is removed due to the force that has been primarily used;

- Force is legitimate only if there is an actual attack or the attack has already been committed.

Force is not allowed to be used in order to establish a certain type of justice, for conquering territories and carrying out reprisals;

- At the moment when UN Security Council has taken appropriate action against the aggressor, the individual right of self-defense turns into the collective[8] right of self-defense.

Force may be used in self-defense only if related to an "armed attack", either imminent or ongoing.

The notion of "armed attack"[9] may include not only an attack against the territory of a state, but also against some authorities of that state, such as its embassies and armed forces.

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[3] E. Colbert, Retaliation in International Law, 1948, pp. 202-203; J. Stone, Conflict through Consensus: United Nations Approaches to Aggression, 1977, p. 89; E. Zoller, Peacetime Unilateral Remedies: An Analysis of Countermeasures, 1984, pp. 39-40.

[4] Raluca Miga-Besteliu – Public International Law, volume II, second edition, Ed. C.H.Beck (2014), page.163.

[5] Avra Constantinou - The Right of Self-Defense Under Customary International Law and Article 51 of the United Nations Charter, publisher, ant. N. Sakkoulas, 2000.

[6] The prohibition on the use of force among states, subject to the right of individual or collective self-defense after an armed attack, arises not only from U.N. Charter treaty obligations, but also reflects customary international law. See Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 99 (June 27); see also IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 279-80 (1963).

[7] http://www.arduph.ro/domenii/conducerea-ostilitatilor/folosirea-fortei-si-a-amenintarii-cu-forta-derogari-de-la-principiile-cartei-onu/ - http://www.arduph.ro/fields/conducting-hostilities/the-use-of-force-and-threatening-force-exceptions-to-the-UN-Charter's-principles/.

[8] https://dreptmd.wordpress.com/cursuri-universitare/drept-international-public/folosirea-legala-a-fortei-potrivit-dreptului-international - http://dreptmd.wordpress.com/university-courses/public-international-law/legal-use-of-force-according-to-international-law.

[9] Tom Ruys – "Armed Attack" and Article 51 of the UN Charter, Katholieke Universiteit, Belgium, 2010.

Force in legitimate self-defense may be used only when[10]: the attack consists of threatening force or use of force, when the attacker has the intention and capacity to attack, and the attack is directed from outside the territory controlled by the state.

In the meaning of article 51, an armed attack does not include only an attack against the territory of the state, including the airspace and inland sea waters, but also the attacks against the state authorities, such as its armed forces or embassies abroad.

An armed attack may also include, in certain circumstances, the attacks against individual citizens from abroad or civil ships and planes.

Therefore, an "armed attack" is a deliberate intervention against another state, without the agreement of that state or its subsequent consent, which has no legal grounds.

On the one hand, a state may use force in legitimate defense against an attack, only if the attack is "imminent".

On the other hand, there is always the risk of an early abuse[11] of self-defense, and that is why the use of force should be applied in good faith and based on clear and solid proofs.

However, the "imminence" criterion should be construed by considering the current types of threats, and should be applied based on the specific circumstances of every separate case.

The imminence criterion is in close connection with the necessity requirement.

Force may be used only when any further delay would result in the incapacity of a threatened state to defend itself efficiently against the attack, or to avoid the attack and its negative and irreversible consequences.

Upon the assessment of the imminence of the attack, one may refer to the seriousness of the attack, the attacker's capacity and the nature of the threat, for example, when the attack is likely to occur without any warning.

Force may be used only on an appropriate basis and, in fact, following an assessment of the facts, in good faith.

In the context of contemporary threats, imminence may not be construed based only a temporal criterion, but it should also reflect the wider circumstances of the threat.

An irreversible emergency should exist. Whether the attack is "imminent" depends on the nature of the threat and the possibility of approaching it efficiently, in any given stage.

The concept of what constitutes an "imminent" armed attack should develop so as to meet new circumstances and new threats.

For example, the resolutions passed by the Security Council in the wake of 11th September 2001 recognized both that large-scale terrorist action could constitute an armed attack that would give rise to the right of self-defense, and that force might, in certain circumstances, be used in self-defense against those who plan and perpetrate such acts and against those harboring them, if that is necessary to avert further such terrorist acts.

It was on that basis that United Kingdom forces participated in military action against Al-Qaida and the Taliban in Afghanistan.

It is right for the states to be able to act in self-defense in circumstances where there is evidence of further imminent attacks by terrorist groups, even if there is no specific evidence of where such an attack will take place, or of the precise nature of the attack[12].

Two further conditions apply where force is to be used in self-defense, in anticipation of an imminent armed attack.

First, military action should be used only as a last resort. It is necessary to use force in order to deal with the particular threat faced.

Secondly, the force used must be proportionate to the threat faced and must be limited to what is necessary to deal with the threat.

In addition, Article 51 of the Charter sets forth that, if a state resorts to military action in self-defense, the measures taken must be immediately reported to the Security Council.

The right to use force in self-defense continues until the Security Council has taken the measures required to maintain international peace and security[13].

Exercising one's right of self-defense should meet the "proportionality" criterion. The force to be used, on the whole, should not be excessive by comparison with the need for prevention or for putting an end to the attack.

The physical and economic consequences of the force used should not be excessive by comparison with the damage expected from the attack.

The proportionality principle was confirmed by the case law of the International Court of Justice and acknowledged as a well-established rule of the customary international law, the use of force in legitimate self-defense having to be "proportional to the armed attack and absolutely necessary for responding to such attack".

This means that the degree of force used should not be higher than the one required for putting an end to the attack or for removing the threat.

Given that the right of self-defense does not allow the use of force for "punishing" an aggressor, proportionality should not be construed as referring to

[10] The International and Comparative Law Quarterly - The Chatham House Principles of International Law on the Use of Force in Self-Defence - Vol. 55, No. 4 (Oct., 2006), pp. 963-972, Published by: Cambridge University Press on behalf of the British Institute of International and Comparative Law.

[11] Amos N. Guiora, "Anticipatory Self-Defense and International Law- A Re-Evaluation " (2008) Journal of Conflict and Security Law.

[12] Christopher Greenwood KCMG, QC "War, Terrorism and International Law" in Essays on War in International Law (2006).

[13] Eli E. Hertz - The Right to Self-Defence, 2009, web address - http://www.mythsandfacts.org/ReplyOnlineEdition/chapter-5.html.

some parity between the response and the damage already suffered because of an attack, for this could transform the concept of self-defense in some grounds for retribution, or could limit the use of force to less than required for resisting the attack.

The imminence criterion involves that any further delay in fighting against the deliberate attack would result in the incapacity of the state to defend itself efficiently against the attack.

For these purposes, necessity shall determine imminence: it is necessary to act before it is too late.

The question is whether "imminence" is a separate, independent criterion, or simply a part of the "necessity" criterion.

As an additional criterion, it serves, however, for emphasizing further that a response with force in such circumstances is at the limit of a judiciary category already exceptional and, as such, requires a corresponding high level of justification.

Forbidding threatening force, although as important as to its regulatory status regarding the interdiction of use, has been subject to fewer scholarly studies so far.

The relationship between the two interdictions – of use of force and threatening force should be constantly reviewed, and we should consider the possibility, hardly analyzed so far, of states using threatening force as a means of lawful defensive response: self-defense in the form of a threat.

The status of such concept according to international law is assessed, and the criteria it may govern are reviewed.

This article is based on an analogy between the traditional "forced" self-defense and the notion of threats as a means of self-defense.

However, the well-established self-defense rules may not be applied automatically to a defensive threat, mostly due to the practical differences between a response and threatening response involving real force.

That is why a clear understanding of the international law rules governing the use of force by states in self-defense is necessary.

The rules are challenged in light of what are considered the new terrorist threats and the possession of weapons of mass destruction; debates arose as to which ones need to be revised or redefined.

The study was based on various statements and actions of states, the latest developments at the level of the United Nations Organization, as well as on decisions of the International Court of Justice.

Conclusions

Currently, international law provides for self-defense and anticipatory self-defense for any situation threatening peace and security.

What is needed is to make the Security Council a reliable and effective body.

The doctrine of pre-emption cannot fit into the current international legal system, and it does not present compelling arguments for it to be accepted as a new norm of international law.

Self-defense must, as a right, reflect international realities and aspirations[14].

International law provides states with the 'inherent' right to defend themselves, while making the exercise of that right subject to law.

Modern methods of intelligence collection, such as satellite imagery and communications interceptions, now make it unnecessary to sit out an actual armed attack in order to wait for convincing proof of a state's hostile intent.

With the advent of weapons of mass destruction and their availability to international terrorists, the first blow can be devastating - far more devastating than the pinprick attacks on which the old rules were premised.

Terrorist organizations "of global reach" were unknown when Article 51 was drafted[15].

In order to flourish, they need to conduct training, raise money, and develop and stockpile weaponry – which, in turn, requires communications equipment, camps, technology, staffing, and offices. All this requires a sanctuary, which only states can provide - and which only states can take away.

After all, the final aim of any debates on this topic is to comply in full with the dispositions of the UN Charter, namely:

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security[16]".

The use of force in contemporary international relations is one of the most significant acts any State can undertake.

Responding to an actual armed attack in self-defense, whereby the State seeks to protect its very existence[17], is one of the fundamental values of statehood that can be exercised.

[14] Al-Sharif, Emad - The Meaning of Self-Defense under Article 51 of the United Nations Charter, 2000.

[15] Lackson Nyamuya Maogoto – Battling Terrorism, Legal Prerspectives on the Use of Forceand the War on Terror, first published 2005 by Ashgate Publishing.

[16] U.N. Charter art. 51.

[17] University of Queensland Law Journal - http://www.austlii.edu.au/au/journals/UQLawJl/2005/23.html.

The consequences, however, of launching anticipatory action and making an error of judgment that a presumed threat is not as great as anticipated, is one that all States must bear the highest levels of accountability and state responsibility for.

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- Eli E. Hertz - The Right to Self-Defence, 2009, web address - http://www.mythsandfacts.org/ReplyOnlineEdition/chapter-5.html;
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- http://www.arduph.ro/domenii/conducerea-ostilitatilor/folosirea-fortei-si-a-amenintarii-cu-forta-derogari-de-la-principiile-cartei-onu/ - http://www.arduph.ro/fields/conducting-hostilities/the-use-of-force-and-threatening-force-exceptions-to-the-UN-Charter's-principles/;
- https://dreptmd.wordpress.com/cursuri-universitare/drept-international-public/folosirea-legala-a-fortei-potrivit-dreptului-international - http://dreptmd.wordpress.com/university-courses/public-international-law/legal-use-of-force-according-to-international-law;
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REGIME OF REFUGEES IN ROMANIA. THE LEGAL FRAMEWORK AND ITS RECENT DEVELOPMENTS

Oana – Adriana IACOB*

Abstract

The present paper offers a general overview of the legal framework of the Romanian asylum system and of its most recent developments, trigerred by the "refugee crisis" that created turmoils and generated debates at the European and international levels. Although traditionally a transit country for migrants, that remained largely unaffected by the crisis, the controversies around the issue and the perspective of an increase of the migration flow, represented an incentive for the adoption of measures at national level, aiming to improve the asylum system and the perspectives of social integration of those who were granted a form of international protection. This study aims to highlight these developments and to place them in a larger international/European context.

Keywords: *migration, asylum system, refugee law*

1. Introduction

The paper analyses the legal regime of the persons granted a form of international protection in Romania (refugees and persons with subsidiary protection), emphasizing the impact that the current situation, at international and European levels, has on its evolution.

Romania is party to the 1951 Geneva Convention regarding the status of refugees and to the 1967 New York Protocol supplementing the Geneva Convention, ratified by Law no 46/04.07.1991[1].

The Romanian legislative framework regarding asylum and migration reflects the country's international and European commitments and obligations.

Romania has traditionally been rather a transit country for migrants and its asylum and migration system was not configurated to cope with a larger number of arrivals.

Despite the turmoil generated by the "refugee crisis" within the European Union, in contrast with the flows that affected other neighboring European states, Romania continued to have a low number of third country national and a low rate of irregular migration[2].

Nevertheless, the debate generated by the international context in the field of asylum and migration led to some developments at national level, aiming to increase the capacity of the system.

The paper will present the general situation of asylum in Romania, the existent legal framework and the evolution of the asylum system within the current context.

2. General overview of the situation of asylum and migration in Romania[3]

According to the latest migration and migrant population statistics, published by Eurostat, a total of 3.8 million people immigrated to one of the EU-28 Member States during 2014. Among these 3.8 million immigrants during 2014, there were an estimated 1.6 million citizens of non-member countries[4].

With a total number of 98 586 foreign citizens residing legally on the Romanian territory in 2014, among which 57 471 third country nationals (most of them being nationals of the Republic of Moldova - 9838, Turkey - 8816 and China - 7359)[5], representing a share of 0.26% of the state's total population[6], Romania is one of the EU countries with a rather low number of migrants.

In 2015, there was a rise in the number of foreign citizens, in general (104 139)[7], with an increase of the number of third country nationals residing in Romania (60 257 - most of them being nationals of Moldova, Turkey and China), but there weren't any major fluctuations.

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[1] http://www.cdep.ro/pls/legis/legis_pck.htp_act?ida=1318&frame=0, last accessed 22 January 2017.

[2] https://www.politiadefrontiera.ro/ro/main/i-analiza-activitatii-politiei-de-frontiera-romane-pe-anul-2015-6678.html, last accessed 22 January 2017.

[3] Based on updated information contained in the research report Oana Iacob, „Rapid Assessment of the Asylum and Migration Policy Area" (unpublished), Oxford Research, 01.08.2016, financed by the Norwegian Financial Mechanism Office.

[4] http://ec.europa.eu/eurostat/statistics-explained/index.php?title=Migration_and_migrant_population_statistics&oldid=292846, last accessed 22 January 2017.

[5] http://igi.mai.gov.ro/comunicate/citeste/ro/1140/Evaluarea-activitii-Inspectoratului-General-pentru-Imigrri-n-anul-2014, last accessed 22 January 2017.

[6] http://ec.europa.eu/dgs/home-affairs/e-library/multimedia/infographics/index_en.htm#0801262489e0e61e/c_ , last accessed 22 January 2017.

[7] http://igi.mai.gov.ro/comunicate/citeste/ro/1335/Evaluarea-activitii-Inspectoratului-General-pentru-Imigrri-n-anul-2015, last accessed 22 January 2017.

In 2016, the situation seemed to remain within the same parameters - there is an increase, but no major fluctuations in number or changes in the general profile of the migrant population: 112 114 foreign nationals, among which 64 903 third country nationals (most of them coming from Moldova – 10 485, Turkey – 9087 and China – 7727)[8].

Figure no 1 – Number of non – nationals in Romania

Country of origin (EU/non EU)	Year			
	2013	2014	2015	2016
Third country nationals	58.497	57.471	60.257	64.903
EU, EEA, Swiss Confederation nationals	40.478	41.115	43.882	47.211
Total number of non-nationals	98.975	98.586	104.139	112 114

A more significant evolution trend was observed in the field of asylum. According to the General Inspectorate for Immigration, in 2016 there were 1886 asylum requests registered, 49% more than in 2015, when there was a total of 1266 asylum requests. This was due to the fact that last year, 554 were relocated to Romania from Greece and Italy, in accordance with decisions taken at EU level. Most asylum seekers are coming from Syria (816), Iraq (472), Pakistan (93) and Afghanistan (80)[9]. Of the 1886 requests registered in 2016, to this date, 824 people were granted a form of protection in Romania[10]. The total number of refugees and persons with subsidiary protection in Romania is around 3000.

Figure no 2 – Number of asylum requests – evolution trend

Year	2013	2014	2015	2016
Number of asylum requests	1499	1547	1266	1886

Source: Evaluation of the General Inspectorate for Immigration Activity, Bucharest, 14 February 2017

3. International and European legislation regarding asylum

3.1. The 1951 Geneva Convention and the 1967 New York Protocol

Romania is party to the 1951 Geneva Convention regarding the status of refugees and to the 1967 New York Protocol supplementing the Geneva Convention. Romania has ratified both the 1951 Convention and the 1967 Protocol in 1991, through Law no 46/04.07.1991[11].

According to the two universal international instruments, the term "refugee" designates any person that "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it"[12].

The Geneva Convention establishes:

- *inclusion clauses* - basic criteria for the recognition of the refugee status (as stated in the above-mentioned definition);
- *cessation clauses* - "the conditions under which a refugee ceases to be a refugee. They are based on the consideration that international protection should not be granted where it is no longer necessary or justified" (Article 1 C (1) to (6) of the 1951 Convention)[13]: voluntary re-availment of national protection, voluntary re-acquisition of nationality, acquisition of a new nationality and protection, voluntary re-establishment in the country where persecution was feared, nationals/stateless persons whose reasons for becoming a refugee have ceased to exist.
- *exclusion clauses* - "The 1951 Convention, in Sections D, E and F of Article 1, contains provisions whereby persons otherwise having the characteristics of refugees (…) are excluded from refugee status. Such persons fall into three groups. The first group consists of persons already receiving United Nations protection or assistance; the second group deals with persons who are not considered to be in need of international protection; and the third group enumerates the categories of persons who are not considered to be deserving of international protection"[14].
- *the principle of non-refoulement* - basic

[8] http://igi.mai.gov.ro/ro/comunicat/evaluarea-activit%C4%83%C5%A3ii-inspectoratului-general-pentru-imigr%C4%83ri-%C3%AEn-anul-2016, last accessed 22 February 2017.

[9] http://igi.mai.gov.ro/ro/comunicat/evaluarea-activit%C4%83%C5%A3ii-inspectoratului-general-pentru-imigr%C4%83ri-%C3%AEn-anul-2016, last accessed 22 February 2017.

[10] *Ibidem.*

[11] *Legea nr. 46/ 1991 pentru aderarea României la Convenția privind statutul refugiaților, precum și la Protocolul privind statutul refugiaților,* available at http://www.cdep.ro/pls/legis/legis_pck.htp_act?ida=1318&frame=0, last accessed 22 February 2017.

[12] Convention relationg to the Status of Refugees, Geneva, 1951, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfRefugees.aspx and *Protocol relating to the Status of Refugees,* available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolStatusOfRefugees.aspx , last accessed 22 February 2017.

[13] *Handbook and Guidelines on Criteria for Determining Refugee Status,* Geneva, December 2011, available at http://www.unhcr.org/3d58e13b4.pdf, p. 23, last accessed 24 February 2017.

[14] *Ibidem,* p. 28.

obligation of receiving states, according to which "no refugee should be returned in any manner whatsoever to any country where he or she would be at risk of persecution"[15].

− *standards of treatment* - The Convention proposes, as a minimum standard, that refugees should receive at least the treatment which is accorded to aliens generally. Most-favored-nation treatment is called for in respect of the right of association (article 15), and the right to engage in wage-earning employment (article 17, paragraph 1). "National treatment", that is, treatment no different from that accorded to citizens, is to be granted in respect of a wide variety of matters, including the freedom to practice religion and as regards the religious education of children (article 4); the protection of artistic rights and industrial property (article 14); access to courts, legal assistance, and exemption from the requirement to give security for costs in court proceedings (article 16); rationing (article 20); elementary education (article 22, paragraph 1); public relief (article 23); labor legislation and social security (article 24, paragraph 1); and fiscal charges (article 29)[16].

3.2. European legislation

All EU Member States are parties to the to the 1951 Geneva Convention regarding the status of refugees and to the 1967 New York Protocol supplementing the Geneva Convention. These two international instruments are considered to be key elements providing "the cornerstone of the international legal regime for the protection of refugees" and form the basis of the European regulations regarding asylum.

Nevertheless, given the fact that the definition of the term "refugee", as prescribed by the Geneva Convention, was generally considered too restrictive, excluding large categories of persons who are in need of protection, but do not meet the criteria established by the Convention, the Conclusions of the 1999 European Council in Tampere state that these provisions "should also be completed with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection"[17].

The EU Member States also agreed over the necessity of establishing a common European Asylum system and, in consequence, in the following years, a series of measures were adopted for the improvement of the European legal framework in this field and the establishment of common procedures and a common asylum regime. These regulations were gradually improved and reformed.

Article 63 of the Treaty of Lisbon provides the legislative basis for the future European Asylum system:

The forms of international protection granted within the European Union are:

− *the refugee status* - granted in accordance with the 1951 Geneva Convention and the European legislation;

− *the subsidiary protection* - According to the *Q*ualification Directive *(*Directive 2011/95/EU), the subsidiary protection is granted to "a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm". The serious harm consists of: "(a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict"[18].

− *the temporary protection* - defined in the Council Directive 2001/55/EC as "a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection"[19].

The main European regulations that form the legal basis of the European Asylum System are:

− *The Qualification Directive* - Directive 2011/95/EU of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted[20];

− *The Common Procedures Directive* - Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and

[15] Guy S. Goodwin-Gill, *Convention relationg to the Status of Refugees, Protocol relationg to the Status of Refugees, Introductory Note,* available at http://legal.un.org/avl/ha/prsr/prsr.html, last accesed 03 March 2017.

[16] *Ibidem.*

[17] *Tampere European Council, 15 and 16 october 1999, Presidency Conclusions*, available at http://www.europarl.europa.eu /summits/tam_en.htm, last accessed 03 March 2017.

[18] *Directive 2011/95/EU*, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:en:PDF, last accessed 03 March 2017.

[19] *Council Directive 2001/55/EC*, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32001L0055, last accessed 03 March 2017.

[20] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:en:PDF, last accessed 03 March 2017.

withdrawing international protection[21];

– *The Reception Conditions Directive* - Directive 2013/33/EU of the European Parliament and of the Council laying down standards for the reception of applicants for international protection[22];

– *The Regulations establishing the Dublin system*:

- Regulation (EU) no 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person[23];
- Regulation (EU) no 603/2013 of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of fingerprints[24].

– *The Temporary Protection Directive* - Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof[25].

The European Agenda on Migration, adopted on the 13th of May 2015 sets out a comprehensive approach for improving the management of migration in all its aspects. This included a commitment to prioritize implementation of the Common European Asylum System[26]. As a result, on the 23rd of September 2015, the European Commission adopted 40 infringement decisions against several Member States for failing to fully implement legislation making up the Common European Asylum System. Romania was among the states targeted by the infringement decisions, for failing to communicate the transposition of the Common Procedures Directive - Directive 2013/32/EU - and the Reception Conditions Directive - Directive 2013/33/EU[27].

Romania transposed the directives and regulations regarding the asylum and migration system in its national legislation.

The transposition of the Common Procedures Directive (Directive 2013/32/EU) and the Reception Conditions Directive (Directive 2013/33/EU) was completed through the Government Decision no 14/2016[28], adopted on the 19th of January 2016, after being partially transposed in December 2015, through Law no 331/2015. The two normative acts brought modifications to Law no 122/2006 regarding asylum in Romania and its Methodological Norms approved by Government Decision no. 1.521/2006. The latter law and its methodological norms had already transposed many of the core elements prescribed by the above-mentioned directives, that were established through the previous legal instruments (now reformed), respectively, the Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers[29].

4. National legal framework regarding asylum[30]

4.1. Specific national legislation

The national legislative framework in the field of asylum is established by Law no 122/2006[31] with subsequent modifications and completions and the Methodological Norms for the enforcement of Law no 122/2006, approved by Government Decision no. 1.521/2006 with subsequent modifications and completions. The framework on the social integration of migrants who were granted a form of international protection in Romania is also regulated by Government Ordinance No. 44/2004, with subsequent modifications and completions and the Methodological Norms for the enforcement of Government Ordinance no.44/2004, approved by Government Decision no. 1.483/2004.

The general framework regulating the status of aliens in Romania (that is applicable in the field of asylum in situations not covered by the specific legislation) is established by Government Emergency Ordinance no 194/2002 on the regime of aliens in Romania, republished, with subsequent modifications and completions.

There are 3 forms of international protection granted by the Romanian state, in accordance with Law no 122/2006, that transposed the European regulations mentioned above (according to Art. 22 of Law no 122[32]):

- refugee status;
- subsidiary protection;
- temporary protection.

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[23] http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32013R0604, last accessed 03 March 2017.

[24] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0001:0030:EN:PDF, last accessed 03 March 2017.

[25] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32001L0055, last accessed 03 March 2017.

[26] https://ec.europa.eu/malta/news/implementing-common-european-asylum-system-commission-escalates-8-infringement-proceedings_en, last accessed 03 March 2017.

[27] http://europa.eu/rapid/press-release_IP-15-5699_en.htm, last accessed 07 March 2017.

[28] https://ec.europa.eu/migrant-integration/news/romania-increase-of-assistance-granted-to-asylum-seekers-approved-by-governement, last accessed 07 March 2017.

[29] See *Substantiation Note for Government Decision no 14/2016*, available at http://gov.ro/ro/print?modul=subpagina&link=nota-de-fundamentare-hg-nr-14-19-01-2016, last accessed 07 March 2017.

[30] Based on the research report Oana Iacob, „Rapid Assessment of the Asylum and Migration Policy Area" (unpublished), Oxford Research, 01.08.2016, financed by the Norwegian Financial Mechanism Office.

[31] *Law no 122/ 2006 on asylum in Romania*, available at http://legislatie.just.ro/Public/DetaliiDocument/71808, last accessed 07 March 2017.

[32] *Ibidem.*

4.2. Asylum procedure

4.2.1. Processing the request

Any foreigner on the territory of Romania or at a border-crossing point may lodge an application for asylum. A person becomes an asylum seeker from the moment they request the protection of the Romanian state, in writing or verbally, in front of competent authorities (structures within the General Inspectorate for Immigration/ Border Police/ National Administration of Penitenciaries/ police units)[33].

The asylum request will be processed either through an ordinary procedure or through an accelerated procedure.

The ordinary asylum procedure is structured in two stages, administrative and judicial. In the administrative stage, the applications for asylum are examined on a case-by-case basis by administrative authorities, based on the interview of the asylum seeker, the documents in the personal file and the country of origin information. The administrative stage of the procedure falls within the competence of the Directorate for Asylum and Integration within the General Inspectorate for Immigration. It should last 30 days since the registration of the asylum request, but if it is deemed necessary the time limit may be extended. At the end of this stage, the General Inspectorate for Immigration will issue a decision that either: grants the refugee status; or grants subsidiary protection; or rejects the application for asylum. The possibility of granting subsidiary protection is analyzed if conditions for recognizing the refugee status are not met.

In the judicial stage, asylum seekers whose applications were rejected in the administrative stage may exercise two remedies and their situation shall be examined by the courts of law.

The accelerated procedure is within the competence of the Directorate for Asylum and Integration of the General Inspectorate for Immigration. This procedure is swifter (3 days) and it applies in specific cases of asylum requests that are: evidently unfounded; or submitted by persons who come from countries of origin that are considered to be safe; or submitted by persons who undertook activities that endanger the Romanian national security or the public order. In case the request is rejected, the applicant has one judicial remedy against the administrative decision.

If after the rejection of the asylum request, new elements are found, that did not exist or could not be invoked during the previous asylum procedure, the Directorate for Asylum and Integration from the General Inspectorate for Immigration may grant the applicant access to a new asylum procedure. If the request for a new procedure is approved, a new asylum procedure will start.

4.2.2. Basic rights of asylum seekers during the procedure

The rights of the asylum seekers during the asylum procedure are established by Law no 122/2006, with subsequent modifications and completions and the Methodological Norms for the enforcement of Law no 122/2006, approved by Government Decision no. 1.521/2006 with subsequent modifications and completions. Among the asylum seeker's basic rights are:

- **The right to stay in Romania** until the expiry of a 15 days period from the completion of the asylum procedure, if the request is rejected and protection is not granted[34].
- The right to assistance:

A.Legal assistance

B. Assistance provided by UNHCR and/or NGOs

C. Assistance for interpretation and translation, free of charge

D. Material assistance and accommodation:

– the right to benefit, throughout the procedure, upon request, from material reception conditions, in order to guarantee subsistence and protect the physical and mental health of the asylum seeker, in case he/she does not have the necessary material means[35].

– the right to be accommodated in reception and accommodation centers subordinated to the General Inspectorate for Immigration, until the cessation of the right to stay on the territory of Romania, in case of asylum seekers who do not have the necessary material means of support[36]. Currently, there are 6 such accommodation centers with an overall capacity of 900 places[37].

E. Medical assistance

F. Social assistance

- **The right to work**

– the right to be granted access to the labor market under the conditions laid down by the law for Romanian citizens, after the expiry of 3 months from the lodging of the application for asylum, if the asylum seeker is still subject to the administrative procedure aimed at determining a form of protection, as well as throughout the judicial procedure[38].

- **The right to education**

– the right of minor asylum seekers to be granted access to compulsory education under the same

[33] http://igi.mai.gov.ro/en/content/submitting-application-asylum, last accessed 07 March 2017.

[34] *Law no 122/ 2006 on asylum in Romania,* available at http://legislatie.just.ro/Public/DetaliiDocument/71808, last accessed 07 March 2017.

[35] *Ibidem.*

[36] *Ibidem.*

[37] *Evaluation of the General Inspectorate for Immigration Activity,* Bucharest, 14 February 2017, available at http://igi.mai.gov.ro/sites/all/themes/multipurpose_zymphonies_theme/images/pdf/Prezentare%202016%20%20Animation%20text%20final.pdf, accessed 10 March 2017.

[38] *Ibidem.*

conditions as minor Romanian citizens[39];

- **The right to participate in cultural adaptation activities -** activities that should be organized by the General Inspectorate for Immigration in collaboration with NGOs active in the field of asylum.

4.3. Integration of beneficiaries of a form of protection

4.3.1. General provisions

The refugee status and the subsidiary protection are granted for an undetermined period. Thus, a system encouraging their social integration was created. Its legislative basis is found in Law no 122/2006 and its Methodological Norms, Government Ordinance no 44/2004 and its Methodological Norms.

The specific legislation on integration (respectively GO no 44/2004 with its subsequent modifications) defines social integration as "the active participation of foreigners who were granted a form of protection or a right of residence in Romania and citizens of Member States of the European Union and European economic Area in the economic, social and cultural development of Romanian society in order to prevent social exclusion, respectively to adapt to the conditions of Romanian society"[40]. Thus, the goal of the system should be that of creating a framework (through the involvement of all relevant institutions) that would enable foreigners to actively participate in the economic, social and cultural life[41].

Generally, each institutional actor (Ministry of Internal Affairs, Ministry of Education, Ministry of Labor, etc) is responsible for the integration of the beneficiaries of a form of protection in their field of competence. The General Inspectorate for Immigration provides through its regional structures, specific services aimed at facilitating the integration into Romanian society of persons granted refugee status or subsidiary protection. It also coordinates and monitors activities regarding the process of integration, that fall within the competence of other institutions[42].

4.3.2. Rights of beneficiaries of a form of protection (refugee status, subsidiary protection)

The beneficiaries of a form of protection are issued identification and travel documents, according to their status.

Generally, by virtue of the legal provisions in force, beneficiaries of a form of protection enjoy a treatment equal to the one granted to the Romanian citizens (with the exception of electoral rights and other specific situations). For instance, such equal treatment is granted to them regarding:

- the right to work (although there still are professions regulated by specific legislation, that are not fully accessible to beneficiaries of a form of protection- for example, in order to practice a medical profession in Romania, beneficiaries of a form of protection must either be a family member of a Romanian citizen or have obtained long term residence in Romania);
- the right to education (In order to be integrated into the Romanian education system, minors who were granted a form of protection in Romania benefit from a free of charge basic Romanian language course for a full academic year. While attending the Romanian language courses, minors who were granted a form of protection in Romania also participate in educational activities of a theoretical, practical or recreational nature, organized in schools, free of charge, without their attendance being registered in official records.)43
- the recognition of studies, diplomas, professional qualifications;
- access to social housing;
- access to social insurance, social assistance measures (including child allowance), health insurance;
- access to justice and administrative assistance.

4.3.3. Integration program

In order to facilitate the social integration of the beneficiaries of a form of protection, a series of services and activities are offered through a cooperative effort of public institutions, local communities and nongovernmental organizations active in the field, under the coordination of the General Inspectorate for Immigration, in the form of the integration program. Enrollment in the integration program takes place within 30 days from the granting of a form of protection and generally lasts for 6 months. The program is established and implemented based on the beneficiaries' needs, without any discrimination, by respecting their cultural background[44]. It may include activities such as:

a) "counseling and support activities for ensuring access to the following rights: right to employment, right to housing, right to medical and social assistance, social security, right to education;
b) b) cultural adaptation sessions;
c) c) Romanian language courses"[45].

In addition to that, beneficiaries of a form of protection that are registered and actively participate in the integration program may also be granted a non-

[39] *Ibidem.*
[40] http://igi.mai.gov.ro/en/content/integration-program**,** last accesed 10 march 2017.
[41] *Ibidem.*
[42] Ibidem.
43 Ordinance No. 44 of 2004 on the Social Integration of Aliens Who Were Granted a Form of Protection in Romania, available at http://www.refworld.org/docid/404c6d834.html, art. 10, para. (1) and (2), last accesed 10 march 2017.
[44] Ibidem.
[45] Ibidem, art. 18, para. (2).

reimbursable financial aid (of around 550 RON (120 euros)/person/month) for an initial period of 6 months, with the possibility of extension for another 6 months[46].

5. Latest legal developments in the field of asylum at national level[47]

5.1. The National Strategy on Immigration for the period 2015-2018

The National Strategy on Immigration (approved by Government Decision no 780/2015)[48] establishes the objectives at national level, in the field of migration, for the period 2015-2018, that will be implemented by the Romanian authorities through concrete actions and measure, based on action plans adopted annually. It was drafted in accordance with the priorities set by the European Agenda for Migration. The Strategy was adopted in September 2015 and reflects the main developments at international and EU levels. It has in view an improvement of the migration and asylum system, that currently is not fully equipped to cope with a larger migration flow. As shown above, Romania has been and still is mostly a transit country for migrants, with a rather low number of non-nationals with right of residence on Romanian soil. Nevertheless, Romania's European commitments, the expected Schengen adherence and the regional and international instabilities are expected to lead to an increased migration flow.

On July, the 2nd 2015, the Romanian Government has approved the Memorandum[49] for the implementation of the European Council's Conclusions from the 25th - 26th of June 2015[50], regarding the migration field. The Memorandum enshrines Romania's commitment to take in a quota of 1705 migrants, within the intra-EU relocation scheme, and 80 migrants who have been identified as in need of international protection, within the extra-EU resettlement program.

On the 14th of September 2015, the Justice and Home Affairs Council within the EU adopted a decision "establishing a temporary and exceptional relocation mechanism over two years from the frontline member states Italy and Greece to other member states"[51]. The mechanism envisioned the relocation of 40.000 persons in clear need of international protection. On the 22nd of September 2015, the European Union interior ministers met again in the Justice and Home Affairs Council and approved a plan to relocate 120,000 migrants "in clear need of international protection" over a period of two years from the frontline states Italy, Greece and Hungary to other 22 EU countries[52]. Through this plan, quotas were established based on "the size of economy and population of each state, the unemployment rate and the average number of asylum applications„[53]. The decision was taken by majority vote.

According to the relocation scheme, Romania was expected to receive 2475 people during the first year: 585 from Italy and 1890 from Greece[54]. Another quota of 2.171 migrants would be allocated to Romania in the second year. So, in September 2015, Romania was expecting to receive a total of 6.351 migrants within a time span of 2 years. Romania, initially has "sustained a position against the mandatory quotas, expressing its solidarity with other EU states, but, nevertheless, explaining that, for the time being, the "physical limit" of reception for Romania was 1785 people, with the possibility of improving and increasing its capacity in the future"[55].

In such a context, one of the 4 general strategic objectives set out by the national Strategy for Immigration for the period 2015-2018 was the improvement of the national asylum system, in order to increase its efficiency and ensure its conformity with the legal national, European and international standards.

The strategic objectives set out under the above mentioned general objective are:

1. continuing to ensure access to the asylum procedure and fully respect the principle of *non-refoulement;*
2. processing asylum requests in an efficient manner and in conformity with the existent legal national, European and international standards;
3. effective fight against the abuse of the asylum procedure;
4. ensuring a dignified standard of living for asylum seekers, in accordance with the national, European and international legal standards;
5. ensuring compatibility and interoperability with other EU Member States asylum systems, coordination with the European Asylum Support

[46] Methodological Norms for the implementation of Law no 122/ 2006, available at http://legislatie.just.ro/Public/DetaliiDocument/75384, art. 60, para. (1), last accessed 10 March 2017.

[47] Data contained in the research report Oana Iacob, „Rapid Assessment of the Asylum and Migration Policy Area" (unpublished), Oxford Research, 01.08.2016, financed by the Norwegian Financial Mechanism Office.

[48] *National Strategy on Immigration for the period 2015 – 2018*, available at http://www.monitoruljuridic.ro/act/strategie-na-ional-din-23-septembrie-2015-privind-imigra-ia-pentru-perioada-2015-2018-annex-nr-1-emitent-guvernul-173049.html, last accessed 10 March 2017.

[49] http://www.cdep.ro/interpel/2015/r7942A.pdf, last accessed 10 March 2017.

[50] *European Council Conclusions, 25 – 26 June 2015*, available at http://www.consilium.europa.eu/en/press/press-releases/2015/06/26-euco-conclusions/, last accessed 10 March 2017.

[51] http://www.consilium.europa.eu/en/meetings/jha/2015/09/22/, last accessed 10 March 2017.

[52] http://europa.eu/rapid/press-release_MEMO-15-5698_en.htm?locale=en, last accessed 10 March 2017.

[53] https://ec.europa.eu/migrant-integration/news/romania-refugee-crisis-relocation-quotas-and-accomodation-capacity, last accessed 10 March 2017.

[54] *Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece*, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015D1601, last accessed 10 March 2017.

[55] https://ec.europa.eu/migrant-integration/news/romania-refugee-crisis-relocation-quotas-and-accomodation-capacity, last accessed 10 March 2017.

Office, as well as consolidating and improving the quality of the asylum procedure and of the measures facilitating the integration of beneficiaries of a form of protection in the Romanian society.

6. unitary and coherent management of situations of influx of irregular migrants, caused by political, social, economic or military crisis, and efficient management of Romania's participation in the EU resettlement and relocation mechanisms[56].

5.2. Subsequent developments

5.2.1. Action Plan for 2015 and other developments

The National Strategy for Immigration for the period 2015-2018 was approved by Government Decision no 780/2015, alongside with the afferent Action Plan for the year 2015.

The Action Plan[57] established the concrete measures to be taken for the implementation of the general and specific strategic objectives, the time frame, the responsible institutions and the available funding. Many of the measures referring to the field of asylum - ranging from the improvement of the reception conditions (increasing accommodation capacity, better responding to needs of vulnerable groups, providing material, medical and social assistance to asylum seekers etc.) to enhancing inter-institutional cooperation and increasing the level of knowledge and information on asylum issues, at the level of local authorities - depend to a great extent on external funding from the EU (especially the Asylum, Migration and Integration Fund – a financial instrument set up for the period 2014 - 2020[58]) and on the cooperation with NGOs active in this field.

In October 2015, after some informal meetings with the representatives of the civil society, the Romanian Government announced its intention to create a platform of cooperation and dialogue with NGOs in order to better manage the efforts undertaken with the purpose of facilitating the social integration of refugees. Through Prime-Minister Decision no 312 from the 27th of November 2015, the Inter-ministerial Committee "the National Coalition for the Integration of Refugees" was founded. The Committee was supposed to meet monthly and whenever it was deemed necessary, with representatives of NGOs as permanent guests.

One of Romania's top priorities, according to the Strategy and its 2015 Action Plan, was the modification of the national legislation on asylum as to fully transpose the legal instruments that are the basis of the Common European Asylum System. Romania has completed the transposition of the Common Procedures Directive (Directive 2013/32/EU) and the Reception Conditions Directive (Directive 2013/33/EU) through the Government Decision no 14/2016[59], adopted on the 19th of January 2016, after being partially transposed in December 2015, through Law no 331/2015. One of the most important modifications was brought to the provisions regulating the material and financial assistance granted to asylum seekers, that hadn't been changed since 2006 and were below the limits of subsistence. Between 2006 and January 2016, asylum seekers received, upon request, food within the limit of 3 RON (0.67 euro) per person per day, accommodation within the limit of 1.8 RON (0.40 euro per person per day - if the asylum seeker is not housed in one of the reception and accommodation centers subordinated to the General Inspectorate of Immigration - and other expenses within the limit of 0.6 RON (0.13 euro) person per day. After the modification operated through Government Decision no 14/2016, "the asylum seeker shall receive, upon request, food within the limit of 10 RON (2.23 euros) per person per day, clothing within the limit of 67 RON (14.92 euros) per person per summer season and 100 RON (22.27 euros) per person per winter season and other expenses within the limit of 6 RON (1.34 euro) per person per day"[60].

Also, another important legislative development was the adoption in November 2015 of Government Emergency Ordinance (GEO) no 53/2015 for the establishment of measures applicable in case of a massive migration flow at the Romanian state border[61]. "According to this GEO, in such a case, by order of the general inspector, head of the Romanian Border Police, one or several integrated centers implementing activities for state border control, protection of public health and clarification of the legal status of foreign nationals crossing the border, may be founded. Foreign nationals that are object to such activities within the above mentioned integrated centers will be granted, free of charge, accommodation, food, medical assistance and personal hygiene materials, with consideration to their opinion and personal religious

[56] *National Strategy on Immigration for the period 2015 – 2018*, available at http://www.monitoruljuridic.ro/act/strategie-na-ional-din-23-septembrie-2015-privind-imigra-ia-pentru-perioada-2015-2018-annex-nr-1-emitent-guvernul-173049.html, last accessed 10 March 2017.

[57] *Action Plan 2015 for the implementation of the National Strategy on Immigration for the period 2015 – 2018*, available at http://legeaz.net/monitorul-oficial-789-2015/hg-780-2015-strategie-nationala-imigratia/anexa-nr-2-plan-de-actiune-pe-anul-2015, last accessed 12 March 2017.

[58] https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders/asylum-migration-integration-fund_en, last accessed 12 March 2017.

[59] http://gov.ro/ro/guvernul/sedinte-guvern/modificari-in-reglementarea-asistentei-de-care-pot-beneficia-in-romania-solicitantii-de-azil, last accessed 12 March 2017.

[60] https://ec.europa.eu/migrant-integration/news/romania-increase-of-assistance-granted-to-asylum-seekers-approved-by-governement, last accessed 22 February 2017.

[61] *Government Emergency Ordinance (GEO) no 53/2015 for the establishment of measures applicable in case of a massive migration flow at the Romanian state border*, available at http://legislatie.just.ro/Public/DetaliiDocument/172739, last accessed 10 March 2017.

and cultural profile, regardless of their legal status"[62] On the 27th of April 2016, was published a draft Order of the Romanian Minister of Internal Affairs regarding the supply of food, the equippement of the accommodation locations and the provision of personal hygiene materials to foreign nationals that are object to activities carried out within the integrated centers mentioned by GEO no 53/2015[63]. "The draft order is meant to establish minimum measures in order to ensure a standard of living that guarantees subsistence and protects the physical and mental health of foreigners"[64].

5.2.2. Action Plans for 2016 and 2017

The Draft Action Plans for 2016 and 2017[65] target, among others, the improvement of reception conditions (with a focus on vulnerable groups also, as, at the practical level, the system is far from actually responding to their needs) and ensuring the access of asylum seekers and beneficiaries of a form of protection to their basic rights, facilitating integration of beneficiaries of a form of protection (modifications of Government Ordinance no 44/2004 on integration are also being prepared), enhancing inter-institutional cooperation (including through the Inter-ministerial Committee "the National Coalition for the integration of refugees") etc. - with great support from NGOs and the same financial focus on AMIF and external funding.

As to the stage of the implementation of the EU relocation scheme (that actually triggered the latest developments in the field of asylum), according to the General Inspectorate for Immigration, in 2016, 568 people were relocated from Greece (523) and Italy (45)[66].

6. Conclusions

Romania's asylum system, from a legislative point of view, is in accordance with the European legislation. However, since the country has a rather low number of migrants, there hasn't been an actual incentive to practically develop the system until now. The current international and European context have put it under scrutiny nonetheless, revealing its shortcomings and trigerring the necessity to adapt it even further to a prospective increase of the migration flow. An improvement of reception conditions for asylum seekers, and better interinstitutional cooperation in order to ensure access to rights and increase the integration perspectives for beneficiaries of a form of international protection in Romania are among the expectations to be fulfilled in the near future. But such improvements must, nevertheless, go beyond the letter of the law and eventually transpose themselves into good practices in order to prove their efficiency.

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[62] https://ec.europa.eu/migrant-integration/news/romanian-government-prepares-measures-to-accommodate-migrants-in-case-of-massive-migration-flows, last accessed 10 March 2017.

[63] Draft Order of the Romanian Minister of Internal Affairs regarding the supply of food, the equippement of the accommodation locations and the provision of personal hygiene materials to foreign nationals that are object to activities carried out within the integrated centers mentioned by GEO no 53/2015, available at http://www.mai.gov.ro/documente/transparenta/OMAI%20norma%20hrana%20straini.pdf, last accessed 10 March 2017.

[64] https://ec.europa.eu/migrant-integration/news/romanian-government-prepares-measures-to-accommodate-migrants-in-case-of-massive-migration-flows, last accessed 10 March 2017.

[65] http://www.mai.gov.ro/index05_1.html, last accessed 10 March 2017.

[66] Evaluation of the General Inspectorate for Immigration Activity, Bucharest, 14 February 2017, available at http://igi.mai.gov.ro/sites/all/themes/multipurpose_zymphonies_theme/images/pdf/Prezentare%202016%20%20Animation%20text%20final.pdf, accessed 10 March 2017.

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ATHLETES CITIZENSHIP ISSUE IN PUBLIC INTERNATIONAL LAW

Anca - Maria IONESCU*

Abstract

International Sports has not been spared the effects of globalization, and among these is the migration of athletes from one country to another. Lately nationality of athletes has become a major issue for professional sports and the principles on which it is based. The problem arose from the lack of a clear and consistent rules on sporting nationality for athletes representing a country in international competition. For a long time, the mere possession of nationality was sufficient to check this link to a particular state. This thesis, outlines how the rules for each sport varies quite considerably, from sports that allow a high degree of flexibility and movement for Olympics to sports that have somewhat restrictive regulations such as football or very restrictive like tennis. It also emphasizes the advantages and disadvantages of quick naturalization and provides some ideas for how this issue can be handled.

Keywords: *sport nationality, international public law, sports law, athletes citizenship*

1. Introduction

1.1. Introduction

Citizenship can be defined as "the legal bond between a person and a state." This definition is, inter alia, having regard to Article 2 (a) of the European Convention on Nationality (1997). Article 2 (a) immediately adds the words "and does not indicate the person's ethnic origin." In other words, citizenship is a legal concept and not a sociological concept or ethnicity.

Sport nationality (or: Citizenship in sport), is a complex matter with various manifestations. The main issue to be addressed in this thesis is how the so-called national teams representing the country in international competitions (Olympics, World and regional Championships and other international sporting events) are composed on the basis of a legal citizenship or their members are "special sports people" which means that an athlete is allowed to participate in the national team without meeting additional criteria of citizenship as a regular person should. The same question also concerns individual athletes representing the country in international competitions.

There are also national laws which contain specific rules for athletes who will represent the country, so it cannot be said that the term sports citizenship jurisdiction rests solely in organized sport.

In the context of the problems that were created by what may be called accelerated naturalization, changes to citizenship were becoming increasingly frequent in sports, for a number of reasons resulting in particular from “the desire to assert itself on the international stage in some countries and / or willingness of athletes to benefit from the best material conditions possible[1]”.

The rules for obtaining citizenship varies considerably from one country to another, which created an inequality sometimes unjustified from an athlete to another.

International sports authorities have been overwhelmed by this marginal phenomenon once it became suddenly a major problem in a large number of sports. They have to analyse each case to prioritize the most urgent ones first, while trying to maintain a certain level of fairness sports. However, the time has come to find comprehensive solutions as unique as valid for long term as where the Kalou Case (2006), an appropriate benchmark on this issue.

Discrimination on grounds of nationality is prohibited under EU law, which establishes the right of every citizen of the Union to move and reside freely within Member States. Also, EU legislation seeks to eliminate any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

Equal treatment also concerns citizens of States which have signed agreements with the EU that contain non-discrimination clauses, and who are legally employed in the territory of Member States (" non-EU nationals ").

2. Problema cetățeniei persoanelor care participă la competițiile olimpice și sportive internaționale

Sport performance has not been spared by the effects of globalization, and among these is the migration of athletes from one country to another.

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[1] Accelerated naturalisation was the core issue in the Scientific Conference on Citizenship in sports. The importance of this conference was widely illustrated by participating in panel terminating the IOC President, Jacques Rogge, senior representatives of four international sports federations (e.g., basketball, ice hockey, skating and skiing).

Lately athletes citizenship has become a major issue for professional sports and the principles on which it is based. The problem arose from the lack of a clear and consistent rules on citizenship for sportsmen representing a country in international competitions.

Contrary to anti-doping regulations, matters regarding athletes citizenship has not reached a consensus on these regulations and is quite difficult to harmonize the laws of each member country of the IOC.

For a long time the mere possession of nationality was sufficient to check this link to a particular state. Since the 1990s, however, this criterion has been questioned, especially because each state has its own legislation relating to the granting of citizenship, resulting in inevitable inequalities. Thus there were cases in which citizenship was granted very easily, in a very short period of time, while other cases waited for years.

Given these differences, each international federation and each organizer of multi-sport competitions, including IOC adopted its own rules regarding the nationality of athletes, each with their own objectives to ensure continuity of their competitions, but also to avoid issues related to mobility and migration and to stop athletes migrating on financial considerations.

Despite the lack of harmonization, most international federations agree that citizenship is the primary state criterion used to judge the eligibility of athletes. This, however, is far from being the only consideration, and therefore, does not ensure the eligibility of athletes. For example, football players in the United Kingdom are all British citizens, but cannot claim to be eligible in each of the four federations 'national' located in the country.

Depending on the country they want to represent and the sport, athletes must follow certain rules, primarily rules are taken into account by the receiving State and the international federations governing more or less the matter. It is important to note that International Federations rules are consistent with the rules dictated by the International Olympic Committee and on participation in international competitions.

Regarding national legislation athletes can be employed as ordinary citizens and follow regular procedures for obtaining citizenship or hold a special status of athletes guaranteed by the national federation and follow special procedures for awarding citizenship if they are covered in that State.

In general the change of nationality for an athlete comes from a desire to participate in the Olympics which, unlike some national competitions and international competitions require the athlete to hold citizenship of the state they represent.

There are two types of migration of athletes who may have both benefits and disadvantages for both the host country and for athletes.

- The case of an athlete of a country poor or less developed economically but well developed in terms of sporting performance migrating to an economically developed country but not so important in terms of sport performance.
- The case of an athlete from a developed country migrate to a less developed country in terms of sporting performance.

In the first case, the examples belong mostly from former Soviet bloc countries or in Africa, athletes generally migrating to countries such as U.S., Germany or France. The main reason being the lack of financial and sometimes representation in international sport concerned of the receiving country.

So this behaviour should be viewed from two perspectives, that of the receiving country and the athlete that is migrating.

Olympics and other international sports events are an opportunity for countries to show their supremacy peacefully, so they developed the practice of borrowing athletes from countries with tradition in a particular sport in those with no tradition and notable results; or individual performance of the athlete facilitates its access in a country wishing to become notable in that sport.

The advantages arise if the receiving country wants to develop a sport with tradition and borrows one or more senior athletes with notable performances in international competitions and the Olympic Games. Thus the athlete can guarantee a place on the Olympic podium which entails advertising, sponsorship and new practitioners or followers of the respective sports. For athletes in the host state the presence of a technically superior athlete with classifications among the first places in the Olympics is a standard to achieve and facilitate easier access to the Olympics by eliminating qualifications (e.g. for specific sports. Skating).

Disadvantages arise when instead of trying to develop that sport states often resort to borrowing elites from other countries.

For athletes advantages are usually financial, migrating to countries in which they are offered the best conditions for practicing sports. But while there are practices to discourage this type of migration such as regulations of the international federations and also national federations that impede an athlete to participate in international competitions for a number of years, during which the athlete lose touch with international standards in the performance.

In the second case the migration phenomenon generally occurs in athletes from countries where competition and standards are very high that they do not meet requirements and standards necessary to represent the country of origin in international competitions, so they migrate to countries in which the standards and competition is weaker to qualify for spots allocated to them in international competitions and Olympic Games. Most often they choose to train further in the home.

The disadvantages are similar to those in the first case but with effects more serious for athletes and sports development in the host country, because in most

cases, resources are limited and they come to the athlete of the developed country and not for the development and promotion of sport.

2.1. Special rules stated by states

When international law refers to citizenship, this reference should be understood as a reference to the general legal nationality of a state acquired under a purchase reason offered by State Citizenship Act. It is, for example, enacted by Article 15 of the Universal Declaration of Human Rights which states that everyone has the right to a nationality and that no one shall be arbitrarily deprived of his nationality nor to be denied the right to change his nationality. In addition to this general legal citizenship indicating formal legal bond between a person and a State Member, a state may, for special purposes, introduce a so-called "functional citizenship". If for some purposes functional citizenship is introduced reasons for the acquisition and loss of this specific citizens must be defined in detail**.**

According to De Groot the answer to the question if sports needs to develop a functional autonomous citizenship was desirable. In principle, the answer was negative. The rules for acquisition and loss of functional citizenship are a very complicated task, if someone does not want to use for example just a single criterion as birthplace for his functional nationality. Even criterion that is considered aa a national of the country of habitual residence needs considerable further elaboration, because the definition of residence differs from country to country. However, there was a reason attractive for the development of a functional citizenship, that would come very close to a separate sports nationality, but it was in fact a notion independent, so it was not necessary to regulate the reasons for the acquisition and loss detail.

To determine whether a person qualifies to represent a country in international sports competitions is used as a basic requirement of citizenship is the general of that state, but added requirements, further ensuring that citizenship is the manifestation of a genuine link between the state and the athlete concerned.

De Groot notes that in the international community of states there is an enormous variety of reasons and grounds for loss of citizenship acquisition. An indirect consequence of this for sports was unequal competition for states and shocking inequalities between athletes. There were also inequalities caused by differing attitudes of states regarding rapid naturalization. De Groot was of the opinion that, in all cases where a genuine link is missing, an additional residence requirement would be reasonable. The next question was, of course, what would be the required period of additional stay. He argued that the required period of habitual residence should be shorter than the smallest residence requirement for regular naturalization, which was three years.

If at the time of naturalization this condition was not fulfilled, a naturalized athlete should be eligible to represent his new country after two years they had lived on its territory (the period of stay directly before and after naturalization may be added). It should not be necessary for two years if the athlete had previously naturalized a continuous and uninterrupted residence of five years in that country.

Such a continuous period of residence in the past guaranteed the existence of a genuine link between the country and the newly acquired citizenship athlete. In these circumstances, there is no need to require an uninterrupted habitual residence two years before and / or after the time of naturalization. This rule of five years of residence was realistic imposed, given that young athletes have received frequent part of their education, sport and made a part of their sports careers in a country other than that in which they were born and maybe raised to a certain age[2].

2.1.1. Citizenship changes and disputes

One of the most famous cases of change of citizenship for the Olympics was Zola Budd, a South African runner who emigrated to the UK because there was a ban on Olympics apartheid in South Africa. Budd was eligible for British citizenship because her grandfather was born in Britain but British citizens accused the government of accelerated citizenship for her[3].

Other notable examples include runner Bernard Lagat of Kenya, who became US citizen in 2004. The Constitution of Kenya asked to give up Kenyan citizenship when becoming a citizen of another nation. Lagat competed for Kenya at the 2004 Athens Olympics, even though he has become a citizen of the United States. According to the Kenyan government, he was not a citizen, endangering the silver medal. Lagat said he began the process of citizenship in late 2003 and did not expect to become a US citizen until after the Athens Games[4].

Basketball player Becky Hammon was not considered for the Olympic team of the United States, but wanted to play in the Olympics, so she emigrated to Russia, where she already played in an internal league during the offseason of WNBA. Hamon received criticism from some Americans, including US national team coach, even being called unpatriotic[5].

Athletes born abroad contributed to the number of Olympic medals won by the United States since 2000 in a modest trend but increasing blurring national boundaries of the competition.

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[2] De Groot 2006, pp. 3-4, 8.
[3] Rory Carroll (24 February 2003). "What Zola Budd did next". *The Guardian*. London. Retrieved 27 November 2011.
[4] Lagat a runner without a country". Cool Running 2011.
[5] "Olympics opportunity too much for Hammon to pass up – Olympics". ESPN. 5 June 2008.

USA are a magnet for attracting veteran athletes to switch citizenship, according to analysis by The New York Times. Since 1992, about 50 athletes who competed in international events to their home countries (including 10 for China) have become citizens of the United States and Olympians, winning eight medals for the US. This practice has implications for American athletes who are excluded from precious Olympic areas and was also a reason for conflict between competing nations.

The International Olympic Committee requires a waiting period of three years, for an athlete who change their citizenship, although it will grant a waiver if the athlete is native and national federations give their consent.

Two American citizens have received permission from IOC: Equestrian Phillip P. Dutton, who won two gold medals for Australia; and canoeist Heather Corrie, who is also a British citizen. (Statistics The Times did not include people with dual citizenship or athletes who immigrated as children.)

On the other hand, among American athletes there were voices that questioned the way government officials to expedite the eligibility of foreign athletes on acquiring US citizenship, which entails and their ability to represent the United States at the Olympics. Thus increasing the difficulty of national qualifications for the Olympic team.

Few of the immigrants said they had chosen exclusively the US to continue their athletic career. Opportunity, freedom and education are defining the main reasons thereof.

Foreign high performance athletes advantage of EB-1 visa, the visa given to people with extraordinary abilities. This meant for renowned scientists, artists and athletes moving fast toward the front of the line for permanent residency. The US government has issued 2749 visas for foreign wives and their children in the fiscal year ended September 30, 2007, and statistics do not indicate the number of athletes who have benefited from this target.

An athlete who marries a US citizen can apply for citizenship for at least three years after obtaining permanent residency green cards, otherwise requiring a minimum of five years.

Since 2000 seven Olympic medals have been won by five immigrants who chose to represent the United States at the Olympics. They are of course considered elite in their countries and even criticized the decision to change nationality such as gymnast Annia Hatch from Cuba and synchronized swimmer Anna A. Kozlova from Russia, the United States brought by two Olympic medals each in 2004; Magnus Liljedahl a Swedish tennis player Monica Seles and two other medals in Yugoslavia in 2000 in Sydney, Australia; also Tanith Belbin and ice dancer from Canada at the 2006 Winter Olympics in Turin, Italy.

In the Netherlands, the situation was such that under Dutch law (Article 10), the implementing provisions of this law include special rules apply also for top athletes. According to the so-called rules of elite athletes achieving an exception is justified when it turns out that accelerated naturalization serve " a cultural interest to Netherlands ", which included also an interest in Dutch sports, which might happen with the representation of the Netherlands by participating in international sports competitions and games.

There is also a circular detailed of the Ministry of Health, Welfare and Sport, on 9 April 1999 to organizations of national sports regarding this matter. These guidelines determined the level of sports performance minimum needed to be eligible for accelerated naturalization.

Preferably, the athlete in question should also be role model for young people or formatting a campaign of fair play. During the proceedings, the witness indicated nationality law applicability for top athletes manifest regulations that allow accelerated naturalization notwithstanding the standard requirements.

The court ordered the minister to reassess its decision and improve the rationale behind it, following which the Minister appealed to the State Council as the highest court.

2.2. Special rules dictated by the International Olympic Committee regarding citizenship

ART.41 Nationality of Competitors

1. Any competitor in the Olympic Games must be a national of the country of the NOC which is entering such competitor.

2. All matters relating to the determination of the country which a competitor may represent in the Olympic Games shall be resolved by the IOC Executive Board[6].

Art. 41 of the Olympic Charter requires that an athlete be a citizen of the country for which they compete. If an athlete has dual citizenship, it can compete for either country as long as three years have passed since the athlete competed for the former country. However, if the NOC[7] and the international federations involved agree, then the IOC Executive Board may reduce or waive this period. This waiting period exists only for athletes who competed previously for one nation and want to compete for another. IOC is concerned only about citizenship issues related to cases in which individual nations have granted citizenship to athletes[8].

[6] "Olympic Charter" (PDF). Lausanne, Switzerland: International Olympic Committee. July 2011. Retrieved 27 July 2012.
[7] National Olympic Comitee.
[8] Jump up, Shachar 2011, pp. 2114–2116.

3. International federations regulations on citizenship athletes

One of the biggest challenges for the international federations is to determine when an athlete's situation requires a change to the eligibility criteria or not, ethically. As such, we must distinguish between athletes that have developed sports skills, after being naturalized and athletes who were naturalized because of their sporting skills. This issue is not easily legislated to take into consideration and differentiate these two cases. The first group was almost always penalized, leaving the door open of the second group to take advantage of the system.

The most controversial issues relate to athletes who are forbidden to change nationality, like in most team sports. Participants representing several of the largest international federation, at the Congress of Sports Citizenship held from 10 to 11 November 2005, concluded that the ban is indeed illegal. These prohibitive rules are still in effect in many international sports federations.

Another aspect of sport citizenship is worth examining the quotas set for the number of naturalized athletes allowed to participate in a national team. This means that some international federations would limit the number of athletes who have changed their nationality to their representative teams. This practice may conflict with the Court of Justice of the European Community, which prohibits discrimination linked to the time of acquiring the nationality of one of its Member States.

Overlapping rules governing citizenship is a challenge to the international federations. This means that athletes must undergo in parallel home state regulations, rules and regulations of international federations, multi-sports competition organizers, such as CIO. Unfortunately, these rules do not always coincide. The following would occur: athletes who have changed citizenship are eligible to represent their new country in accordance with international federations, but paradoxically, are not eligible to participate in the Olympics. The reverse is also possible. This lack of harmonization can give athletes the feeling of the victim and in the future could lead them to pursue legal action to be considered eligible to compete.

By their regulations, international federations seeks uniformity, regularity and equality, in order to protect the interests of their competitions. But this does not authorize the international federations to take measures to achieve them. International federations and multi-sports competition organizers must balance the interests and values of their legitimate rights of athletes. Each change of citizenship does not necessarily contradict the spirit of sport**.**

3.1. International Handball Federation (IHF)

International Handball Federation regulates the issue of changing citizenship in The Players Eligibility Code published on 8 July 2014 in accordance with art. 41 of the Olympic Charter.

Chapter VI, relating to athletes citizenship who are part of the national team, regulates the conditions that are required to be part of the national team, namely:

ART. 6 National Players

6.1 National team players shall meet the following conditions:

a)Citizenship of the country concerned. b)They shall not have played in any national team of another country in the three years preceding their first appearance in the national team in an official match. Official matches are considered to be: the qualifying matches for a continental championship, matches in a continental championship, qualifying matches for IHF World Championships and Olympic Games, matches in IHF World Championships and Olympic Games[9]

Eligibility Code also regulates the situation of players with two or more nationality, enabling them to choose the country whose national team to represent.

6.2 Player eligibility in case of multiple nationalities

A player who holds more than one nationality and who complies with 6.1., is eligible to officially represent one of those countries if:

a) he was born in the territory of the federation concerned or b) his biological mother or biological father were born in the territory of the federation concerned or c) he has been living in the territory of the federation concerned for more than 24 months in any period of his life.

The latter regulation enables the professional players who play very often for teams from countries other than their native country, to naturalise much easier in terms of legislation of the international federation, evithat the rules state he wishes to naturalise hold supremacy.

An interesting article is art. 6.3 limiting changing of citizenship at once, this article is interesting because it does not limit the express change nationality but limits the number of federations which can be ascribed to an athlete, creating a special body to resolve the situation where a federation is dissolved.

6.3 Change eligibility to play for a National Federation

It is only permitted to change the National Federation and thus to obtain eligibility to play for a new national team one time.In case of dissolution of an existing federation or a constitution of a new one, the IHF shall create a separate body to examine the cases should disputes over eligibility arise.

Another important aspect covered by IHF in chapter V of the Players Eligibility Code art.5.1-5.4 is the procedure whereby a player can be transferred from one national federation to another. This transfer is

[9] Players Eligibility Code, IHF 8 July 2014.

attested by International Transfer Certificate approved by IHF, requiring written approval of both federations involved and date of last participation as a player for the national team, the federation confirmation in writing where the athlete played.

3.2. International Football Federation (FIFA)

FIFA published on 18 June 2008 a statement addressed states federations explaining how to apply the rules concerning the eligibility for players who want to represent a country other than the one they are currently representing or for players who already own two citizenships[10].

Art.15 Principle

1. Any person holding a permanent nationality that is not dependent on residence in a certain country is eligible to play for the representative teams of the Association of that country. 2. With the exception of the conditions specified in article 18 below, any Player who has already participated in a match (either in full or in part) in an official competition of any category or any type of football for one Association may not play an international match for a representative team of another Association.

Unlike IHF rules, FIFA clearly defines the type of citizenship that player must hold to represent a particular state. The expression used in the text of the law is permanent nationality, which means that nationality should not be subject to a certain residence time the athlete should reside in that State.

Article 15, paragraph 2 defines the framework norm that allows exceptions for situations presented in art. 18 is important to note that the strict nature of this rule limits the right of players to represent another national team if they were part of a particular team representatives, regardless of the age or type of football played. To clarify the content of these regulations it should be noted that they relate to international competitions between teams representing federations states for example EURO, World Cup or Olympics, where teams representing Member States and not some clubs.

FIFA further regulation is more stringent than the IHF making it tougher for players eligibility requirements than other international sports. E.g:

Art.16 Nationality entitling players to represent more than one Association

1. A Player who, under the terms of art. 15, is eligible to represent more than one Association on account of his nationality,may play in an international match for one of these Associations only if, in addition to having the relevant nationality, he fulfils at least one of the following conditions:(a) He was born on the territory of the relevant Association;(b) His biological mother or biological father was born on the territory of the relevant Association; (c) His grandmother or grandfather was born on the territory of the relevant Association;(d) He has lived continuously on the territory of the relevant Association for at least two years.2. Regardless of par. 1 above, Associations sharing a common nationality may make an agreement under which item (d) ofpar. 1 of this article is deleted completely or amended to specify a longer time limit. Such agreements shall be lodged withand approved by the Executive Committee.

Regulations retain the same note as the IHF and does not cover national member federations but their subordinate.

Rules art. 17 refers to the acquisition of new citizenship for athletes conditions of this article are similar to Article 16, with one exception regarding the period of time that the athlete must be resident in that state. This time period has been extended to 5 years and the athlete must be at least 18 years old after the passage of time .

Art.17 Acquisition of a new nationality

Any Player who refers to art.15 par. 1 to assume a new nationality and who has not played international football in accordance with art. 15 par. 2 shall be eligible to play for the new representative team only if he fulfils one of the followingconditions:

(a) He was born on the territory of the relevant Association;(b) His biological mother or biological father was born on the territory of the relevant Association;(c) His grandmother or grandfather was born on the territory of the relevant Association;(d) He has lived continuously for at least fi ve years after reaching the age of 18 on the territory of the relevant Association. .

Implementing the rules of FIFA statutes contain regulations concerning the exchange federation represented in the article 18.

Art.18 Change of Association

1. If a Player has more than one nationality, or if a Player acquires a new nationality, or if a Player is eligible to play for several representative teams due to nationality, he may, only once, request to change the Association for which he is eligible to play international matches to the Association of another country of which he holds nationality, subject to the following conditions:

(a) He has not played a match (either in full or in part) in an official competition at "A" international level for his current Association, and at the time of his first full or partial appearance in an international match in an official competition for his current Association, he already had the nationality of the representative team for which he wishes to play.

(b) He is not permitted to play for his new Association in any competition in which he has already played for his previous Association.

2. If a Player who has been fielded by his Association in an international match in accordance with art.15 par. 2 permanently loses the nationality of that country without his consent or against his will due to a decision by a government authority, he may request

[10] Players and Officials Code of FIFA.

permission to play for another Association whose nationality he already has or has acquired. 3. Any Player who has the right to change Associations in accordance with par. 1 and 2 above shall submit a written, substantiated request to the FIFA general secretariat. The Players' Status Committee shall decide on the request. The procedure will be in accordance with the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber. Once the Player has filed his request, he is not eligible to play for any representative team until his request has been processed.

The above rules clearly illustrate that the procedure is followed in case of change of citizenship, as can be seen from the text shown above rules imposing restrictive conditions are quite difficult to change by state representative. Even if the ban to change his nationality more than once was declared illegal by the Conference on Athletes Citizenship 2015, this rule still appears within the regulations of the International Federations.

Legal texts are generally addressed to federations because the latter are deemed responsible for the eligibility of athletes they represent.

3.3. International Basketball Federation (FIBA)

Statute of the International Basketball Federation includes regulations related to fair play, how to organize national federations, rules on the status of professional players (in team sports, they have a different status from amateur players) but also rules relating to athletes citizenship that are part of national teams.

General Principles contain a unique rule that defines different rules for certain areas delineated and defined by the General Council of FIBA[11].

Art.12 General priciples

If necessary for reasons of mandatory international law, the Zones are authorised to draw up specific regulations applicable to club competitions within the Zone in question. Such regulations are subject to the prior approval of the FIBA Central Board prior to their implementation.

Art.13 Players with Two or More Nationalities

Any player with two legal nationalities or more, by birth or by naturalisation, may choose at any age the national team for which he wishes to play. Any such choice must be made in a written declaration to FIBA. This provision applies also to any player having acquired legal nationality by birth, or having the right to acquire a second nationality at birth, but who does not lay claim to this right until a given time in the future[12].

Unlike FIFA regulations and IHF, FIBA limits the number of people who have acquired citizenship of naturalized or by any other means by the age of 16.

Art.21. a. A national team participating in a Competition of FIBA may have only one player on its team who has acquired the legal nationality of that country by naturalisation or by any other means after having reached the age of sixteen (16). This provision applies also to any player having the right to acquire a second nationality at birth but who did not lay claim to this right until after having reached the age of sixteen (16).

b. For purposes of letter (a) above and in the event of doubts, any player claiming to have acquired a legal nationality before having reached the age of sixteen (16), without presenting the respective passport with a date of issue before the player's sixteenth birthday, requires a decision by the Secretary General confirming that he does not fall under the restriction of letter (a) above. In taking this decision the Secretary General shall take into account the following criteria:

-the number of years during which the player has lived in the country, for the national team of which he wishes to play;

-the number of seasons during which the player has participated in domestic competitions in the country of the national team for which he wishes to play;

-any other criteria capable of establishing a significant link between the player and the country, for the national team of which he wishes to play.

FIBA defines an age by which a player can exercise the right to acquire a new nationality by imposing a restriction contrary to international law, we can assume that this limitation has emerged through evolution in the performance of athletes at early age .

Another distinction in terms of age is contained in the regulations of art. 22-23.

Art. 22 A player who has played in a main official competition (see article 2-1) of FIBA before reaching his seventeenth (17) birthday may play for a national team of another country if both national member federations agree; in the absence of an agreement the Secretary General decides.

Art.23 A player who has played in a main official competition of FIBA (see article 2-1) after having reached his seventeenth (17) birthday may not play for a national team of another country. However, in exceptional circumstances the Secretary General may authorise such a player to play for the national team of his country of origin if he is ineligible to play for such country according to this article 3-23 and if this is in the interest of the development f basketball in this country. An administrative fee as stipulated in article 3-305 and decided by the Secretary General is payable to FIBA

Exceptional circumstances which require the authorization of the Secretary-General may arise lawsuits based on discrimination, because there is no uniform rule on such emergencies.

[11] Eligibility and nationality status of players FIBA.

[12] Note: for exceptions see articles 3-20 and 3-21 of the FIBA Book 3.

3.4. International Skating Union(ISU)

Unlike the regulations contained in the statutes TEAMS team sports, individual sports enjoy lighter regulation. This lightness appeared likely to facilitate access to international competitions athlete. Novelty appears the need for an authentication certificate issued by ISU under certain conditions[13].

A. Clearance Certificate is required for Skaters in the following circumstances:

(i)any Skater (with the exception of Synchronized Skaters) who is not a citizen of the ISU Member's country, whom the ISU Member intends to enter in ISU Championships, other ISU Events and/or International Competitions in the coming season,

(ii)any Skater (with the exception of Synchronized Skaters) who is a citizen of the ISU Member's country and who has in the past represented another ISU Member in ISU Championships, other ISU Events and/or in International Competitions, whom the ISU Member intends to enter in ISU Championships, other ISU Events and/or International Competitions in the coming season.

B. For Skaters not yet in the possession of a Clearance Certificate, the respective ISU Member must submit to the ISU Secretariat ***by July 1 of each year*** *an application for a Clearance Certificate, together with the documentary evidence and the completed Questionnaire as per sections B and E below.*

In exceptional cases, when the requirements for obtaining a Clearance Certificate are fulfilled only after July 1, (e.g. grant of a new citizenship, completion of the 12 months residence period (see Rule 109 paragraph 2. a)), completion of the 12 months waiting period according to Rule 109 paragraph 2, receipt of a release from a former ISU Member according to Rule 109 paragraph 2. c)), the application may be submitted to the ISU Secretariat after July 1, but not later than thirty (30) days before the first day of the event in which the ISU Member desires to enter the Skater.

The application for partners of Pairs and Ice Dance couples may be submitted at any time, but not later than thirty (30) days before the first day of the event in which the ISU Member desires to enter the Skater

It seems that the International Skating Union believes that this agreement plus a suspension of one year is sufficient to change the state represented. So the regulations are laxer than in team sports, such participation is not limited to another state, there is no age limit up to which the athlete can use this procedure and it is not necessary to demonstrate residence. ISU gives validity of one year and accepts that certificate instead of documentary evidence of citizenship that have not yet been issued.

3.5. International Swimming Federation (FINA)

Before the start of the procedures for changing citizenship FINA requiers an official request from the federation. This procedure takes place only after the swimmer holds a valid nationality. Among the conditions imposed include[14]:

- *Confirmation from the new club*
- *Confirmation from the new national federations*
- *Confirmation from the previous federation*
- *Statement from the federation as a swimmer was not at international competitions in the last 12 months*
- *List of official results from the club home*

All these documents are assumed to be consistent, otherwise the request of the athlete may be rejected and the athlete subjected to penalties for statements inconsistent with the truth. The request may be submitted to FINA only after they have fulfilled the GR 2.5 and 2.6 of the General Regulation of the FINA.

GR 2.5 When a competitor or competition official represents his/her country in a competition, he/she shall be a citizen, whether by birth or naturalisation, of the nation he/she represents, provided that a naturalised citizen shall have lived in that country for at least one year prior to that competition. Competitors, who have more than one nationality according to the laws of the respective nations must choose one "Sport Nationality" and be affiliated to one Member only.

GR 2.6 Any competitor or competition official changing his affiliation from one national governing body to another must have resided in the territory of and been under the jurisdiction of the latter for at least twelve months prior to his first representation for the country.

Unlike other international federation FINA rules governing the case where an official, non competitor wants to change affiliation to a particular federation.

3.6. International Fencing Federation (FIE)

FIE status is much stricter than other individual sports federations presented so far. These are[15]:

9.2 FENCERS' NATIONALITY

9.2.1 At the Olympic Games a competitor's nationality is set by rules of the I.O.C. to which the F.I.E. must conform.

9.2.2 For official competitions of the F.I.E., competitors must be strictly of the nationality of the country which they are representing:

a) The fencer who enjoys multiple nationality must choose which country he wishes to represent. The fact that he has fenced for one of the countries implies that he has made a choice. If he wishes to represent another country of which he enjoys nationality, he must so advise the Office of the F.I.E. and he may only represent this other country after an interval of three years from when he advised the Central Office of the

[13] ISU Clearance Certificate, ISU Statute.
[14] FINA General Rules.
[15] FIE Statue adopted in December 2016.

F.I.E., during which he can no longer represent the other country.

b) A fencer who has already represented a country and acquires a new nationality (from being stateless or through naturalisation) can only represent his new country after an interval of three years from his last participation in a competition for his previous country.

c) The fencer who acquires a new nationality as a result of marriage may fence for that new country immediately, without waiting three years.

d) The Executive Committee of the F.I.E., with the agreement of the member federations concerned, and only for just reasons, may reduce or dispense with the interval of three years.

e) The fencer who has never participated in an official competition of the F.I.E. or in a Regional Championships, is not constrained by these limitations concerning change of nationality and may fence for his new country immediately.

f) Any change in country which a fencer represents is definitive; no further change can be authorised.

g) In cases of dispute the Executive Committee of the F.I.E. will make a ruling, which is not subject to appeal.

9.2.3 For the FIE competitions fencers who are legally stateless may compete as long as they are registered by the member federation of the country in which they live.

The practical process for a request of modification of nationality is stated in the FIE Administrative Rules, "Licences and nationality" chapter.

4. Conclusions

Athletes citizenship issue is a current problem that must be considered from many angles to be understood correctly. On the one hand there are countries that want sport performance, without regard to nationality of sportspeople representing, and on the other hand there are athletes for which a country is only a means of reaching the Olympics.

As outlined in this thesis, the rules for each sport varies quite considerably, from sports that allow a high degree of flexibility and movement for Olympics such as individual sports and handball to regulations somewhat restrictive in football or very restrictive in tennis.

Because of the degree of participation, which varies in different sports, it is difficult to provide a set of rules to regulate and be effective for all sports. Indeed, in the world of free movement of workers and multiculturalism we are living now, some flexibility is certainly welcome, provided that establish an appropriate balance.

International federations take extra precautions to stop this process or diminish it benefits. International federations regulations aimed at bridging the gap between athletes who practice the same sport arisen due to different national laws. Despite these regulations, most cases are presented before an ethics committee that decides after the general criteria are met if the period of residence should be deleted. This practice can lead to discriminatory decisions and to prosecute the respective federation. Higher Forum International Federations, namely IOC tried to harmonize international law on citizenship by creating a set of universal rules for all sports available to participants in the Olympics. But unfortunately the international federations have diverged from this set of rules imposing stricter rules to stop this stream of migration. The autonomy of federations has created considerable differences between sports and automatically between individuals who practice them, giving rise to unlawful discrimination between persons.

The athletes citizenship must be addressed ethically and morally two principles that underpin sport performance, for example an American sportsman that has not caught the national team for the gymnastics team, decides to represent a country like Albania who has no tradition in this sport and no results. But this decision is not followed by naturalization of the athlete but rather it will follow the procedures of expedited naturalization and would probably never leave the US and do not know the language or positioning on the map of the state but represents that country in the Olympics and can win a medal for this. From an ethical standpoint this practice is condemned but there are still no legal regulations to discourage this phenomenon.

Regarding the states law is clear that they are supreme and only with their consent there is the phenomenon of rapid acceleration. Just as with international federations there is a huge discrepancy between states regulations, the difference being that states are not subjected to higher decision-making body such as IOC but have autonomy in this matter.

One possible way of solving the problem would be the conclusion of treaties between countries in some sports fields with a clear indication of the conditions which must be satisfied with the removal of the expedited naturalization. Another way of solving would be applying a much stricter set of rules of the IOC, after all the Olympics is the reason for naturalization of most athletes

This would help eliminate differences between sports, would ensure that athletes participating in Olympic events know the rules of citizenship, and to ensure that there is consistency between the different disciplines.

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A BRIEF ANALYSIS ON BREXIT'S CONSEQUENCES ON THE CJEU'S JURISDICTION

Iuliana-Mădălina LARION[*]

Abstract

As the United Kingdom of Great Britain and Northern Ireland's effective withdrawal from the European Union advances, there is a growing interest on what solutions shall be found for the complex legal problems raised by Brexit. The research intends to highlight the main issues relevant for the Court of Justice of the European Union's jurisdiction, in an effort to better understand the possible consequences on the European Court's competence to receive, hear and solve cases involving the United Kingdom, as well as on the means to enforce its rulings. The study aims to anticipate and suggest possible approaches to the practical challenges that shall have to be addressed.

Keywords: *Brexit; withdrawal from the European Union; Court of Justice of the European Union; jurisdiction; actions.*

1. Brexit and its challenges

As this study is being written, the United Kingdom of Great Britain and Northern Ireland's Government is preparing to notify the European Council of the state's intention to exercise its right to withdraw from the European Union (EU), using Article 50 of the Treaty on European Union[1]. The United Kingdom (UK) is taking the legal steps necessary to give full effect to the result of the referendum held on 23 June 2016.

Thus, the only withdrawal so far of a Member State from this international integration organisation has become imminent. This raises a lot of questions regarding the legal, economic and social aspects of the process, as well as questions about EU's future, once such a precedent is established[2].

The negotiations that will follow the formal use of Article 50 of the Treaty on European Union shall have their result enshrined in a withdrawal agreement. One of the legal issues that shall have to be taken into account is the matter of the Court of Justice of the European Union's jurisdiction in pending cases involving the UK.

The study shall present the possible consequences on the jurisdiction of the three courts which compose the Court of Justice of the European Union (CJEU): the Court of Justice[3], the General Court and the Civil Service Tribunal, focusing on their main competences, that is (i. e.) on the main types of actions they can solve. There is also the topic of the efficiency of the means to enforce the CJEU's rulings once UK's withdrawal becomes opposable to the other Member States.

So, for the Member States, including the UK, it is important to know what they can expect from the different stages of this process and how far the limits of the negotiations[4] could extend on the matter of CJEU's jurisdiction.

This brief analysis is meant to contribute to the debate among legal practitioners and officials from the Member States and to help clarify these legal problems. Its main objective is a better understanding of how the European Court works, what it can and cannot do with respect to a withdrawing Member State and how far reaching are the effects of its rulings beyond formal jurisdiction.

For achieving this purpose, the study shall present the powers of the three courts in a temporal correlation with the different stages of Brexit and shall suggest solutions to the legal and practical issues in discussion, supported by doctrinal opinions from established authors and by relevant examples from the CJEU's case-law.

Since the subject matter is rather recent and unprecedented, there are few contributions in legal literature, all the more reason to stimulate the pursuit of knowledge in this global society we share.

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[1] The Treaty on European Union (TEU) was signed at Maastricht on 7 February 1992 and entered into force on 1 November 1993. Article 50 was introduced by the Treaty of Lisbon, signed on 13 December 2007, in force since 1 December 2009. For the consolidated version of TEU see: http://europa.eu/eu-law/decision-making/treaties/index_en.htm, last accessed on 20 March 2017.

[2] See Fuerea, *Brexit – trecut…*, 2016, 631-633 and The White Paper presented by the European Commission on 1 March 2017, available at https://ec.europa.eu/commission/white-paper-future-europe-reflections-and-scenarios-eu27_en, last accessed on 20 March 2017.

[3] The former Court of Justice of the European Communities.

[4] For an analysis on the limits of negotiation between the UK and the other Member States in the field of the free movement of persons and services, see Fuerea, *Brexit – Limitele…*, 106-112.

2. The jurisdiction of the Court of Justice of the European Union with respect to the withdrawing UK

2.1. Official date of Brexit

The first question to be addressed is what is the moment when Brexit becomes effective, i.e. the moment from which the UK ceases to have the rights and obligations of an EU Member State. The answer can be found in TEU, that establishes two alternative dates.

According to paragraph 3 of Article 50 of the Treaty on European Union[5] the UK shall no longer be bound by the Treaties establishing the EU from the day of entry into force of the withdrawal agreement or, failing that, two years after the day it has notified its intention to withdraw from the EU to the European Council. The period of two years may be extended by a unanimous decision of the European Council, in agreement with the state concerned.

Per a contrario, the UK is bound by the Treaties until the withdrawal agreement enters into force or, if it does not do so within the two-year period from the day the European Council is officially notified, two years after the day of notification. Hence, there is an aproximate period of two years, that may be extended, in which the UK is still under the CJEU's jurisdiction.

Three distinct stages can be of interest:

a) after the referendum, but prior to the official notification of the European Council;
b) after notification, up until the effective withdrawal date, a period in which negotiations shall take place;
c) after the day of effective withdrawal, a stage in wich, at least for a short or medium time after withdrawal, the EU law might still have an echo.

2.2. Prior to the official notification of the European Council

As we have seen, after the referendum the UK has taken the internal legal steps that would allow official notification of withdrawal. Since Article 50 paragraph 1 of the TEU states that a Member State shall decide to withdraw from the EU according to its own constitutional requirements, the UK has had to sort out if, following the result of the referendum, the Government needed the Parliament's approval to use Article 50 of the TEU[6]. The High Court answered that such a permission was necessary and its decision was confirmed by the UK's Supreme Court[7]. It also stated that the withdrawal process is irreversible, though prominent legal authors argued the contrary[8] and even expressed the view that this is a matter of interpretation for the Court of Justice, not for the internal court[9].

However, the Government did get the permission of the Parliament, the proper internal legislation was passed and official notification of the European Council is due until the end of March 2017.

During this time, the UK is under the complete jurisdiction of the CJEU, under all its aspects and it has to give full effect to all of the three court's rulings, just like any other Member State.

A succint presentation of the role and attributions of the three courts composing the Court of Justice of the European Union[10] is necessary in order to better understand what type of legal relations they can establish with a Member State, including the UK.

The main *sedes materiae* is Article 19 of the Treaty on European Union, Articles 256, 258-277 of the Treaty on the Functioning of the European Union (TFEU) and Protocol no. 3 to the TFEU on the statute of the Court of Justice of the European Union (the Statute)[11].

The role of the CJEU is to "ensure that in the interpretation and application of the Treaties the law is observed"[12]. For this purpose, the CJEU can function as a jurisdictional institution, and give rulings, as well as an advisory one, and render opinions.

Article 19 paraghraph 3 of the TEU summarizes CJEU's competence. It can: "(a) rule on actions brought by a Member State, an institution or a natural or legal person; (b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions; (c) rule in other cases provided for in the Treaties"[13]

From this text, it results that the CJEU's jurisdictional function is also divided into ruling on direct actions and on preliminary references.

One author observes that there are two categories of direct actions: "those over which the Court has jurisdiction by virtue of an agreement between the parties and those where the Court's jurisdiction is conferred by direct operation of the law"[14].

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[5] Article 50, paragraph 3 of TEU reads: "The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period." For its legal analysis, see Hillion, 2016, 1-12.

[6] See Hestermayer, 2016, 2-15 and Douglas-Scott, 2016, 6-18.

[7] See Sari, 2017, 2-3, with reference to the *Miller* case. For the UK's court hierarchy see Schütze, 2012, 293.

[8] See Craig, *Brexit…*, 2016, 33-37.

[9] See Sari, 2017, 30-32.

[10] See also Chalmers, Davies and Monti, 2010, 143-149.

[11] For further details and legal texts see Fábián, 2014.

[12] Article 19, paragraph 1 of TEU. For more about the role of CJUE, see Stone Sweet, 2011, 121-153.

[13] Text available at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016M/TXT&from=EN, last accessed on 20 March 2017.

[14] Hartley, 2010, 56.

The former may result from a contract concluded by the EU with a jurisdiction clause and "are not very important in practice"[15].

The latter are the actions that can be brought against a Member State, as part of the infringement procedure, for the alleged violation of EU law[16] and the actions against the EU and its institutions, such as annulment actions, actions regarding the EU's institutions' failure to act, the EU's non-contractual liability, actions against penalties[17] or staff cases.

Preliminary rulings procedure, on the other hand, is noncontencious[18] and can be started by a judicial body[19] from a Member State in order to obtain an answer on the interpretation of the Treaties or on the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union[20].

The Court of Justice, whose existence dates back to the creation of the three European Communities[21], is at the top of the judicial system created by the Member States of the EU, as shown by its competence and by the judicial remedies. The General Court, established in 1989, on the base of ammendments contained in the Single European Act[22], was meant to relieve the Court of Justice of its increasing case-load, which is why the Court of Justice has jurisdiction to do all of the above and the General Court only has jurisdiction to determine the cases expressly provided by Article 256 of the TFEU and Article 51 of the Statute. It can solve a part of the annulment actions, actions for failure to act, tort actions and contract cases, where the contract so provides.

Altough Article 256 paragraph 3 of the TFEU gives the General Court competence to answer preliminary references in specific areas laid down by the Statute, the Statute has not yet been modified in this respect[23].

The Civil Service Tribunal determines disputes between the EU and its staff. It was established in 2004, in order to take over these types of cases from the General Court[24], that was also experiencing an increasing case-load in the context of EU enlargement.

Due to this chronology, it is not surprising that there is a right to appeal the General Court's rulings to the Court of Justice and the Civil Service Tribunal's rulings to the General Court.

Concretely, until official notification of withdrawal is made, the UK's legal standing is untroubled. As the case may be, it can stand in any of the three courts as a plaintiff or a defendant in a direct action, it can be the subject of an infringement/enforcement action, it can make an appeal, it can ask the Court of Justice's opinion on the base of Article 218 paragraph 11 of the TFEU[25], its judicial bodies may ask for preliminary rulings, its nationals may be the subject of direct actions or staff cases etc.

2.3. Between official notification and effective withdrawal

This shall be a time when the UK is one foot out the door, but still a member of the EU, still bound by EU law[26] and, in our opinion, still completely under the jurisdiction of the CJEU.

This period is dedicated to negotiation between the Member States, that will have to solve a series of complex issues such as budget contributions, rights of UK and EU nationals[27], pending cases before the CJEU and so on28. But, as long as the UK still has all the rights and obligations set out in the Treaties, the negotiations cannot result in the partial or complete loss of jurisdiction over the UK until effective withdrawal. At the same time, the UK cannot adopt internal legislation to limit CJEU's jurisdiction or UK's courts and nationals access to the European Court, without infringing the principle of the supremacy of EU law and exposing itself to some form of punishment, on the basis of either EU law or public international law.

All of the three EU courts can receive, hear and solve cases involving the United Kingdom, acording to their competence. The only way in which CJEU's jurisdiction could be limited during this period is if an agreement would be negotiated on this aspect and if that agreement would enter into force before the withdrawal agreement and the two-year time-limit.

2.4. After UK's effective withdrawal from the EU

The UK shall no longer be a Member State and it shall no longer be under CJEU's jurisdiction. The CJEU shall lack competence, *ratione personae*, to

[15] Hartley, 2010, 56.
[16] Also, known as enforcement actions.
[17] See Mathijsen, 2010, 131-132.
[18] See Şandru, Banu and Călin, 19-20.
[19] For the criteria that judicial body has to fulfil, see Andreşan-Grigoriu, 2010, 72-143.
[20] Article 267 of the Treaty on the functioning of the European Union.
[21] See Fuerea, 2011, Manualul…, 14-19.
[22] Text of the Single European Act available here: http://europa.eu/european-union/law/treaties_en, last accessed on 26 March 2017.
[23] See Article 3 of the Regulation (EU, Euratom) of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, available at http://curia.europa.eu/jcms/jcms/Jo2_7031/, last accesed on 20 March 2017. For an analysis on why this transfer of jurisdiction has not happened yet, see Broberg and Fenger, 2010, 25-28.
[24] See Hartley, 2010, 53.
[25] Article 218 paragraph 11 of the TFEU reads: "A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised." The text is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016E/TXT, last accessed on 20 March 2017.
[26] For a concurrent opinion, see Craig, *Brexit…*, 2016, 34.
[27] About EU citizenship after Brexit, see Mindus, 2016, 7-27.
[28] See also Hestermeyer, 2016, 15-22.

receive, hear and solve cases involving the UK and the UK shall no longer be under the obligation to observe the Court's rulings. This raises the question of the fate of the pending cases. If a case has already been registered, will it no longer be heard? If it was heard, will it no longer be solved? And if it was solved, will the ruling no longer be observed and enforced?

However, "Article 50 is uncharted territory and therefore the content of the withdrawal agreement is uncertain. This is so not merely with respect to the precise details of the future relationship between the EU and the UK, but also more fundamentally with regard to what is put into the withdrawal agreement and what remains for resolution through some later treaty"[29].

Therefore, depending on the outcome of the negotiations and on the practical implications of some measures, the UK may retain some rights and some obligations under a form or another, to make the transition equitable for all the Member States and their nationals, including the UK and its nationals.

It is difficult to speculate on what an agreement on these issues shall include. It would be salutary if it would address the matter of the pending cases and establish criteria for the CJUE to keep jurisdiction over some of them. For example, such a criterion could be the date of the event giving rise to the dispute. If the facts of the matter are prior to effective Brexit, the European Court should be able, in principle, to continue determining the case and the UK should have to observe its ruling, even after withdrawal. This solution would be justified especially in those cases related to cross-border disputes governed by the rules of EU private international law[30] or to intellectual property litigation[31], where "A large part of UK legislation on intellectual rights comes from the European Union"[32].

For a more accurate image, it is useful to have a separate look at each of the main actions the three EU courts can solve[33], as presented above.

With respect to the direct actions, in the infringement/enforcement actions the UK can be a plaintiff, as well as a defendant. The legal basis for this action is represented by Articles 258-260 of the TFEU. The wording of these articles leads to the interpretation that the Member State status of the defendant has to subsist until a judgment is given, since the Court of Justice has to find "that a Member State has failed to fulfil an obligation under the Treaties"[34]. Thus, if the UK is a plaintiff, the action introduced before withdrawal against another Member State should be given a final judgment. Another solution could be to let the Comission decide if it chooses to continue the action UK has introduced or not.

On the other hand, if the UK is a defendant, the action cannot be solved after withdrawal, but the issue may be addressed during the negotiations for the conclusion of the withdrawal agreement, if it has relevance and importance for an amiable separation.

In annulment actions[35], the UK can only be a plaintiff[36], as the goal is for the Court of Justice or the General Court, as the case may be, to review the legality of EU acts. If the act is declared null and void, the ruling produces a retroactive effect (*ex tunc*) and an *erga omnes* effect.

If such an action is registered before effective withdrawal, the Court should be able to give its judgment even after the UK loses Member State status, as it is in everybody's best interest for legality to be established in a system based on the rule of law[37]. Even for a non-member UK the ruling of the Court could be relevant, for example, if UK courts had to solve post Brexit cases in which UK's internal law for intertemporal situations would lead to the conclusion that EU law still applies to the grounds of the matter. Since national courts do not have jurisdiction to decide on the annulment of EU law[38], they have to turn to the European Court's jurisprudence.

The same should be the solution for the other direct actions against the EU or its institutions, whether actions regarding EU's institutions' failure to act[39], EU's non-contractual liability[40] or staff cases[41], especially if the plaintiff is a UK national. The main arguments supporting this view are that the UK was a Member State at the time the action was registered, the facts of the dispute occurred prior effective withdrawal and it would be in agreement with the principles of legal certainty and with the principle of the protection of legitimate expectations, ensuring the highest degree of protection for the parties.

The preliminary reference procedure[42] is an instrument of dialogue with the Court of Justice given to

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[29] Craig, *Brexit…*, 2016, 37.

[30] For an analysis of how far can the EU rules of private international law extend after Brexit, see Dickinson, 2016, 10-11.

[31] See van Hooft, 2016, 541-564.

[32] Traub, Haleen and Clay, 2016, 12. For how Brexit might affect the sources of UK law see Popa, 2016, 126-136.

[33] For a synthesis about the main actions CJUE can solve, see Fuerea, 2016, *Dreptul…*, 65-123.

[34] Text available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016E/TXT, last accessed on 20 March 2017.

[35] Articles 263-264 of the TFEU.

[36] For the legal standing of Member States to introduce an annulment action, as priviledged plaintiffs, see Craig and de Búrca, 2009, 637 and Schütze, 2012, 269.

[37] Judgment of 23 April 1986 in case 294/83 *Les Verts/Parliament*, paragraph 23, available at http://curia.europa.eu/en/content/juris/c1_juris.htm, last accessed on 20 March 2017.

[38] Judgment of 10 January 2006 in case C-344/04 *IATA and ELFAA*, paragraph 27, available at http://curia.europa.eu/en/content/juris/c2_juris.htm, last accessed on 20 March 2017.

[39] Articles 265-266 of the TFEU.

[40] Articles 268 and 340 paragraphs 2 and 3 of the TFEU.

[41] Article 270 of the TFEU.

[42] Article 267 of TFEU.

the judicial bodies from the Member States. As we have argued, in detail, on another occasion[43], the Court of Justice should answer preliminary references registered and unsolved until effective withdrawal, as the judicial body did fulfil the condition of pertaining to a Member State at the time the reference was registered and an answer may still be necessary to the UK judicial body in order to solve the pending national case. A restrictive interpretation seems excessive and in discord with the two principles mentioned above, especially since the length of the proceedings is at the discretion of the Court of Justice. Otherwise, two references from UK courts registered the same day might find themselves in the absurd situation in wich one receives an answer and the other is rejected for lack of competence, depending solely on the duration of the procedure.

The solution is different for the references registered with the Court of Justice after Brexit, even if they arose from facts that happened before withdrawal, since Article 267 paragraph 1 of the TFEU expressly requires that the reference be made by a court or tribunal of a Member state, meaning that the judicial body would belong to a Member State at the time the reference is made.

As emphasized by other authors[44], it is also our opinion that the date of registration of an action with the European Court should be the moment taken into account in order to establish if the state is still a Member State or not and if the national or the judicial body is still from a Member State or not.

As to appeals against the rulings of the General Court or of the Civil Service Tribunal and applicatons for revision based on Article 44 of the Statute, it is our belief that the UK and its nationals should retain the right to appeal or ask for revision even after effective Brexit, if either were a party to the proceedings[45]. Producing a final solution to a case is essential for legal certainty. Therefore, it is the legitimate interest of the parties to use all the judicial remedies available, especially since they have little influence on the leghts of the procedure and cannot be sanctioned for not having been offered a final ruling before the UK's withdrawal.

If a ruling was given before effective Brexit, EU legal means of enforcement, like the infringement procedure, are no longer available in case the UK does not, after Brexit, give full effect to what the CJEU decided. For example, the UK could be ordered to pay a sum of money as a result of an infringement procedure conducted just before its withdrawal from the EU. If UK refuses to pay, there would only be recourse to means of public international law, ranging from diplomatic means to sanctions[46].

If the other Member States so require, perhaps it could be possible for the UK to accept to keep the obligation to obey any of the three court's rulings that were given in cases in which the UK or a UK national was a party to, as well as to observe the rulings that produce *erga omnes* effects, which have relevance for UK courts in pending or future cases, by inserting a provision in this respect in the withdrawal agreement, as well as some kind of enforcement means based on this new international treaty.

In the future, the UK might come again under the CJEU's jurisdiction, at least for some types of actions, like a direct action based on contractual liability[47], if it concludes a contract or an international agreement with the EU, as any other third country can. For example, if the UK becomes a member of the European Free Trade Association (EFTA), the Agreement on the European Economic Area already authorises courts and tribunals of the EFTA Member States to refer questions to the Court of Justice on the interpretation of an agreement rule[48].

3. Conclusions

The unexpected result of the referendum held in the UK on 23 June 2017 has given rise to many new challenges for the EU, which has to redefine itself, to regain the trust of EU nationals, to fermly address all the reasons for which it is vulnerable to a certain type of nationalist propaganda and to draw up a new vision for its future[49].

At the same time, Brexit represents an opportunity to witness something without precedent: a Member State's withdrawal from the EU, with all its legal and practical implications. Finding solutions for all the terms of this separation shall obviously be a highly complex task, but the prize shall be, in the end, a better understanding of how Article 50 of the TEU works and the development of EU law.

The study has approached the specific issue of the CJEU's jurisdiction throughout the withdrawal process: before the official notification of the European Council on the basis of Article 50 of the TEU, from the day of official notification until the day withdrawal becomes effective, i.e. EU law ceases to apply for the

[43] See Larion, 2016, 76-84.

[44] See Broberg and Fenger, 2010, 90.

[45] The exception provided by Article 56 paragraph 3 of the Statute for Member States that were not parties and did not intervene in the main proceedings is not justified for former Member States. The former Member State does not have an interest to appeal anymore, since the obligation to observe the ruling as *res judicata* and as a part of the EU case-law ceases to exist.

[46] For solving disputes according to public international law, see Miga-Beșteliu, 2008, 1-21, 167-169.

[47] Article 272 of the TFEU.

[48] Article 107 of the Agreement on the European Economic Area and Protocol 34 annexed to it, available at http://www.efta.int/legal-texts/eea, last accessed on 20 March 2017.

[49] The 27 Member States still committed to a common future are taking steps in order to define a vision of even stronger unity and solidarity for EU's future, the latest example being The Rome Declaration, signed on 25 March 2017, at the 60th anniversary of the Treaties of Rome, signed on the same day in 1957, in the same city. Its text is available here: http://www.consilium.europa.eu/en/press/press-releases/2017/03/25-rome-declaration/, last accessed on 26 March 2017.

UK and the period after withdrawal. Focusing on the main competences of the courts composing the CJEU, we have highlited to what extent CJEU shall or should retain jurisdiction during these different stages of Brexit and offered our opinion on what legal solutions could be chosen for pending cases in order for all the participants, including UK and its nationals, to obtain the highest legal protection possible.

The research is meant to raise awareness about the legal problems that have been identified, to sparkle more substantial debate, aimed at identifying all the aspects wich may be relevant for CJEU's jurisdiction in relation to a withdrawing state, to stimulate creativity in finding innovative answers to the questions raised and, perhaps, to inspire in determining the future content of the withdrawal agreement.

Further efforts could focus in detail on the infringement procedure, on any of the other direct actions or on the limits of the negotiations between Member States on the matter of CJEU's jurisdiction.

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ASPECTS REGARDING THE TERMINATION OF THE LEGAL EFFECTS OF NORMATIVE ADMINISTRATIVE ACTS

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Abstract

The final cessation of the legal effects of administrative acts can be achieved by annulment and revocation. Both are legal operations that lead to the termination of legal effects of administrative acts. A controversial issue is the one regarding the authorities that may exercise the right of revocation and annulment of an administrative act. As concerns normative administrative acts, the specific manner of termination of enforcement of such acts is to repeal them. On the relationship between repeal on the one hand and cancellation and revocation on the other hand, various contradictory opinions were voiced in the legal doctrine. An aspect with important implications in the administrative practice is the one concerning the possibility of invalidating a normative administrative act before its entering into force. Finally, the article deals with the notion of non-existent administrative acts, which has become a constitutional institution as concerns administrative normative acts.

Keywords: *administrative normative act, annulment, revocation, repeal, non-existence*

1. Introduction *

The administrative act is one of the palpable forms of public administration bodies activity, coupled with the administrative acts and operations. The administrative act is a manifestation of will with the intention of producing legal effects, namely to create, modify or extinguish legal relations. It is the main form of activity of public administration, the other forms being accomplished for the preparation, drafting or enforcement of administrative acts.

In terms of incidence in the activity of public administration, it was noted that administrative acts are the predominant aspect in the activity of central public administration, while administrative acts and operations are more numerous in the activity of public administration at lower levels[1].

The doctrine defines the administrative act as "the main legal form of activity of public administration bodies, which consists of a unilateral and explicit manifestation of the will to create, modify or extinguish rights and obligations, in the enforcement of public power, under the main control of legality by judicial courts"[2].

The narrow sense of the administrative act is also defined by the legislator in art. 2 para. (1) letter c) of the Administrative Litigation Law no. 554/2004[3], with subsequent amendments. According to this text, the term "administrative act" means "the unilateral act of an individual or normative nature issued by a public authority, in the enforcement of public power, in view of organising law enforcement or of actually enforcing the law that creates, modifies or extinguishes legal relations".

Broadly, by an administrative act, one means any legal act emanating from public authorities under the enforcement of public power[4].

The distinction between the unilateral administrative act of an individual nature and the normative administrative act, performed by the legislator under the Law no. 554/2004, is traditionally accepted in the doctrine of administrative law also. According to the criterion of the extent of legal effects they produce, most authors divide administrative acts by normative administrative acts and individual administrative acts. According to this classification criterion, some authors also mention the *internal acts* category, their characteristic being that "they are enforced within a public authority or institution, generating effects in relation to the staff of said institution"[5].

Normative administrative acts contain general, impersonal rules, generating judicial effects for an undermined number of subjects. In this category, we mention the following: Government orders; Government decisions; decisions of the local council of a commune, city, municipality or of a Bucharest municipality sector; county council decisions; decisions of the General Council of Bucharest municipality, etc.

Individual administrative acts generate legal effect upon one or more specified subjects. Unlike the first category, these administrative acts are mostly issued by unipersonal bodies: decrees of the Romanian President; Prime Minister's decisions; Ministers orders;

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[1] Mircea Preda, *Drept administrativ, Partea generală*, Ediția a III-a (București, Lumina Lex, 2000), 180-181.

[2] Antonie Iorgovan, *Tratat de drept administrativ*, vol. II, *Forme de realizare a administrației publice. Domeniul public și serviciul public. Răspunderea în dreptul administrativ. Contenciosul administrativ* (București, Editura All Beck, 2005), 25.

[3] Published in the „Romanian Official Gazette", Part I, no. 1154 of December 7, 2004.

[4] Anton Trăilescu, *Drept administrativ*, Ediția a 3-a (București, Editura C.H. Beck, 2008), 179.

[5] Verginia Vedinaș, *Drept administrativ*, Ediția a IX-a (București, Editura Universul Juridic, 2015), 101.

acts issued by the heads of central specialised bodies*;* Prefect orders; Mayor provisions; provisions of the county council president. Individual administrative acts may also be acts adopted by collegial bodies of public administration, such as Government decisions or decisions of the local council.

Between normative and individual administrative acts, there are important differences as concerns the moment when the administrative act starts generating legal effects and the termination of such effects. Below we are going to present some controversial issues relating to the termination of the legal effects of normative administrative acts, highlighting the necessary features in connection with individual administrative acts.

2. Manners of termination for the judicial effects of normative administrative acts

The legal relationships that arose on the basis of administrative acts can cease by means of a legal act with equal or greater force or following the occurrence of a material fact.

Legal acts that have the effect of terminating the legal effects of administrative acts are acts of authority ordering the annulment or revocation of the administrative act. Most authors also include suspension in this list[6], although the latter is a way to interrupt the legal effects of an administrative act and not to put a definitive end to them. In case of suspension, the administrative act becomes inapplicable on a temporary and provisional basis, but it continues to exist within the legal domain[7].

The doctrine states that it is necessary to distinguish between the suspension of a legal act and the suspension of its judicial effects. In the first case, the act in question no longer generates any effect whatsoever, while in the latter case only the legal effects of the act in question are interrupted[8].

Suspension occurs when there are doubts about the legality or appropriateness of an administrative act. The suspension can occur only after the entry into force of the act, that is after the moment when it begins to produce legal effects. The suspended administrative act may have a normative or an individual nature[9].

The suspension may occur by law (such as the suspension referred to in art. 123 para. (5) of the Constitution) or due to an act belonging to a public authority (the administrative court, the body which issued the act or the superior body)[10].

The occurrence of a material fact may be a way to terminate legal effects, as a rule, only for individual administrative acts. Among these material facts, the following can be mentioned: death of the subject the act is addressed to, termination of a legal entity, material execution of the act, the completion of a certain period of time[11].

For normative administrative acts, this manner of judicial effects termination is exceptional, being possible only for temporary normative administrative acts "whose legal effects cease by means of completion of the term - the material fact - for which they were issued"[12].

2.1. Annulment

Annulment was defined as the "legal operation consisting of a manifestation of will in order to determine directly the dissolution of an act and therefore the cessation of the definitive effects produced by it"[13]. The object of annulment can be both an individual administrative act and a normative administrative act.

In the literature, there is no single point of view on the relevant authorities certified to cancel administrative acts.

Most authors consider that the right to void administrative acts belongs to both superior administrative authorities and courts[14]. Administrative authorities exercise this right under the administrative subordination report. For example, under art. 28 para. (2) of the Law no. 90/2001 on the organisation and functioning of the Romanian Government and of ministries, as amended and supplemented, the Government is entitled while exercising hierarchical control, "to rescind illegal or inappropriate administrative acts issued by public authorities subordinated to it and to prefects".

Administrative courts exercise the right of annulment of administrative acts under art. 21, art. 52 and art. 126 para. (6) of the Constitution as well as under the Law no. 554/2004. Among the solutions that the administrative court can provide, art. 18 para. (1) of the Law no. 554/2004 also stipulates the annulment of the administrative act, in whole or in part.

Another opinion claims that the annulment must be understood as a way to abolish administrative acts exclusively reserved for the courts, while revocation is

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[6] Rodica Narcisa Petrescu, *Drept administrativ* (Bucureşti, Editura Hamangiu, 2009), 340; Corneliu Manda, *Drept administrativ, Tratat elementar*, Ediția a V-a (București, Editura Universul Juridic, 2008), 413; Lucian Chiriac, *Drept administrativ, Activitatea autorităților administrației publice* (București, Editura Hamangiu, 2011), 143.

[7] Tudor Drăganu, *Actele de drept administrativ* (București, Editura Științifică, 1959), 278.

[8] Vedinaș, *Drept administrativ*, 122.

[9] Trăilescu, *Drept administrativ*, 194.

[10] Cătălin-Silviu Săraru, *Drept administrativ, Probleme fundamentale ale dreptului public* (București, Editura C.H. Beck, 2016) 105.

[11] Alexandru-Sorin Ciobanu, *Drept administrativ, Activitatea administrației publice, Domeniul public* (București, Edditura Universul Juridic, 2015), 81-82.

[12] Petrescu, *Drept administrativ*, 356; Trăilescu, *Drept administrativ*, 198.

[13] Iorgovan, *Tratat de drept administrativ*, 72.

[14] Petrescu, *Drept administrativ*, 344; Vedinaș, *Drept administrativ*, 130; Manda, *Drept administrativ*, 416; Dumitru Brezoianu, *Drept administrativ român* (București, Editura All Beck, 2004), 91; Chiriac, *Drept administrativ*, 159.

a way of abolishing reserved only to an administrative body[15]. To support this view it was stated that the issue is essentially terminological and that this distinction is required for revocation and annulment to acquire "internal consistency, which alone justifies their usefulness"[16]. The doctrine also highlighted the possibility that annulment would remain the responsibility of an administrative body when it is an administrative-jurisdictional authority[17].

We agree with the expressed opinion that it is possible for the annulment of the administrative act to be ruled by the administrative court and, exceptionally, by a jurisdictional-administrative organ. We underline the observation that, through its implications in the administrative and judicial practice, this issue is crucial to the legal regime of the administrative act and it is necessary to form the subject of an explicit provision in the future Administrative Procedure Code.

Within the boundaries of the current regulatory framework, an argument in favour of this theory ensues from the provisions of art. 1 para. (6) of the Law no. 554/2004: "The public authority issuing an unlawful unilateral administrative act may request its annulment to be court, if the act can no longer be revoked since it joined the circuit civil and generated legal effects". Even if by that provision, the legislator took into account the individual administrative acts whose legal effects escaped the field of the administrative law regime[18], we consider it relevant to legally delimitate the judicial operations that the issuing administrative bodies, respectively the administrative court can perform.

The effects of the annulment are different depending on whether the cancellation of the administrative act conducted done for reasons of unlawfulness or for inappropriate reasons.

Authors who claim that annulment can also be ordered by the hierarchically superior body emphasize this distinction given that, in this case, the administrative act may also be cancelled for lack of opportunity. Therefore, if the act was annulled on grounds of illegality, the effects occur both for the future (*ex nunc*) and for the past (*ex tunc*). When the act is annulled for reasons of untimely circumstances, the effects occur only for the future (*ex nunc*) as the act maintains its legal effects so far.

According to the opinion limiting the scope of the bodies that can rule the annulment of the administrative act only to the administrative courts sphere, it is stated that the abolition of the act can only be made on grounds of illegality. One must remember however that following the analysis of administrative case law, the doctrine recognised the possibility of the court to also investigate the timeliness of the administrative act issuance "in the context of finding an excessive enforcement of power by the authority issuing the administrative act"[19].

Regardless of the scope of the authorities that may rule annulment, we believe that it can be taken as a rule of the legal regime concerning the annulment of the administrative act that "the annulment of an administrative action has the effect of nullity of all subsequent legal acts that were conditioned, in terms of their legality, by the existence of the said administrative act"20. One also pointed out that beyond the validity of this principle, in practice there are many difficulties resulting from the absence of procedural means to unconditionally support this effect[21].

2.2. Revocation

Revocation is one way of terminating the legal effects of an administrative act by the express manifestation of will of the issuing administrative body or of the hierarchically superior body[22]. When the body that rules on the revocation is the issuing body of the act in question, revocation is also called retraction or withdrawal[23].

The doctrine emphasizes that revocation should also be understood as a principle of the legal regime of administrative acts. Although not specifically provided for in legislation, this principle is widely recognised in the specialty literature. Given the dominant place of the revocability principle in public law, it is considered that "revocation of administrative acts must be regarded as a manifestation of the public power regime specific to these acts"[24].

Following the approval of the Law no. 554/2004, it was pointed out that for the first time one regulated, in a partial manner, the issue of administrative acts revocation. While regulating the preliminary complaint requirement, art. 7 para. (1) of the law stipulates that "before addressing the competent administrative court, the person who considers himself harmed in his right or

[15] Ion Brad, *Revocarea actelor administrative, Instituția revocării sub exigențele dreptului european* (București, Editura Universul Juridic, 2009), 59-63; Săraru, *Drept administrativ*, 109. In this regard, it was suggested nearly a decade ago that "the future of the Administrative Procedure Code would expressly enshrine the principle according to which annulment can only be imposed by the court and revocation would devolve exclusively on the issuing authority or on the hierarchically superior authority." See also Dana Apostol Tofan, „Nulitatea actelor administrative. Corelația nulitate-revocare-inexistență. Aspecte controversate în doctrină, legislație și jurisprudență", *Dreptul* 1 (2017): 135.

[16] Brad, *Revocarea actelor administrative*, 63.

[17] Ciobanu, *Drept administrativ*, 109.

[18] Apostol Tofan, „Nulitatea actelor administrative", 134; Ovidiu Podaru, *Drept administrativ*, vol. I, *Actul administrativ (I) Repere pentru o teorie altfel* (București, Editura Hamangiu, 2010), 289.

[19] Apostol Tofan, „Nulitatea actelor administrative, 133; Săraru, *Drept administrativ*, 111.

[20] Iorgovan, *Tratat de drept administrativ*, 82; Vedinaș, *Drept administrativ*, 131.

[21] Ciobanu, *Drept administrativ*, 111.

[22] Chiriac, Drept administrativ, 150.

[23] Petrescu, Drept administrativ, 346.

[24] Brad, Revocarea actelor administrative, 42-43.

in a legitimate interest by means of an individual administrative act, must request the issuing public authority or the superior authority, if any, within 30 days from the notification date of the document, to revoke it, in whole or in part".

Upon analysis of this text, it can be seen that the legislator referred exclusively to individual administrative acts in order to establish the duration of the 30 days term prior to formulating the complaint. Art. 7 para. 11 of the law stipulates that "in the case of the normative administrative act, the prior complaint may be made at any time".

Unlike individual administrative acts, in the case of normative administrative acts, the principle of revocability has an absolute nature[25]. This means that competent public administration authorities may at any time revoke or modify a normative administrative act by issuing another administrative act with a legal force at least equally binding.

The reasons that may entail revocation may be related to the illegality or inappropriateness of the administrative act. Depending on the time when they occur in relation to the issuance of the act, the grounds for revocation may be prior, simultaneous or subsequent.

In general, the legal effects determined by revocation are for the past (*ex tunc*) when the causes are prior or concurrent, or for the future (*ex nunc*) when the causes are subsequent to the issuing of the act[26]. As concerns normative administrative acts, it was pointed out that from the perspective of the requirements imposed by art. 15 para. (2) of the Constitution, those provisions may only be revoked with effect for the future (*ex nunc*), except for the more favourable acts of criminal matter[27].

Another important aspect is that revocation must be understood not only as a way to terminate legal effects but also as a way of abolishing an administrative act. For this reason, the doctrine underlined the impossibility to accept the existence of a partial revocation, the use of this concept within art. 7 para. (1) of the Law no. 554/2004 being considered a "terminological confusion"[28].

2.3. Repeal

Repeal is defined as "the procedure provided for by law for the removal of existing normative acts"[29]. The doctrine mentions repeal as a distinct way for terminating the legal effects of normative administrative acts, included either in the category of annulment[30] or in that of revocation[31]. As concerns this latter perspective, it was mentioned that a particular feature of repeal is the possibility of the repeal being decided not only by public administration government bodies but also by the Parliament. Given the hierarchy of normative acts, the law may at any time repeal a normative administrative act, so unlike revocation which is "a way reserved for the Administration, repeal may be the work of both the Administration and the Parliament"[32].

Repeal is achieved by effect of the law or by adopting or issuing another administrative act of the same level or higher. When the provisions of a previous administrative act are contrary to a new regulation with a judicial force equal or superior, the repeal shall be deemed implicit[33]. Some authors consider tacit repeal as a form of amending normative administrative acts while considering the "constant need of the administrative body to adapt to changes occurring in the economic, social and political life, in order to ensure the public interest"[34].

Its effects are produced only for the future (*ex nunc*), regardless if it intervenes for inappropriateness or illegality of the administrative act subject to repeal[35].

The Law no. 24/2000 on legislative technique regulations for drafting normative acts, republished[36], amended and supplemented, considers repeal as a "legal event" that may arise after the entry into force of a normative act, together with modification, addition, republication, suspension "or the like" [art. 58 para. (1)].

Repeal may be full, when all legal provisions of the repealed normative administrative act cease, or partial, when certain provisions of that act continue to remain in force[37]. According to art. 64 para. (5) of the Law no. 24/2000 partial repeals "are similar to changes in normative acts, a partially repealed normative act remaining in force through its non-abrogated provisions ". Where successively, several partial repeals are involved, the last repeal will have to cover the whole normative act and not just the texts remained in force.

Repeal is definitive. In this respect, art. 64 para. (3) of the Law no. 24/2000 provides, as a principle, that „it is not admitted to re-enforce the initial normative act by means of repealing a previous repeal".

This rule is allows only one exception, also provided for by art. 64 para. (3) of the Law no. 24/2000:

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[25] Manda, Drept administrativ, 417.
[26] Vedinaș, Drept administrativ, 124.
[27] Podaru, Drept administrativ, 307.
[28] Brad, Revocarea actelor administrative, 57-58.
[29] Anton P. Parlagi, Dicționar de administrație publică, Ediția a 3-a (București, Editura C.H. Beck, 2011) 3.
[30] Petrescu, Drept administrativ, 340.
[31] Chiriac, Drept administrativ, 151; Trăilescu, Drept administrativ, 195; Podaru, Drept administrativ , 334; Săraru, Drept administrativ, 105.
[32] Brad, Revocarea actelor administrative, 70.
[33] Ioan Alexandru, Mihaela Cărăușan, Sorin Bucur, Drept administrativ, Ediția a III-a (București, Editura Universul Juridic, 2009), 326.
[34] Chiriac, Drept administrativ, 155.
[35] Podaru, Drept administrativ, 334-335.
[36] Republished in the „Romanian Official Gazette", Part I, no. 260 of April 21, 2010.
[37] Trăilescu, *Drept administrativ*, 195.

"the provisions of Government ordinances stipulating abrogation norms that have been rejected by the Parliament".

The doctrine considers that the effect of "regeneration" of the rules repealed also operates in situations that upheld the objection of unconstitutionality of a repealing law or ordinance[38]. Jurisprudence of the Constitutional Court has consistently held the following interpretations: during the period between the entry into force of the repealing law and the publication of the decision finding the unconstitutionality of the repealing norm, the repealed provisions do not generate judicial effects, but after publication of the decision they "re-enter the active foundation of the law".

The Law no. 24/2000 stipulates in art. 58 para. (2) the possibility to repeal a normative act "highly important and complex" during the period between the date of publication in the Official Gazette of Romania, Part I and the date set for its entry into force. This possibility is subject to the cumulative fulfilment of three conditions: a) the existence of a thoroughly justified situation (a concept that the Law no. 24/2000 does not define); b) the repeal needs to be ordered by the issuing authority of the act repealed; c) the termination should take effect at the same date as the normative act subjected to this legal event.

2.4. Non-existence

Inexistent administrative acts hold no appearance of legality and they cannot be enforced. By means of this feature, inexistent acts are essentially different from administered acts declared null and void which, enjoying the presumption of legality, generate legal effects until the finding of their nullity[39].

The lack of the administrative act theory is accepted by most authors, being considered a creation of the Romanian administrative legal doctrine between the two world wars[40].

The doctrine distinguishes between lack of fact and legal absence. In the first case, will was never expressed, under any form. In the second case, will was expressed but "the law, considering certain capital flaws affecting it, does not even recognize its existence"[41]. In other words, a distinction was established as concerns material absence, when the act does not exist in reality, and legal absence, when the "illegality is so grave and flagrant that goes beyond mere nullity"[42].

Non-existence can be established by any interested legal subject: the court, other public authorities, addressees of the inexistent act, other individuals and businesses.

Among the cases of non-existence the doctrine retained we can mention: the administrative act was issued under a law repealed; the administrative act was adopted or issued by a body with no material and territorial jurisdiction; the administrative act deals with a dispute incumbent upon the jurisdiction of a court[43].

In the case of normative administrative acts, we can find mentions regarding non-existence among the Constitution stipulations regarding the acts of the Romanian President and of the Government[44]. Thus, according to art. 100 para. (1) of the Constitution, failing to publish the presidential decree in the Official Gazette attracts "the lack of existence of the decree" and in accordance with art. 108 para. (4), failure to publish entails "the lack of existence of the decision or order".

Given these constitutional provisions, it was pointed out that currently non-existence ought to be considered „not only a concept, but also a constitutional institution"[45]. Consequently, it has been shown that failure to publish normative administrative acts attracts the sanction of non-existence should publication of said documents be a condition of validity. It is irrelevant whether the administrative acts in question are adopted or issued by central or local public administration authorities[46].

The doctrine emphasized the practical interest in establishing the lack of existence of an administrative act. Taking into account that acts cannot be challenged in administrative proceedings, attention was drawn upon the fact that "should courts fail to rule on the legality of these acts in a direct way, they can find *their non-existence*"[47]. The practical difficulties are obvious given that the regulatory framework does not provide (an aspect considered natural from a certain perspective) legal proceedings which have as their object the finding of non-existence of an administrative act[48].

3. Conclusions

Upon analysis, even sequential, of the ways for termination of the legal effects of administrative acts, one can see a need for regulation in this area. Legal doctrine, administrative practice and case law of

[38] Ciobanu, *Drept administrativ*, 82.
[39] Trăilescu, *Drept administrativ*, 198.
[40] Iorgovan, *Tratat de drept administrativ*, 74; Manda, *Drept administrativ*, 415.
[41] Podaru, *Drept administrativ*, 395.
[42] Chiriac, *Drept administrativ*, 158.
[43] Vedinaș, *Drept administrativ*, 131; Săraru, *Drept administrativ*, 114.
[44] Dan Constantin Mâță, *Drept administrativ*, volumul I, *Noțiuni introductive, Organizarea administrației publice, Funcția publică și funcționarul public* (București, Editura Universul Juridic, 2016), 104-106, 138-139.
[45] Iorgovan, *Tratat de drept administrativ*, 79.
[46] Apostol Tofan, „Nulitatea actelor administrative", 129.
[47] Petrescu, Drept administrativ, 346.
[48] Ciobanu, Drept administrativ, 116.

administrative courts in recent decades have revealed a series of principles and rules of nature to clarify most controversial aspects. However, legislator intervention is imperative given that the administrative act is the main form of activity of public administration. Clarity and stability of the legal regime of the administrative act is likely to contribute not only to increase the efficiency of the administration but also to strengthen the legal safety for the recipients of the administration activity. We hope that in the near future the adoption of the Code of Administrative Procedure will be able to meet these requirements.

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ANTITHETICAL PERSPECTIVE OF LEGAL FORMALISM AND LEGAL REALISM

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Abstract

The necessity to outline a historical context is implicit in study of legal theories of formalism and realism. Understanding those notions presumes also understanding the social and polical context from the time of elaboration.
The main purpose of legal debates about this subject is to identify the preferable path for adjudicating particular cases, between mechanical application of existing legal rules and judge's possibility to use personal values, beliefs or ideological theories. The dispute about the measure of constraint by the text of the law has the aim of achieve the way to better decisions.

Keywords: *Legal formalism, textualism, legal realism, political influences, legal decisions.*

1. Introduction

The object of the present writing is to study the theoretical debate, between Legal formalists and Legal realists and to identify the definitions given to these notions.

Argumentations used by the adherents of both theories turned to account in understanding why the same laws are interpreted different modes. Legal Formalism and Legal realism are notions which can be examined especially in common law jurisprudence and juridical literature. But the importance and the use of the legal debate can not be neglected by the jurists from any legal system.

Regarding present concerns in our doctrine, the purpose of the article is to try to find answers to question that the judges from Romanian Constitutional and Supreme Courts are actually making the law when they interpret legislation.

Examinated notions are privileged in doctrine of common law community. Over decades there were many important partisans of both theories. Their solid arguments have enriched specialized literature from almost two centuries until these days.

The controversy brought to light interesting points of view concerning interpretation of legislation, especially by acting judges. One of the main gains is that after all the debate it is easier to understand decisions, even try to explain different adjudicating process.

A thorough from year 2008 research in law journals from United States pointed out the increasing number of articles having terms of Legal formalism and Legal realism in their titles. Until 1968, no article was published in a law journal with "formalism" or "formalist" in the title[1]. The first article title to include one of these terms was written by Grant Gilmore in 1968. From 1968 through 1979, *nine* articles had one of these terms in the title. From 1980 through 1989, the total was *twenty-seven*; from 1990 through 1999, it was *sixty-eight*; and from 2000 through 2007, *forty-eight*.[15] A search for titles with "realism" or "realist" (subtracting other usages of these common terms) shows a similar trajectory, moving from a relatively low frequency from the 1930s through the 1950s (a low of *seven* and high of *sixteen*), going up a bit in the 1960s and 1970s (numbering in the low *twenties* each decade), then jumping to a much higher level in the 1980s (*sixty-five*), 1990s (*eighty-two*), and 2000 through 2007 (*sixty-four*). It has to be mentioned that this counts only titles with a reference to the formalists or the realists. Many more articles (in the thousands) and books mention or discuss them[2].

1.1. Legal Formalism versus Legal Realism

Even before medieval Europe, kings had to show benevolence, merci, and above all, just as a condition to obtain the populace submission. In that period, kings were situated in a precise hierarchy under the religious leader. The common characteristic of that period was that every one of these rulers was supposed to be instituted by God Himself.

With all the achievements of our times, until these days, the religion justifies the limitless power of authorities as it is written in Apostol's Paul Epistle to the Romans (13:1-7)

Submission to the Authorities

Let everyone be subject to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God. Consequently, whoever rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves. [3] For rulers hold no terror for those who do right, but for those who do wrong. Do you

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[1] Christopher Peters, *Legal Formalism, Procedural Principles, and Judicial Constraint in American Adjudication*, Springer International Publishing Switzerland (2015): 26-28.

[2] Idem: 34.

want to be free from fear of the one in authority? Then do what is right and you will be commended. For the one in authority is God's servant for your good. But if you do wrong, be afraid, for rulers do not bear the sword for no reason. They are God's servants, agents of wrath to bring punishment on the wrongdoer. Therefore, it is necessary to submit to the authorities, not only because of possible punishment but also as a matter of conscience.

This is also why you pay taxes, for the authorities are God's servants, who give their full time to governing. Give to everyone what you owe them: If you owe taxes, pay taxes; if revenue, then revenue; if respect, then respect; if honor, then honor[3].

In order to obtain people's obedience, the rulers, with their authority received directly from God, kings among other duties, had to provide protection and well-being to them and to punish the wrongdoers. Even the equal rights weren't yet gained, and the privileged positions in those societies was obviously, there was an expectation of equitably treatments.

Only in presence of a benevolent ruler, the people will maintain their fidelity and the public welfare could be obtained.

And the solution of the equilibrium was Justice the only value that can provide or establish a fair balance between ruler and populace.

One of the important companions of Louis IX - also known as Saint Louis - Jean de Joinville, a crusader himself, describes the typical instance of king's justice:

During the summer he often went and sat in the woods of Vincennes after Mass. He would lean against an oak tree, and have us all sit round him. All those who had matters to be dealt with came and talk to him, without hindrance from an usher or anyone else. He himself would ask: Is there anyone here who has a case to be settled? Those who had one would stand up and said to them: Everyone be quiet and you will be given judgement, one after the another[4].

This kind of providing public justice was similar to King's Solomon which is also an iconic figure of fair judgement. Another similarity of these two kings was that neither one of them resolved cases based on a precise law. These are examples of how justice can be done analyzing the circumstances, and, regarding the precise context, giving the just resolution, by the entitled authority.

In modern society a new kingdom was established and the ruler of it is the Law. But, this new establishment came with a dispute between general rule of the law and the discretion to make justice of those which are entitled to apply it in this societies.

In Politics, Aristotle states: Rightly constituted laws should be the final sovereign; and personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement[5].

In any democracy, the general rule of law has undisputedly preference, being emission of the people's representatives.

While the legislature generalizes, the judges decide over individual cases, based on the existent law.

The main danger in judicial interpretation in judicial interpretation of any law – is that judges will mistake their own predilections for the law[6]. Originalism does not aggravate the principal weakness of the system, for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself[7].

It appears as a justified worry that unloosen discretion of judge could weaken the democratic legitimacy, making necessary a strict mechanism of applying the law.

Simply identifying the danger didn't make it easier to regard laws, reflecting judge's values and goals; often, laws appear rather to reflect compromises achieved by the different parties.

Studies of the legislative process stress the importance of interest groups, pursuing private goals rather than the public interest, in shaping legislation[8].

In this conditions it appeared a favorable ground for contradictious philosophies regarding adjudicating, and how is preferable for judges to decide cases.

One of them is a Formalist theory which considers that law is determinate in rationally, offering to the judge full and sufficient support for his decision.

Legal Formalism theory encourages the judge to adjudicate without prior appealing to moral or political ground using a mechanical deduction as it is found in Beccaria's model of the syllogism[9].

There are frequent situations when, in the law making process not all the legislators think at the same time, at the same things when, or a precise outcome is not prefered by all groups of interests. This kind of situations give birth to a serious question of authority transfer from legislator to judge.

Interpretation is a human enterprise which can not be carried out algorithmically by an expert system on a computer. But discretion can be hedged in by rules and misuse of these rules by a crafty or willful judge then can be exposed as an abuse of power. A more

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[3] *Holy Bible*, New International Version, by Biblica, accessed on April 8, 2017 at url: https://www.biblegateway.com/passage/?search=Romans%2013.

[4] Jeroen Duindam, *Dynasties: A Global History of Power, 1300-1800* Cambridge University Press (2016): 24.

[5] Ernest Barker, Sir - *The Politics of Aristotle, book III, ch xi, § 19* Oxford Clarendon Press, (1946):127.

[6] Antonin Scalia *The Rule of Law as a Law of Rules*, The University of Chicago Law Review, Volume 56 Number 4 Fall (1989): 863–864.

[7] Idem.

[8] Daniel Farber and Philip Frickey, *The Jurisprudence of Public Choice: Empiricism, Cynicism, and Formal Models in Public Law Theory*, forthcoming in Texas Law Review (1986): 15.

[9] Cesare Beccaria, Interpretation of the Law in Of Crimes and Punishments (1764):98.

latitudinarian approach to interpretation, by contrast makes it hard to see when the judge has succumbed[10].

Irremovability conjugated with the fact that usually that to be judge is a lifetime option, gives a higher probability for her or him to show faith to a law than the lawmaker who adopted by a political conviction.

Even so, the judicial unanimity is not a guarantee if the interpret a of the law is a Textualist.

Fidelity to the text of law rather than legislator's thought, intention, or expectetion from his creation is decisive for judge.

The beauty and the real meaning of a law consists in legislator's and community's eyes that interprets the text at the moment of adoption. But law are made to be applied by generations.

So, the real meaning of any law must be found at any time in order to exclude any speculative interpretations with their undesirable consequences. The desideratum is to consolidate society's trust in the rule of the law.

Nontextual interpretation makes statesmen of judges, promotes the shifting of political blame from the political organs of government to judiciary. The consequence is the politicizing of judges and a decline of faith in democratic institutions[11].

It is an utopia to think that Textualism will exclude any hesitation in adjucating process. It's purpose is to achieve the necessary predictability in this activity that will gain the necessary trust in the rule of law.

The lack of predictability leads to weakness of any society and the increasing number of laws conduct also to a difficult acces to laws.

It is undisputed true that even a bad law is preffered to a lack of law but this does not mean that we must accept a inflation of rules.

Liberation from text is attractive to judges as well. It increases their ability to do what they think is good.

The quest for nontextual decision-making sometimes become a kind of mystical divination. Preffering the spirit to the letter, we should endlessly create new meanings[12].

The fact that almost every judge uses the phrase "begining with the words of the law" it doesn't mean necessary that judge has textualist convictions. The difference between textualist and non-textualist is determined by grade of remaing fidel to the text.

Textualists are conducted by Justinian's saying A verbis legis non est recendum, meaning not to depart from the words of the law. There is no doubt that we have to understand the context which presumes the purpose of the law.

The difference between textualist interpretation and so-called purposive interpretation is not that the former never considers purpose. It almost always does. The subject matter on the document is the context that helps to give words meaning[13].

But the textualists insist on four limitations[14]:

- The purpose must be derived ftrom the text,not from extrinsic sources
- The purpose must be defined precisely, and not in a fashion that smuggles in the answer to the question before the decision-maker
- The purpose is to be described as concretely as possible, not abstractly.
- Except in the rare case of an obvious scrivener's error, purpose cannot be used to contradict text or to supplement it.

Legal formalists try to impose what the text is really transmiting, not to speculate what it may imply. They adopt the definition of law as a set of rules and principles. This theory puts the law above institutions of political or social nature.

In opposition to legal formalism is the legal realism, starting from the point of view that notes the frequent contradictions of the law and the frequent exceptions from it.

In contrast, "legal realism" is the concept that the law, as a malleable and pliable body of guidelines, should be enforced creatively and liberally in order that the law serves good public policy and social interests[15]. Legal realists often believe that judges should develop and update law incrementally because they, as the closest branch in touch with economic, social, and technological realities, should and can adapt the law accordingly to meet those needs. They often believe judges should have broad discretion and decide matters on an individual basis, because legislatures are infamous for being slow or innate to act to such pressures for change[16].

For the realists, the judge decides by feeling and not by judgment and uses deliberative faculties not only to justify that intuition to himself, but to make it pass muster. They sought to weaken, if not dissolve, the law-politics dichotomy, by showing that the act of judging

[10] Frank Easterbrook, Foreword to Antonin Scalia & Brian Garner, Reading Law, The Interpretation of Legal Texts, Library of Congress Cataloguing-in-Publication Data (2012):18.

[11] Idem: 20.

[12] Antonin Scalia & Brian Garner, Reading Law, The Interpretation of Legal Texts, Library of Congress Cataloguing-in-Publication Data (2012):22.

[13] Antonin Scalia & Brian Garner, Reading Law, The Interpretation of Legal Texts, Library of Congress Cataloguing-in-Publication Data (2012):34.

[14] Idem: 61.

[15] Ibidem:116.

[16] Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?* University of Chicago Law School Chicago (2010), accesed on April 8, 2017 at url: http://ssrn.com/abstract=1646110.

was not impersonal or mechanistic, but rather was necessarily infected by the judge's personal values[17].

Realists were certainly antiformalists. The doctrine of legal formalism holds that the law is an internally consistent and logical body of rules that is independent from the variable forms of its surrounding social institutions[18].

In doctrine it was said that formalist conceptualism served the end of limiting the scope of law in the sense that it limited occasions on which legal functionaries would assess conduct and therefore occasions on which persons would be called upon to justify their actions before such functionaries[19]. The realist and postrealist ambition, by contrast, is the expansion of these occasions, theory which it is inherent in the anti-formalist's treatment of law as an instrument for achieving social purposes. That treatment postulates a collective purpose or collectively determined end state as an objective, an organic beneficiary of this end-state and someone, presumably the legal functionary, as the formulator and implementor of the objective[20].

The Legal realism's suggestion for legal argumentation has the advantage of ambivalences as solution to the issue of whether judges make or find law. The judges who embrace this theory try to adjudicate without ignorance of the social coutcome and their decisions contain moral value choices.

The realists weigh the social context, case's circumstances, judge's ideologies, and professional consensus affirmingg that study of this elements should increase predictability of decisions[21].

3. Conclusions

The subject of whether judges make or find law will continue to concern legal practictioners and theorists. Judges exercise judgment (they make law) and the realist insight that judges are substantially constrained in that process by the social and institutional context in which they act (they find law)[22]. Confusion about how to understand the relation between these two insights is the most pronounced characteristic of the current state of legal theory[23].

The legal process theorists have moved away attention from essential legal principles to the process by which legal institutions operate. According to legal realist theory, specific rules cannot deduce from abstract legal principles.

Contrary to legal formalist theory, it is sustained that legal rules can be justified if they are created through a legitimate set of procedures by legitimate institutions keeping within their proper roles[24]. This approach to legal reasoning has three different facets: institutional competence, reasoned elaboration, and majoritarianism[25].

If we are trying to analyse in this context we can hope for clarification and enlightenment, but it cannot be found final answers. The analysis may clarify meanings and truths as they arise in different linguistic contexts or in different human situations, but there are no final answers because there is nothing fixed or final about the contexts or situations that we encounter in actual life[26].

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[18] Wendell Holmes Jr, *The Path of the Law*, in Harvard Law Review **(1897):** 457, 461.

[19] Paul N. Cox, *An Interpretation And (Partial) Defense Of Legal Formalism* inaugural lecture was delivered on March 7, 2002, at the Indiana University School of Law—Indianapolis, in Indiana Law Review (2002):57.

[20] Idem: 72.

[21] Karl Llevwellyn, *The Common Law Tradrion: Deciding Appeals* Indiana Law Review (1960**):** 19-61, 121-32, 178-219.

[22] Idem.

[23] Ibidem.

[24] Joseph William Singer, *Legal Realism Now*, in California Law Review **(**1988): 505.

[25] Idem .

[26] Hans Meyerhoff, *From Socrates to Plato*, in *The Critical Spirit: Essays In Honor Of Herbert Marcuse*, K. Wolf & B. Moore eds. (1967): 187, 200.

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DEFINING AGGRESSION IN THE LIGHT OF UNIVERSAL JURISDICTION

Raluca MIGA-BEȘTELIU[*]

Abstract

Historical background of the crime of aggresion, in the light of Nuremberg Principles of 1947 and UN General Asembly Resolution of 1974. The Rome Statute, which created an International Criminal Court, enlists the crime of aggression, as one of the four crimes under its ratione materiae competence. Uunlike the other three crimes, the Rome Statute does not define the aggression, untrusting this task to the Assembly of State Parties, as the most important negociating fora of the Court. The Kampala Amendements, issued as a result of those negotiations, offer a significant distinction between the definition of the crime of aggression, imputable to a person, which fells under the ICC specific competence, and the aggression as an act of a state. The principle of universal jurisdiction, applied in light of the complementarity betwen ICC and national courts, represents an important additional avenue towards impunity, an efective means to discourage aggression, as an individual crime and as a crime of a state.

Keywords: *Crimes against peace, crime of aggression, act of aggression, Kampala Ammendements, universal jurisdiction, complementarity of ICC jurisdiction, impunity.*

1. Historical Background

The crime of aggression is one of the four „*most serious crime(s) of concern to the international community as a hole"*[1], which are under the jurisdiction of the International Criminal Court in the Hague ("ICC" or "the Court"). The crime of aggression is the only one whose definition was innitialy not included in the Statute (Part 2, Articles 6-8). According to Art.5, a definition of the crime of aggression was to be adopted, by the Assembly of States Parties at a later date, as an Amendement to the Statute[2].

During the first half of the 20th century, mainly after the first World War, numerous atempts did not conduct to the adoption of a legal, *generally accepted* definition of aggression - neither as a crime of an individual, nore as an act of a State[3].

The concept of aggression was introduced by Article 231 of the Treaty of Versailles in 1919, imposing on Germany the outbreak of the First World War: *"Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected, as a consequence of the war imposed upon them by the aggression of Germany and her allies"*.

In 1928, a General Treaty for the Renounciation of War was adopted and ratified by a large number of States. The treaty is considered as prohibiting „wars of aggression" and brings to the forfront the importance of an agreed definition of the concept. According to its provisions, state parties engage not to recourse to war and resolve peacefuly all *"disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them.*"

Under the auspecies of the League of Nations, in July 1933, during the Conference for the Reduction and Limitation of Armaments, in answer to a proposal of the Soviet delegation and after intense diplomatic negotiations, a definition of aggression was agreed upon[4], and two *Conventions for the Definition of Aggression* were adopted and signed in London and ratified afterwards by a number of states, mainly the *new States* from Europe and Asia[5]. The Conventions defined an act of aggression by the following **actions**:

„Declaration of war upon another State; invasion by its armed forces, of the territory of another State, with or without a declaration of war; attack by its land, naval or air forces, with or without a declaration of war, on the territory, vessels or aircraft of another State; naval blockade of the coasts or ports of another State; provision of support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State, to take, in its own territory, all the measures in its power to deprive those bands of all assistance or protection"[6].

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[1] Art. 5 of the Rome Statute

[2] Art. 5, paragraph 2 and Art. 121-122 of the Rome Statute

[3] History of International criminal law mentions King Conradino of Sicily to be the first ruler who, in 1268, was tried for waging an aggressive war.

[4] Among the politicians and scholars who took part in the negociations,the Soviet diplomat Maxim Litvinov,the Romanian statesman Nicolae Titulescu and the Greak politician Nicolaos Politis were most active.

[5] Romania, Czechoslovakia, Poland, Finland, Letonia, Estonia, Lithuania, the Soviet Union, Yugoslavia, Turkey, Persia and Afghanistan.

[6] Ironically, the only circumstances under which the League of Nations applied its definition of aggression were in December 14, 1939, when the League Assembly decided to expel from the organization a State member, the Soviet Union, following the invasion of Finland.

2. The Nuremberg Principles

In 1945, the London Charter of the International Military Tribunal identified three categories of crimes under the Tribunal jurisdiction: Crimes Against Peace („*count 2"*), War Crimes (*„count 3"*) and Crimes Against Humanity *(„count 4").* The Charter defined ***crimes against peace*** as: *„planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the forgoing".*

In 1946, the final Judgment of the International Military Tribunal of Nuremberg, defininig the nature of the crimes against peace, stated that "*to initiate a war of aggression, ... is not only an international crime; it is the supreme international crime, differing only from the war crimes in that it contains within itself the accumulated evil of the whole*".

During the Cold War period, the issue of defining aggression continued to be an imperative, assumed in the fora of United Nations, mainly by the UN General Assembly and the International Law Commission.

In 1950, after the outbreak of the Corean war, debates on defining aggression gain new importance in the UN phora. The main confrontation took place beteen the western governements which intended to qualify North Korea and the Peoples Republic of China as aggressor states, and the Soviet Union. As a reaction, the soviet Government proposed to draft an UN Resolution defining aggression, based on the 1933 Convention.

Following this proposal, the General Assembly decided to entrust the International Law Commission (ILC) with the task to elaborate a definition of aggression. Due to large disagreements among the ILC members, it was decided that „*the only practical course was to aim at a general and abstract definition (of aggression)*".

In 1967, after several unsuccesessful attempts, the General Assembly created a *Special Committee on the Question of Defining Aggression*, composed of the representatives of thirty-five UN Member States.

The *Special Committee* held seven yearly sessions and in1974 recommended to the General Assembly for adoption a definition of aggression. On 14 December 1974, the UN General Assembly adopted *by consensus* the Resolution 3317/1974. The Resolution identifies seven actions, which decided and perpetrated by the government of a UN Member State, were qualified as aggression. In short, they were formulated as:

(a) Invasion or attack by the armed forces of a State of the territory of another State;(b) Bombardment of another State territory;(c) Blockade of the ports or coasts;(d) Attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;(e) Uuse of armed forces of one State which are within the territory of another State with the agreement of the receiving State (f) Allowing its territory to be used by other State for perpetrating an act of aggression against a third State (g) Sending mercenaries to carry out acts of armed force against another State."

Since no description was considered to be exhaustive, Resolution 3317 introduces those seven actions by mentioning „*such as... ".* The formulation leaves open the possibility that in the future other actions might be aided to the list, qualifying as aggression

3. The Kampala Amendements to the ICC Statute.

The ratione materiae of the Court is described in Paragraph 1 of Article 5: „*The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression*."

Paragraph 2 of the same **Article** introduces the *exceptionality* of the fourth crime under the jurisdiction of the Court; it reads:

„The Court shall exercise jurisdiction over the ***crime of aggression*** *once a provision is adopted, in accordance with articles 121 and 123, defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations."*

According to **Paragraph 2,** the ICC can not exercise jurisdiction over the crime of aggression **until** a definition of this crime is agreed by the *Assembly of State Parties*, as the only authority empowered, under Articles 121 and 123 of the Statute, to amend the Statute.

In accordance with these provisions, a **Review Conference** was held, on June 11,2010, in **Kampala**,Uganda. The so called „*Kampala Amendements*" represent the result of the Review Conference. Representatives of 111 States Parties to the Rome Statute agreed *by consensus* to adopt a Resolution on the definition of aggression and the conditions for the exercise of ICC jurisdiction over this crime. The Resolution introduces an important distinction as the *ratione materiae* competence of the ICC by identifying and conecting two concepts:

- The ***crime of aggression***, imputable to ***a person*** (who falls under the *ratione personae competence* of the **ICC**).
- The ***aggression***, as an ***act of a state,*** consisting of one or several of the the seven acts, qualified as such by the Resolution 3317 adopted in 1974 by the UN General Assembly.

3.1. The **crime of aggression,** comited by **an individual,** is defined in the new **Art. 8 bis (1)** of the

Rome Statute, adopted at the Review Conference in Kampala, as:

*„**planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations**."*

3.2. The act of aggression, as an action attributable to a State, is described in Art.8 bis (2) of the Kampala Amendements, by *literally* reproducing the *seven actions*, already described in UN General Assembly Resolution 3317/1974.

Article 8 bis (2) enumerates, as aggression:

a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexationby the use of force of the territory of another State or part thereof;
b) Bombardment by the armed forces of a State against the territory of another State or the use
c) of any weapon by a State against the territory of another State;
d) The blockade of the ports or coasts of a State by the armed forces of another State;
e) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
f) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
g) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
h) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."

3.3. The exceptionality of the crime of aggression, as compared with the other three crimes under the jurisdiction of the ICC, consists in the closer connection it imposes between: actions of an individual, the national or international criminal law and the issue of the use of force under the Chapter VII of UN Charter.

The crime of aggression is often qualified as „*a leadership crime",* since the author is usually in a position to "effectively exercise control over or to direct the political or military action of a state". Often such a decision implies the use of force in violation of Art. 2.4 of the UN Charter.

It is not surprising that, during the Cold War, in 1974, when adopting the Resolution 3317, the General Assembly also called the attention of the Security Council to the Definition it adopted and recommended that the Security Council should, as appropriate, take account of that Definition as guidance in determining, in accordance with the Charter, the existence of an act of aggression, in light of the Art 39 of UN Charter[7].

Thus, under the Kampala Amendments[8] the ICC can exercise jurisdiction over individuals, responsible for comiting *crimes of gression*, under one of the following three situations:

- Acts of aggression committed by a state party to the ICC Statute, when the Security Council has made a determination, under Art. 39 of the Charter, that such an act of aggression has been committed by a UN Member State;
- Acts of aggression committed by any state, when the Security Council refers a situation of agression to the Court;
- When the ICC's Pre-Trial Division *authorizes* the Prosecutor to proceed with an investigation, if no determination is rendered by the Security Council, within six months of an incident.

Those relevant amendments to the Statute, however have not entered into force yet.

4. Complementarity betwen ICC and national courts jurisdiction, an efective means to prosecute international crimes of aggression.

The *principle of complementarity between ICC and national courts* is advanced in the Preamble of the Rome Statute (Paragraph 10) [9]. First and formoust the Preamble stresses that the four categories of crimes which constitute the competence *ratione materiae* of the Court must not go unpunished and that their effective prosecution must be assured by measures taken at national level: *„Every state has a duty to exercise criminal jurisdiction for crimes of concern to the international community as a whole".*

Art. 1 of the Rome Statute establishes *expressis verbis* the complementarity principle between ICC and national courts as follows:

„...(The Court) shall be a permanent institution and shall have the power to exercise its jurisiction over persons for the most serious crimes...as referred to in

[7] Article 39, in Chapter VII of the United Nations Charter, provides that the UN Security Council shall determine the existence of any act of aggression and "shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security".

[8] No sooner than January 1, 2017.

[9] Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (1998).

this Statute, and shall be complementary to national criminal jurisdictions..."

For effective impunity, the cooperation at international level under the jurisdiction of the ICC should come only as a safeguard, the ICC beeing a court of last resort, exercising its above mentioned jurisdiction only when domestic courts are *unwilling or unable* to prosecute.

Art. 17 of the Rome Statute offers the full content of the principle of complementality betwen the Court and the national jurisdictions, by defining in its second and third Paragraphs the termes *unwillingness* and *inability* of national courts to „genuinly...carry out the investigation or prosecution"of a case.

The situations where a state is unwilling or unable, clearly described in Paragraphs 2 and 3 of Art.17, offer in fact a *per a contrario* definition of the principle of *due process*, which is actually the corner stone of complementarity Art. 17.2 provides in full that*:*

„In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, wheth er one or more of the following exist, as applicable:

a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article;
b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

Art. 17.3 determines some procedural circumstances which qualify the inability of a national court to offer due process:„... *a total or substantial collapse or unavailability of the national judicial system,the State... being unable to obtain the accused or the necessary evidence or testimony or otherwise unable to carry out its proceedings.*"

5. Universal jurisdiction, an additional avenue towards impunity for crimes of aggression

5.1. The term *jurisdiction*, synonymous especially in common law systems, with *competence*, refers to the exercise of a State's authority to prescribe, to adjudicate and to enforce its legislation over persons and territory under its sovereignty. In a narrow meaning, the term jurisdiction points only to the exercise of contentious functions by a State's judicial bodies. In connection with the concept of jurisdiction, a main distinction is well observed between the State's competences over persons and over territory.

In principle, international law rules do not determine the content and exercise of each state's competences over persons, being only concerned with determining the limits of the exercise of such competences by a State, in its relations with other States. Nevertheless, in civil matters, States may agree, under certain conditions, to mutually accept the extension of the exercise of some competences of one State on the territory of another[10].

In criminal matters, on the contrary, the exercise of the State's jurisdiction is limited to national territory, by stringent requirements. Still, a range of exceptional circumstances in international relations, which offer a legal definition seem to have avoided even those strictly protected territorial limits of a State's criminal jurisdiction.

From this perspective, several distinctive *principles* have received over the years a certain degree of support, from both practice and doctrine: *the principle of territoriality* which stems directly from the exercise of State's sovereignty and takes into account the exercise of its criminal jurisdiction over all acts committed on the national territory, either by citizens or by foreigners[11]; *the nationality principle (or active personality principle)* refers to State's competence to submit to its jurisdiction criminal acts perpetrated by its nationals, on the territory of another State[12]; *the passive personality principle* which refers to the State's criminal jurisdiction over acts committed by *foreigners abroad*, significantly harmful to the rights or interests of the nationals of the forum; *the principle of universal jurisdiction*, adopted in time by a considerable number of states, allows the exercise *of any State'*s criminal jurisdiction over particularly serious crimes, such as piracy, slavery, genocide, crimes against humanity, certain war crimes, the crime of aggression, torture, terrorism, etc., committed on the territory of another state, regardless of the nationality of the authors (citizens or aliens alike) or of the victims.

[10] In certain legal relations, with one or more *foreign elements* (such as the whereabouts of the assets, the venue of the conclusion of the document or the foreign status of one of the parties), the rules of private international law of each State will be applied. Due to the diversity of the solutions of those rules, relatively few principles or customary rules of public international law have been imposed by state practice, concerning the exercise of their jurisdiction in civil matters.

[11] It is based on the State's right and duty to ensure public order within its national borders. Another reason which requires the application of this principle takes into account the management of the evidence, which is facilitated by the fact that authorities it is to be presented to are within the limits of the same territory, versus the venue of the offending acts (*forum conveniens*).

[12] Due to the diversity of national criminal legislations and constitutional principles for granting citizenship, positive conflicts in the exercise of criminal jurisdiction between several States may occur, when enforcing this principle.

5.2. Universal jurisdiction provides states with the authority, under international law, to prosecute certain universally condemned crimes, committed by foreign citizens, in foreign territory[13]. This principle is not the result of recent developments or initiatives. Equal to the other principles mentioned above, it was primarily imposed by custom, through States' legislation and case law. The importance it gained lately is mainly related to the role it is called to play in order to *universally bring an end to impunity*, for authors of „*most serious crimes of concern to the international community as a hole.*

The 1945 *Nuremberg precedent* accelerated the formation of a customary norm concerning individual responsability and punishment, in the name of universal jurisdiction, for *crimes of aggression* (identified as „crimes against peace", accordimg to Nurenberg Principles), *crimes of war* and *crimes against humanity.*

In the years since the Nuremberg and Tokyo prosecutions, there have been *several notable domestic prosecutions* based on universal jurisdiction, outside the context of WW II atrocities. A court in the United Kingdom relied on universal jurisdiction authorizing the extradition of former President of Chile, Augusto Pinochet, to Spain for acts of torture committed in Chile in the 1980s; Courts of Denmark and Germany have relied on universal jurisdiction in trying Croatian and Bosnian Serb nationals for war crimes and crimes against humanity committed in Bosnia in 1992; Courts in Belgium and Canada have invoked universal jurisdiction as a basis for prosecuting persons involved in the atrocities in Rwanda in 1994; United States employed universal jurisdiction in prosecuting Charles Taylor Jr. For torture committed in Sierra Leone in the 1990s.

In view of the customary nature of the principle of universal jurisdiction, *the duty* to prosecute those crimes concerns not only the states in whose territories such crimes have been committed or whose nationals were perpetrators; it applies to all states where perpetrators of such crimes are found.

After the entry into force of the K*ampala* definitions concerning aggression, State Parties to the Rome Statute could exercise universal criminal jurisdiction over the crime of aggression, imputable to a person.

5.3. Concerning the competence of the International Criminal Court to exercise universal jurisdiction, during the negotiations which led to the adoption of the Statute, a large number of states argued that *the Court should be allowed to exercise universal jurisdiction.* The proposal was defeated due in large part to opposition from the United States. A compromise was reached, allowing the Court to exercise universal jurisdiction only under the following limited circumstances:

- where the person accused of committing a crime is a national of a state party (or where the person's state has accepted the jurisdiction of the Court);
- where the alleged crime was committed on the territory of a state party;
- where the state on whose territory the crime was committed has accepted the jurisdiction of the Court); or,
- where one of the three situations mentioned above are referred to the Court by the UN Security Council.

6. The controvesial side of complementarity in light of the universal jurisdiction principle

6.1. Since the adoption of the ICC Statute, as a consequence of the duty of states to prosecute and the complementarity principle, there has been a proliferation of national laws establishing universal jurisdiction over international crimes. In 2016, in a survey of legislation around the world, Amnesty International identifed 145 countries having authorized their courts to exercise universal jurisdiction over the following crimes within the ICC's jurisdiction: war crimes, crimes against humanity, and genocide. Five countries (Azerbaijan, Belarus, Bulgaria, the Czech Republic, and Estonia) already have enacted laws giving their courts universal jurisdiction over the crime of aggression. Other countries have adopted laws giving their courts universal jurisdiction over "offenses against international law", under international treaties as well as customary internationa law. If aggression is viewed as falling into that category („*offenses against international law")*, these countries, too, might exercise universal jurisdiction over the crime of aggression.

6.2. An effect of the complementarity between the ICC and national courts, that should enhance the role of the Court is the risk that *in national courts, defendants may not be treated with all the guarantees of due process,* compared with those strictly followed by the ICC. In front of the Court, defendants are the beneficiaries of all the protections imposed by the UN International Covenant on Civil and Political Rights, „whereas most national criminal-justice systems, by contrast, are *far less even-handed* , particularly those States have experienced atrocities serious enough to draw the Court's interest"[14].

The question one must answer is the following: is a case admissible under article 17 of the Rome Statute, if the Court has reasons to suspect *an unfair national*

[13] *Inter alia*, a definition of univesal jurisdiction was adopted by in a Regulation of the United Nations Transitory Authority for Eastern Timor (UNTAES) on the creation of specific courts in Eastern Timor. It provides that : *"universal jurisdiction means jurisdiction* ***irrespective of*** *whether: (a) the(...) offence at issue was committed within the territory of East Timor; (b)the (...) offence was committed by an East Timorese citizen; (c) the victim of the (...) offence was an East Timorese citizen."(*UNTAET Regulation No. 2000/15, available at http//www.un.org/peace/etimor/untaetR/Reg0015E.pdf.

[14] See K.J.Heller,*The shadow side of complementarity:the effect of article 17 of the Rome Statute on national due process*, in Criminal Law Forum (2006) - Springer 2006. A particular situation in Sudan is described by the author, as an exemple: routinely sentences, unrepresented defendants setenced to death after secret trials,involving confessions obtained through torture, practiced by the Specialised Courts in which Sudan intended to prosecute those responsible for the atrocities in Darfur.

proceeding by the State asserting jurisdiction? Since, according to the Statute the Court has the competence to decide under such circumstences, it may quualifiy a State as unwilling to investigate or prosecute. In this respect,one should focus mainly on the conditions of *independence* or *impartiallity* (Art. 17.2.c) of the courts.The opinion has also been expressed that, if due process is not guaranteed, the State should be considered also unable (Art.17.3) to exercise jurisdiction over a particular case[15].

This is also the position taken by the authors of the *Informal Expert Paper*, commissioned in 2003 by *the Office of the ICC Prosecutor, on complementarity*[16]. According to this report, the Court should take into account a State's „legal regime of due process standards, rights of accused, and procedures" *when determining whether it is able to investigate and prosecute.* To avoid abuses, States which exercise universal jurisdiction have an obligation to ensure that adequate safeguards are established.

6.3. In criminal matters, the crime of aggression notwithstanding, one has to take into consideration that there might always be *„another side of the coin".* Sometimes, states might have an interest, in the name of complementarity, to establish universal jurisdiction over the crime of aggression, *in order to shield the perpetrators of such a crime* from the jurisdiction of the Court.

6.4. Under a different perspective, exercise of universal jurisdiction by national courts might also give rise to some other abuses. Such are the concerns perceived, for instance, in the *Joint Separate opinion* of three Judges of the International Court of Justice (Higgins, Kooiman and Burgenthal) in the *Arrest Warrant* case (April 11, 2000)[17], as well as those voiced in a document drafted by a Group of Scholars for the Pace in the Middle East[18]. In short, some of these limitations considered as safeguards are proposed: establishing a nexus between the state and the alleged transgression; providing mechanisms to prevent politicization; recognizing *qualified immunities for certain governmental officials;* requiring prior exhaustion of adequate and available domestic remedies, in the country of origin.

7. Some other reasons of concern in the light of the Kampala Amendements?

During the negociations of the Amendements in Kampala, US representatives expressed serious reservations, due to the before mentioned trend: the concern that many states will enact legislation, under the principle of universal jurisdiction, enabling domestic courts to prosecute crimes of aggression, *commited by non-cytizens, outside the state territory*.

In order to prevent that US citizens be prosecuted abroad for crimes of aggression, US and other countries pressed for some *restrictive interpretations* of the Amedemets. The compromise resulted in the adoption of an accopaning interpretative document, namely an Undersanding[19]. The document stipulates that *„it is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.*

References:

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- Regulation of the United Nations Transitory Authority for Eastern Timor (UNTAES) available at http//www.un.org/peace/etimor/untaetR/Reg0015E.pdf;
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- United Nations Charter available at http://www.un.org/en/charter-united-nations/;
- Vienna Convention on the Law of Treaties available at https://www.ilsa.org/jessup/jessup17/Batch%201/Vienna%20Convention%20on%20the%20Law%20of%20Treaties.pdf.

[15] *Id.*

[16] ICC Office of the Prosecutor, Informal Expert Paper: *The Principle of Complementarity in Practice* (2003),http://www.icc-cpi.int/library/organs/otp/complementarity.pdf.

[17] Arrest warrant of 11 april 2000 (Democratic Republic of the Congo v. Belgium) (merits) Judgment of 14 February 2002.

[18] *Statement of the Legal Task Force of Scholars for Peace in the Midle East, On the Abuse of Universal Jurisdiction, 2004.*

[19] *Understandings* are officially adopted *interpretative documents*, appended to an aggreed text. They are used sometimes in multilateral negotiations,with an important interpretative weight, when last-minute changes to a negociated text are no more possible. According to the Vienna Convention on the Law of Treaties, *a treaty is to be interpreted within its contex.* Under the concept of „context", a formally adopted document as an „understanding" bears *important interpretative consequences.*

CERTAIN ISSUES ON THE DETENTION OF AN INDIVIDUAL

Andrei MURARU*

Abstract

The dynamics of the law is natural in the existence and evolution of the state legal system. The law has to be actual, always actual, if not in a perfect harmony, at least in an efficient harmony with the social status of a country. The constitution, by being itself a law, more precisely a fundamental law, has to comply with the existences of the system dynamics. But not in any way. In order to fulfill its regulating and especially, civilizing role, constitutional revisions have to meet certain substantiations of content and legislative technique, but also certain demands of constitutionalism. One of these demands is that the revision (amendment, supplementation, etc.) of a constitutional text is not a step backwards as regards democracy and rule of law. The efficiency of constitutional revisions is questionable if they restrict or remove classic rules and principles such as: freedom respect, property respect, free access to justice, earned rights, presumption of innocence.

Keywords: *constitution, constitutionalism, constitution primacy, revision, fundamental rights and freedoms, guarantees*

1. Introduction

1. The re-discussion of theoretical and practical issues on the detention of an individual, as a preventive measure, is relevant because we find ourselves in a period where one of the important matters which are in the attention of public authorities and public opinion is the revision of the Constitution.

There is no doubt that proposals for improvement of Title II of the Constitution, called Fundamental rights, freedoms and duties are also targeted by the efforts on the Constitution revision.

In what concerns the place of the regulations on the detention of an individual, in Title II, we recall some of the literature findings[1], namely:

a) Art. 23 of the Constitution regulates individual freedom and security. There are two categories in close connection expressing distinct legal realities. Individual freedom is human freedom to move freely, to think and speak freely. If the individual violates the laws of the state, the state repression is entitled to act. Notwithstanding, the action of the state against the individual is conditioned by certain rules which protect the individual and stop arbitrary actions of public authorities. These rules are provided by art. 23 and concern the detention of an individual, the arrest of an individual, the presumption of innocence, certain rules on criminal trial. All these are in fact guarantees in favor of the freedom of individual and form the category of individual security.

b) The security of individual in the constitutional context is traditionally considered as being part of the guarantees of the fundamental rights. And art. 152 para. (2) of the Constitution provides that „ no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms, or of the safeguards thereof". Therefore, we will note that certain provisions of the constitution revision drafts which try to amend current rules on the detention of an individual have to be removed.

c) The detention of an individual, as a theoretical and practical matter, concerns both criminal science and constitutional law due to the fact it is a dimension of human rights and human rights are by excellence a subject of study for constitutional law, and of course, a subject of study for other disciplines. This explains why detailed explanations are found both in criminal science and in constitutional law books. No doubt, constitutional explanations must largely prevail due to the fact that, in the legal pyramid, the Constitution ranks the supreme position.

2. Concepts, correlations, doctrine

Therefore, it is shown that detention is a preventive measure, including deprivation of freedom, which can be ordered by the prosecutor or by the criminal investigation body[2].

Furthermore, the detention as a preventive criminal procedural measure is explained, being a measure whereby the person suspected of having committed an offense provided and punished by the

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[1] See Andrei Muraru Protecția libertății individuale a persoanei prin mijloace de drept penal (The protection of individual freedom of a person by criminal law means) PhD thesis, 2009, Manuscript. The paperwork shall be hereinafter referred to as the Thesis; Ioan Muraru, Elena Simina Tănăsescu (coordinators), Constitution of Romania, Comment on articles, CH Beck Publishing House, Bucharest 2008, pag.217; Ioan Muraru, Elena Simina Tănăsescu, Drept constituțional și instituții politice, Edition 15, Vol. I, CH Beck Publishing House, Bucharest, 2016, pg. 165.

[2] Crişu, Constituţia României, op. cit. p. 217.

law, is deprived of freedom by the competent authorities, on a strictly limited term[3].

The explanation of the detention is performed with details in the criminal procedure books.

Therefore Grigore Theodoru, under title the concept of procedural measures and their importance[4] establishes, among others, the following: public authorities may use coercive means in order for the normal performance of the criminal trial and for the fulfillment of its scope; the constraint may consist in the deprivation of freedom of these individuals, in the restriction of their freedom or of other rights and freedoms; these measures prevent absconding prosecution and trial, as well as execution of prison sentence; although individual freedom is established by the Constitution, art. 53 of the Constitution allows, in order to protect national safety, public order, criminal investigation performance, the restriction of its exercise, subject to proportionality and to the guarantee on the existence of the right or freedom; procedural coercive measures can only be taken during criminal trial; by representing a deprivation or restriction of the rights guaranteed by the Constitution, criminal procedural measures have an exceptional nature; the law has to establish their maximum term, to provide the possibility of withdrawing them and to regulate the cases when they cease de jure; in case of flagrant offenses, the detention measure adoption is mandatory. The same author[5] classifies criminal procedural measures in personal and actual, and the first category includes: deprivation of freedom (detention, arrest), the obligation of not leaving the locality or country, to undergo a medical treatment.

By analyzing the concept and the categories of preventive measures, Grigore Theodoru[6] shows that: according to art. 136 (Code of Criminal Procedural of 1968) para. (1), preventive measures are coercive instruments provided by the law which can be taken by criminal prosecution bodies, judges and courts of law, in order to ensure the good performance of the criminal trial or to prevent the absconding of the defendant from criminal prosecution, trial, or from the execution of sentence; this is why they are called preventive measures and exist in all law systems; the establishment of measures with different individual freedom restriction is recommended in the adoption of preventive measures; the law has to establish the legal guarantees required in order to prevent any abuse in taking and maintaining preventive measures; such guarantees are provided by art. 23 of the Constitution, in art. 5 of the Code of Criminal Procedure (1968), etc.

In what concerns the procedural nature of preventive measures, Grigore Theodoru concludes that: deprivation of freedom as preventive measure has a procedural nature; it is taken only within criminal trial; preventive detention is optional; deprivation of freedom is an exception to freedom rule[7].

Ion Neagu și Mircea Damaschin analyze the detention in the large context of procedural measures[8], in section on preventive measures. By analyzing critically the opinions already expressed in the doctrine, Ion Neagu and Mircea Damaschin formulate a more concise definition according to which preventive measures are coercion institutions which can be ordered by criminal judicial bodies, for the good performance of criminal trial and the fulfillment of the scope of the actions carried out in the criminal trial[9]. The author believes that procedural measures: have a nature adjacent to the main activity; have a temporary nature; have coercive purpose although not all measures entail the existence of coercion (protection measures or safety measures of medical nature); in special situations they have protective and not coercive purpose.

In what concerns the classification[10] of procedural measures, Ion Neagu notes the existence of the following: personal or actual procedural measures (on the basis of values); measures which concern the person of the suspect or defendant (detention, arrest) and measures which can be taken on other individuals (sequestration, protection of minors) – on the basis of the individual; measures which can be taken only in the criminal prosecution stage (detention); measures which can be taken only in the judgment stage (removal from the court room); measures which can be taken in both situations (arrest, sequestration) – on the basis of the stage of the criminal trial; coercive measures (arresting, sequestration) and protection measures (notification to the protection authority) – on the basis of the scope. By analyzing the preventive measures, Ion Neagu and Mircea Damaschin note that their legal regulations led to cases of non-unitary application of the criminal procedural law, causing the High Court of Cassation and Justice to make certain decisions in the settlement of second appeals in the interest of the law promoted in this field[11]. The detention is deemed a preventive measure, together with the arrest.

Due to the fact preventive measures entail individual freedom, they can be ordered if the following general conditions are met at the same time:

- there are substantiated evidence or indications which lead to the reasonable suspicion that an

[3] Ioan Muraru, Elena Simina Tănăsescu, Drept constituțional și instituții politice, op. cit. p 166-167.
[4] Grigore Theodoru, Tratat de drept procesual penal, Hamangiu Publishing House, 2007, p. 425 and the following.
[5] Theodoru, op. cit. p. 427.
[6] Theodoru, op. cit. p. 428-429.
[7] Theodoru, op. cit. p. 429-430.
[8] Ion Neagu, Mircea Damaschin, Tratat de procedură penală, Partea generală, Edition II, Universul Juridic Publishing House, 2015, pg. 592 and the following.
[9] Neagu, Damaschin, op. cit. p. 595.
[10] Neagu, Damaschin, op. cit. p. 594.
[11] Neagu, Damaschin, op. cit. p. 595.

individual committed a crime;

− preventive measures are required for the good performance of the criminal trial, for the prevention of suspect's or defendant's absconding from criminal prosecution or judgment or for the prevention of another offense;

− there is no ground to prevent the initiation or pursuing of the criminal action;

− the preventive measure should be proportionate with the gravity of the accusation brought to the person this measure is taken against and should be required for the fulfillment of the scope pursued by ordering this measure;

− the suspect or defendant must be heard in the presence of a lawyer of their own choosing or appointed ex officio.

According to all the criminal procedural rules, these general conditions must be fulfilled for any of the preventive measures provided by the law[12].

By analyzing the detention, Ion Neagu and Mircea Damaschin[13] believe: this is the easiest of the measures involving freedom deprivation; as a preventive measure differs from three similar concepts, namely: criminals capturing under art. 310^2 and art. 61 para. (2); the individual detention by the police either for identity checking or for the fulfillment of an warrant for arrest under art. 266 para. (1); the prohibition to leave the courtroom until the end of the judicial investigation (in this respect, art. 381 para. (9) provides that heard witness shall remain in the room at the disposal of the court until the completion of the judicial investigation carried out in the respective session)

The conditions which must be fulfilled at the same time in order for this measure to be adopted are, according to art. 209 para. 1, in connection to art. 202, the following:

− there are substantiated evidence or indications which lead to the reasonable suspicion that an individual committed a crime;

− preventive measures are required for the good performance of the criminal trial, for the prevention of suspect's or defendant's absconding from criminal prosecution or judgment or for the prevention of another offense;

− there is no ground to prevent the initiation or pursuing of the criminal action;

− the preventive measure should be proportionate with the gravity of the accusation brought to the person this measure is taken against and should be required for the fulfillment of the scope pursued by ordering this measure;

− the suspect or defendant must be heard in the presence of a lawyer of their own choosing or appointed ex officio.

The detention can be ordered both by the criminal investigation body and by the prosecutor. If the detention was ordered by the criminal investigation body, this is bound to notify immediately and by any means the prosecutor on the preventive measure adoption.

As a transposition of the fundamental principle of the right of defense in this field, the judicial body which adopted the measure is bound to notify the suspect or defendant, before the hearing, that he is entitled to be assisted by a lawyer of his own choosing or appointed ex officio and that he is entitled to make no statements, except the provision of information on his identity, by making him aware of the fact that what he says may be used against him. According to the provisions of art. 209 para. (2), the detained person shall be promptly informed in a language which he understands, on the crime he is suspected for and the reasons of the detention.

The detention measure can take no more than 24 hours. According to previous regulation, the term throughout which the person was deprived of freedom following the administrative measure of being taken to the police department, provided by art. 31 para. 1 letter b of Law no. 218/2002 on the organization and functioning of the Romanian Police was deducted from the aforementioned term.

According to current regulation, art. 209 para. (3), the term required for taking the suspect or defendant to the office of the judicial body is not included in the term of the detention.

According to art. 209 para. (10) the detention measure shall be ordered by ordinance, which shall include the grounds of the measure, day and time when the detention begins, as well as day and time when the detention ends.

Throughout the term of the detention, the criminal prosecution body can conclude that the conditions for preventive detention are concluded, case in which the prosecutor shall notify the judge of rights and freedoms in order to take the preventive detention measure in what concerns the detained suspect, at least 6 hours before the expiry of the retention term.

3. Constitutional regulations

In what concerns the detention of an individual, the Constitution, in art. 23, establishes the following:

− it shall be permitted only in the cases and under the procedure provided by law;

− it shall not exceed 24 hours;

− any person detained shall be promptly informed, in a language he understands, on the grounds for his detention;

− the release of a detained person shall be mandatory if the reasons for such steps have ceased to exist, as well as under other circumstances stipulated by the law.

The rule of art. 24 of the Constitution according to which all throughout the trial, the parties shall have the right to be assisted by a lawyer of their own choosing or appointed ex officio shall be added.

[12] Neagu, Damaschin, op. cit. p, 597-599.
[13] Neagu, Damaschin op. cit. p. 619-623.

The constitutional text is clear and definite. No detention can last more than 24 hours. Upon the expiry thereof, the authority which ordered the detention has two options: the release; the obtaining of a preventive detention warrant.

It is important to note that the constitutional provision establishes the maximum term of the detention, but this does not mean that the person must be retained the respective number of hours, regardless of the situation. The authority which ordered the detention shall be entitled to maintain this status only for the time required to clarify the circumstances leading to it.

Therefore, the detention can last one hour, seven hours, etc. The legal liability of the authority for an unjustified term of the detention is out of question.

This is the reason why we will note the legal details in the field.

Legal regulations

We can add here several rules provided by the Code of criminal procedure, namely: the conditions which have to be fulfilled for the ordering of this measure are provided by art. 143 para. 1 and 2; the detention can be ordered both by the criminal prosecution body and by the prosecutor; it is required to notify the defendant that he is entitled to hire a lawyer and not to make any statement, by drawing his attention on the fact that what he declares can be used against him; the grounds of the detention are made available; the detention measure is ordered by ordinance, which has to provide the day and hour the detention began, and the release ordinance has to provide the day and hour the detention ceased; preventive detention measure can be taken throughout the detention term, under the terms of the law; the deputy or senator cannot be retained without the consent of the Chamber he is part of, after hearing him; in case of flagrant offense, they can be retained and the Ministry of Justice shall notify immediately the President of the Chamber on the detention; if the Chamber thus notified finds that there are no grounds for detention, it shall order the annulment of this measure (Ion Neagu criticizes this regulation in op. cit. p. 466).

4 Certain references to the Constitution revision draft which was discussed by the Constitutional Court of Romania and then in the doctrine[14] are also of great interest.

Art. 23 of the Constitution regulates individual freedom, thus establishing in para. (1) that individual freedom and security of a person are inviolable.

Paragraph (3) of this article establishes that „Detention shall not exceed 24 hours"

The President of Romania, in the exercise of the right provided by art. 150 (1) of the Constitution, upon the proposal of the Government, initiated the revision of the Constitution,[15] and in this context the revision of art. 23 para. (3). Therefore, the legislative proposal established that paragraph (3) shall read as follows: "Detention shall not exceed 48 hours." Therefore, the extension of the term of the detention from 24 hours to 48 hours was proposed.

Under art. 146 letter a) final thesis of the Constitution, the Constitutional Court pronounced on the revision initiative in favor of the legislative proposal, namely: the new wording of the constitutional text, by regulating the maximum term of detention, cannot be construed as resulting in the suppression of the guarantees of a fundamental right under art. 152 para. (2) of the Constitution; the proposed amendment responds to the obligation of the state to ensure a fair balance between the interest of defending fundamental rights of the individual and the interest of defending the rule of law, by taking into account the issues raised in practice by the current detention term, in what concerns the activity of the criminal prosecution bodies; the detention of a maximum term of 48 hours is justified for the effectiveness and efficiency of the measure.

The view of the Constitutional Court can not be deemed as resulting from a thorough examination of the doctrine, legislation and case law in the field. We will try to motivate this statement.

We hereby recall that personal freedom represented the subject of thorough analyses in the drafting of art. 23 of the Constitution (1990-1991), as well as in the Constituent Assembly[16]. This should be recalled because the historical method was and remains one of the main methods of interpretation of legal regulations.

In the Theses of the Constitution Draft submitted to the Constituent Assembly (Thesis 2) the Drafting Committee proposed the following wording:

"The right to personal security and freedom is guaranteed.

Prosecution, detention or arrest of an individual shall be permitted only in cases expressly provided by the law and in strict compliance with the legal procedure established for this purpose.

Detention shall not exceed 24 hours."[17]

The Constitution Draft submitted to the Constituent Assembly established the following:

"(1) Individual freedom and security of a person are inviolable.

(3) Detention shall not exceed 24 hours."

The debates held on the content of individual freedom and safety of a person explain history and motivate solutions. We believe that the maintenance of

[14] The information and documentation for this issue are taken over from Ioan Muraru, Examinare critică a unor aspecte rezultate dintr-o decizie a CCR. Curierul Judiciar, no. 11/2011, pg. 590-593.

[15] We will use the text of the Constitution revision proposal as it is provided in Decision no. 799 of the Constitutional Court.

[16] See Romanian Constitution Genesis. 1991. Works of the Constituent Assembly. Autonomous Administration „Official Journal", 1998, especially p. 196-198; 211-256; 293-334; 341-434; 440-445. The work shall be hereinafter referred as **Genesis**.

[17] Genesis, p. 191.

the view of the Drafting Committee submitted by one of its reporters presents undoubtedly an historical interest, meaning that: "It may be that in 2-3 years, when we improve justice apparatus, prosecution apparatus, therefore, everything that works in the judicial systems, these terms are exaggerated. We may ask the judges to pronounce a ruling in less than two months, for example. This may happen when we have everything required for a good functioning of justice. Therefore – this observation must be considered from now on– we do not have to brake, by means of the Constitution, the possibility that the legislation responds as best as possible to the requirements for the protection of life and freedom of person. This is why we, the committee, we dare to ask you to keep the text proposed by us"[18]. Therefore, basically, these discussions explained the constitutional provisions and opened perspectives for public freedoms.

Conclusions

I always considered that the provisions of art. 23 are earned rights, a victory of reason against abuses and dictatorship, a victory against the police state. The aforementioned legislative proposal has to be regarded as a step forward or as a step backwards?

A potential convincing answer to this question entails the elucidation of two issues:

1) Which is the legal nature of reason; 2) If the provisions of art. 152 para. (2) of the Constitution are applicable in this case[19].

1.1 After a thorough examination of art. 23 of the Constitution, it can be noted that two legal categories are regulated, which are undoubtedly connected but not the same, namely individual freedom and security of person. If freedom concerns physical liberty of a person, his right of acting and moving freely, of not being held in slavery or in any other servitude, of not being detained or arrested, except in cases and according to the forms expressly provided by the Constitution and laws, the security of a person represents all the guarantees which protect the person in cases where public authorities, in the application of the Constitution and the laws, take certain measures which concern individual freedom, guarantees which make sure that these measures are not illegal. This system of guarantees allows the repression of antisocial acts, but, at the same time, provides innocents the required legal protection[20].

A first finding is required: the content of the security of a person includes all the rules in the field of art. 23 of the Constitution: detention, arrest, hearings, procedures, presumption of innocence, etc. Therefore, art. 152 para. (2) of the Constitution concerns the security of the person as a whole, any revision of components being prohibited.

By analyzing briefly the doctrine we find that a valuable work[21] shows, among others, the following: the right to freedom and security is an inalienable right, which no one can give up, which concerns all persons; the European Court of Human Rights often stated in its case law, among others, that the main scope of art. 5 is the protection of individual against arbitrary actions of state authorities; the circumstances under which a person can be legally deprived of freedom have to receive a narrow and rigorous interpretation, due to the fact they are exceptions on a fundamental guarantee of individual freedom; deprivation of freedom can have direct and adverse consequences on the exercise of other individual rights and freedoms; the detention of the persons to be prosecuted should not be a rule; the right to freedom and the right to security, taken together, represent a fundamental right that takes no alternative – there is the status of freedom or the status of deprivation of freedom, etc.

Another successful work shows that "the guarantee of the substance", the respect of the essential content or of the essence of fundamental rights and freedoms is a major idea of comparative constitutional law which is recorded in modern constitutions[22]. The thesis according to which the security of the person falls into the category of guarantees of individual freedom is generally recognized, in this respect, the scientific works of real value being interesting and showing among others, the following: "The concept of security does not mean that the state can never prejudice individual freedom, but it does mean that guarantees have to be granted in this field to the individual in order for these prejudices not to be illegal... . Protective principles mainly consist in the organization of a criminal procedure which ensures not only the repression of crimes and offenses, but also grants innocents certain guarantees[23]. "Together with the term of individual freedom, the constitutional text also uses the expression of security of person. The security of the person consists of all the guarantees provided by the law whereby the person is protected if the state takes measures of deprivation of freedom against the respective person"[24]; "the meaning of the concept of security of person expresses the guarantees which

[18] Ioan Muraru, in Genesis, p. 347.

[19] According to this article, para. (2) no revision can be performed if it results in the suppression of fundamental rights and freedoms of the citizens or of the guarantees thereof (subl. ns.).

[20] Cf. Ioan Muraru, Elena Simina Tănăsescu, Drept constituțional și instituții politice, Edition 14. Vol. I, C.H.Beck Publishing House, 2011, p. 166

[21] Corneliu Bîrsan, Convenția europeană a drepturilor omului, Comentariu pe articole, vol. I, All Beck Publishing House, 2005, p. 277, 278, 279, 283.

[22] Louis Favoreu, Patrick Gaïa, Richard Ghevontian, Jean-Louis Mestre, Otto Pfersmann, André Roux, Guy Scoffoni, Droit Constitutionnel, 13e edition, Dalloz, Paris, 2010, p. 887.

[23] Claude-Albert Colliard, Libertés publiques, Dalloz, Paris, 1982, p. 234.

[24] Ștefan Deaconu, Drept constituțional, C.H.Beck Publishing House, Bucharest, 2011, p.237.

protect the person in case the state orders measures of deprivation of freedom"[25].

The Charter of Fundamental Rights of the European Union must also be taken into account, by providing in art. 6 the following: "any person has the right to freedom and security". The security of a person is therefore considered a fundamental right[26].

Given all these brief remarks, we can conclude the following: the security of a person which is often considered a fundamental right represents a guarantee of the fundamental rights in the Romanian Constitution system; all components of the security of person, as provided by art. 23 of the Constitution, form a single and indivisible block, therefore, the revision of a component is not allowed due to the fact it affects the whole block; the legislative revision proposal comes into conflict with art. 152 para. (2) and therefore it cannot be performed.

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[25] Anastasiu Crișu, Comentariu, p. 213.

[26] For the explanation of the text, see Guy Braibant, La Charte des droits fondamentaux des l'Union Européenne, Edition du Seuil, 2001, p.107-109.

THE RIGHT TO HEALTH PROTECTION VERSUS ECONOMIC FREEDOM

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Abstract

Our assertion is that our freedom exists and can be manifested as long as we do not infringe upon anyone else's freedom. But is this contention still valid when we aim to protect our health by exercising our rights in this direction and, in the process, we encroach on another fundamental right such as economic freedom? The establishment, through fundamental national and international regulations, of the right to health preservation, entitles every human being to exist, to develop, as health, alongside life, is a goal that each and every one of us strives for. However, exercising economic freedom ensures our development and the chance to lead a better life. In this article our focus is on the analysis of some aspects regarding the limitations of exercising such fundamental rights.

Keywords: *right, protection, health, economic freedom, regulations*

1. Introduction

Law No. 349/2002 on the prevention and control of the effect of tobacco product use[1], as provisioned by article 1, adopted some measures regarding the prevention and control of the use of tobacco products by such means as: smoking bans in closed public spaces, tobacco product warning labels, organizing awareness and education campaigns for the population in order to protect the health of smokers and non-smokers from the harmful effects of smoking. We consider that this legislative act, which was passed during the pre-accession period to the European Union, precisely in order to be in full accordance with Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products[2], outlined, for the first time, a fairly comprehensive legal framework to ensure the prevention and control of the effects of tobacco product use, with a view to guaranteeing the fundamental right to health protection[3].

Amendments and additions were brought to this law by means of primary legislative acts, specifically one Government emergency ordinance, two Government ordinances issued on the basis of an enabling law and six laws, two of which approved the two ordinances but they also brought amendments and additions to them. The last two laws were adopted by the Parliament of Romania in 2016, mostly in order to transpose into national law Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC, published in the Official Journal of the European Union No L 127, of 29.04.2014, the transposition deadline being 20 May 2016, according to article 29, section 1 of the Directive. The measures adopted by the European law and, consequently, by the national law were also determined by the need to guarantee a high level of health-related quality of life

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[1] This law was published in the Official Gazette of Romania, Part I, no. 335 of 21.06. 2002.

[2] This Directive was published in the Official Journal of the European Communities No L 194 from 18.07.2001, and in the Official Journal of the European Union No 15/vol. 7, pp.125-134.

[3] The process of the transfer and implementation of the Community acquis regarding tobacco products also complied with other directives such as: Council Directive 89/622/EEC of 13 November 1989 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products, published in Official Journal of the European Communities No L 359, of 08. 12. 1989, amended by Council Directive 92/41/EEC of 15 May 1992 amending Directive 89/622/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products, published in the Official Journal of the European Communities No L 158 of 11.06.1992 , transposed by Order no. 853/2000 issued by the Ministry of Public Health regarding the formulation and dimensions of the health warning text to be used in tobacco advertisements, published in the Official Gazette of Romania, Part I, no. 667 of 15.08.2000, respectively the Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, published in the Official Journal of the European Communities No L 213 of 30.07.1998 (which was repealed in 2000), and also the Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, published in OJEC No L 298 of 17.10.1989, were transposed in the Government Emergency Ordinance no. 55/1999 regarding the banning of tobacco advertisement in cinemas and the ban on selling tobacco products to minors, approved by Law no. 151/2000 or by the Audio-visual Law no. 48/1992, published in the Official Gazette of Romania no. 104 of 25.05.1992. See also *A Study on Smoking and Public Health in Romania* (Studiul Fumatul şi sănătatea publică în România) http://stopfumat.eu/wp-content/uploads/2014/10/Studiu_CPSS_04.pdf, accessed 15.03.2017, from p. 12 onwards.

as well as consumer protection, without overlooking the observance of other fundamental, acknowledged and secured rights of the citizens of the European Union member states, and had to be consonant with the well-functioning of the European single market[4], by also taking into account the latest scientific research pointing to the harmful effects of tobacco use on health and to the health benefits of using electronic cigarettes instead of tobacco[5]. At point 59 of its Preamble, the above mentioned Directive admits that this legislative act will impact upon a series of fundamental rights, which does not however entail that the obligation to observe the fundamental rights and legal principles established by the Charter of Fundamental Rights of the European Union will be modified.

The research that has been conducted so far revealed, beyond a shadow of a doubt, the harmful effects of tobacco use not only on the health of those who smoke these products but also on the health of those who passively inhale the toxic cigarette smoke[6]. Unfortunately, the studies revealed the great number of smokers but also of those who, rather paradoxically, support the increase of tax on tobacco products or who support the banning of cigarette advertisements in stores or who advocate for the banning of on-line selling of cigarettes. Moreover, among other aspects[7], it has been noted that in spite of the European Union's "consistent policy of tobacco control", structured on several segments, smoking remains "the most widely-spread avoidable cause of death in Europe, amounting to approximately 700 000 deaths per year"[8].

In these studies, there were also evaluations of the economic impact of tobacco use with regard to the expenses incurred by the financial support of this habit, but also for the prevention and control of the consequences that tobacco use has on health, costs that are sustained not only by those suffering from such illnesses and/or by their families, but also by the public health systems.

Nonetheless, one must not disregard the fact that the adoption of any prevention and control measures of tobacco use, its decrease in sales, the actual reduction of tobacco use, are not factors that economically affect businesses, the veritable industry which is organized and operated in connection with tobacco use.

But however affected the tobacco industry and commerce might be, thus even affecting a fundamental right stipulated by article 45 of the Constitution of Romania, republished, these are not comparable, in our opinion, to the impairment of the health of human beings and, implicitly, of their right to health protection, established by article 34 of the same instrument.

Bearing this situation in mind, one can only wonder what prevails in this world whose most prominent feature is mercantilism and where the fundamental rights of any human being are perceived as a luxury by some - is it the right to health preservation, to health care or the liberty to conduct economic activity?

2. Content

2.1. Aspects regarding the right to health protection

Health is "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity"[9], as the very Constitution of the World Health Organization define the state that we pursue and to which every individual is entitled at any moment of their existence. However, through the same act, the World Health Organization admitted, as early as 1946, that the right to health cannot be viewed solely as an individual right of every human being as it also has a collective aspect due to the fact that states are, first and foremost, the ones that have to contribute actively to assure the health of their citizens, without any discrimination whatsoever, by means of coherent policies and strategies.

Hence, in the Preamble of this Constitution, it is acknowledged that "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race,

[4] As the above mentioned Directive stipulates at points (1) – (59) of its Preamble, especially at point 59.

[5] In this direction, article 1 of Law no.349/2002, as amended in 2016, provides that the object of this legislative act consists in the adoption of „various measures regarding the prevention and control of tobacco product use, by completely banning smoking in all closed public spaces, in the closed spaces from workplaces and on playgrounds, by labelling tobacco product packages, by carrying out awareness and education campaigns for the population, by informing consumers of the tobacco products that they intend to purchase by indicating the tar, nicotine and carbon monoxide content in the final products, by some measures regarding the use of ingredients in tobacco products". The same article also identifies the goal pursued by the adoption of such measures, namely a threefold goal: the protection of the health of smokers and non-smokers from the damaging effects of smoking, preventing the spread of smoking among minors and ensuring an adequate quality of life for the Romanian population, respectively.

[6] In this sense see, for instance, the European Commission, Eurobarometer, *Attitudes of Europeans towards Tobacco and Electronic Cigarettes*, http://ec.europa.eu/public_opinion/archives/ebs/ebs_429_fact_ro_en.pdf, accessed on 16.03.2017, or A case study within the National No Smoking Day campaign – 20th November 2015 (*Analiza de situaţie în cadrul campaniei cu ocazia zilei naţionale fără tutun - 20 noiembrie 2015*), a study conducted by the National Institute of Public Health via the National Health Evaluation and Promotion Centre, available at: http://insp.gov.ro/sites/cnepss/wp-content/uploads/2016/01/Analiza-situatie-Campania-antifumat-2015.pdf, accessed 16.03.2017.

[7] In this sense see A case study within the National No Smoking Day campaign – 20th November 2015 (*Analiza de situaţie în cadrul campaniei cu ocazia zilei naţionale fără tutun - 20 noiembrie 2015*), a study conducted by the National Institute of Public Health via the National Health Evaluation and Promotion Centre, op. cit., p.23.

[8] Ibidem.

[9] This definition is from the Preamble of the Constitution of the World Health Organization which was adopted at the International Health Conference and signed on 22 July 1946, and entered into force on 7 April 1948. Amendments were adopted by the World Health Assemblies and these resolutions came into force between 1977 and 2005. See http://www.who.int/governance/eb/who_constitution_en.pdf, accessed on 16.03.2017.

religion, political belief, economic or social condition". Conversely, it is claimed that "the health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States", and that "the achievement of any State in the promotion and protection of health is of value to all".

The right to health and its preservation is established by international regulations even prior to the adoption of the Universal Declaration of Human Rights[10], which does not expressly allot an article to this right. However, by the provisions of article 25 on the right to a satisfactory living standard, the Declaration stipulates that one of the defining components of this right is health care provision, necessarily including medical care among the issues of interest. Then, article 12 of the International Covenant on Economic, Social and Cultural Rights[11], settles the two dimensions of the right to health care by clearly stipulating in paragraph (1) that all countries should recognize the right of every individual to benefit from the best attainable physical and mental state. Paragraph (2) of the same article conveys the collective dimension of this right and indicates several necessary measures that the states should adopt with a view to fully exercise this right.

From the aforementioned issues, one can consider the right to health and to its protection[12] not exclusively from the perspective of this right because many of its other facets can be highlighted[13]. Hence, there is the medical aspect owing to which the international community, by the organizations founded precisely for this aim, such as the World Health Organization, and by their specifically established attributions[14], but mostly the states have to contribute to the provision of hygiene and public health by systematizing medical assistance and the medical insurance system as well as by devising measures for the protection of the physical and mental health of all individuals, according to the provisions of Article 35 (2) and Article 35 (3) of our Constitution[15].

Moreover, this right has a dimension which is echoed by the right to a satisfactory living standard with regard to health, medical care, health insurance policies that every human being should benefit from, a view which is also shared by the provisions of article 47 of the Constitution of Romania, republished.

But the consideration of this right from the point of view of the right to a healthy environment, as the health of human beings is totally dependent upon the health of their environment, should not be disregarded. Hence, reasserting and aiming to expand the Declaration issued at the United Nations Conference on the Human Environment adopted in Stockholm on 16 June 1972, the United Nations Conference on Environment and Development, through the Rio Declaration on Environment and Development16, which was adopted during the proceedings of the conference held between 3 June and 14 June 1992, stated in its first principle that people "are entitled to a healthy and productive life in harmony with nature". Also, in Principle 14, the same organization demanded the states to "cooperate effectively for discouraging and preventing the movement and transfer to other states of any activities and substances that could cause severe

[10] This Declaration was adopted by the UN General Assembly on 10 December 1948, by its Resolution 2171 A/III. Romania signed the Declaration on 14 December 1955, when it became member of the United Nation Organization, as it is settled by the Resolution R 955 (X) of the UN General Assembly.

[11] This Covenant was adopted and opened for signature by the United Nations General Assembly on December 16th 1966, Resolution 2200 A (XXI), entered into force on January 3rd 1976, according to art 27. Romania has ratified the International Covenant on Economic, Social and Cultural Rights on October 31st 1974, by Decree no 212 which was published in the Official Gazette of Romania, Part I, no 146 from November 20th 1974.

[12] As regards the name given to this right, it varies from the right to health to only a reference to the respective right as a dimension of another right such as the right to a satisfactory or decent living standard. But by a Fact Sheet, WHO names this fundamental right the right to health, but it gives its full name - the right to the enjoyment of the highest attainable standard of physical and mental health. See Office of the United Nations High Commissioner for Human Rights and World Health Organization, Fact Sheet No. 31 from 2008, p. 1, at http://www.ohchr.org/Documents/Publications/Factsheet31.pdf, accessed on 07.03.2017.

[13] I. Cloșcă, I. Suceavă, *Tratat de drepturile omului*, „*Treaty of Human Rights*", Europa Nova Publishing House, Bucharest, 1995, p.293 and onwards.

[14] Hence, for instance, in article 2 of its own Constitution, WHO has provided some of its functions such as: to act as the directing and co-ordinating authority on international health work, to establish and maintain effective collaboration with the United Nations, specialized agencies, governmental health administrations, professional groups and such other organizations as may be deemed

appropriate, and to assist Governments, upon request, in strengthening health services.

[15] În Fact Sheet No. 31 from 2008, WHO identified a number of 115 states in the Constitutions of which the right to health or the right to health protection is regulated, and other six states identify, by means of their constitutional norms, the duties of the state regarding the development of public medical care services or regarding the allocation of funds from the state budget for this objective. See Fact Sheet No. 31 from 2008, op. cit., p.10. Moreover, it has been pointed out in various studies that more than a third of the world's countries have included provisions regarding the right to health or to the protection of health in their fundamental laws. In this sense, see H. Matsuura, *The Effect of a Constitutional Right to Health on Population Health in 157 Countries, 1970–2007: the Role of Democratic Governance*, in Program on the Global Demography of Aging - Working Paper Series, pp. 2-3, at: https://cdn1.sph.harvard.edu/wp-content/uploads/sites/1288/2013/10/PGDA_WP_106.pdf, accessed on 10.03.2017, or G. Backman, P. Hunt, et al., *Right to Health - Health systems and the right to health: an assessment of 194 countries*, at: http://www.who.int/medicines/areas/human_rights/Health_System_HR_194_countries.pdf, accessed on: 17.03.2017. Hence, for instance, the Constitution of Bulgaria, in article 52, takes into consideration both the individual as well as the collective dimension of this right. Therefore the right to medical insurance guaranteeing affordable medical care and free medical care to citizens is ratified; but it is also established that State shall protect the health of all citizens, and shall exercise control over all medical facilities and over the production and trade in pharmaceuticals, biologically active substances and medical equipment. This Constitution also provides that Medical care shall be financed even from the state budget. Furthermore, article 40 of the Constitution of Slovakia provisions that every person shall have the right to protect his or her health, but also that through medical insurance, the citizens shall have the right to free health care and medical equipment for disabilities under the terms to be provided by law. These constitutions are available at: https://www.constituteproject.org/search?lang=en, accessed on: 17.03.2017.

[16] See http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm, accessed on: 17.03.2017.

environmental damage or which could be harmful to people's health".

One cannot overlook the fact that, at European level, the European Convention on Human Rights does not expressly establish the right to health or to its protection[17]. Yet, by its case law, the European Court of Human Rights increasingly resorts to the vague notion of "private and family life", thus encompassing in this frame-concept not only the right to live in a healthy environment, among other things, but also the right to health[18]. The physical and moral integrity of the individual, as a dimension of private life protection, but in some circumstances, it is chiefly the physical one that comprises the dimension of the right to health[19], according to the Court's case law[20].

On the other hand, the Charter of Fundamental Rights of the European Union acknowledges the existence of this right-lien[21], by stating that the right to health protection entails the right of every individual to have access to preventive medical assistance and to benefit from medical care, according to national legislation and practice. Furthermore, article 25, in its second sentence, also orders that a high level of protection of human health should be furnished by means of policies and actions at European Union level. Therefore, nowadays, there is an increasingly poignant orientation towards the need to secure the right to the highest possible health standard, but in order for this to materialize the characteristics of health systems must be identified, but working our way through this process is similar to the implementation of the right to a fair trial[22].

In fact, in the constitutional definition of the right to health, three criteria can be identified[23], namely the purpose of this right, "the right to health must contain the guarantee of the right to access health care rather than the right to a healthy environment or health insurance for all citizens of the country"[24], then that this "right must be an individual right enforceable through the independent judicial review or specific complaint process if no judicial review process is available for a country"[25], and in the end such a right has to be explicitly written in one or more provisions.

In light of all the above, we hold that, legitimately, "the right to health provides a framework that can be used across disciplines, communities and cultures (and, indeed, with sectors outside health) for developing, delivering and evaluating health-related policies, services and programmes to ensure they are robust, sustainable, effective, and equitable"[26].

Consequently, it is utterly undeniable that saving life is a basic element of social justice (and the access to life-saving treatment is a basic human right), but, at the same time, due to the ever more sophisticated and expensive means of modern medicine, this also constitutes a fundamental economic and political problem[27]. Or, in other words, universal health care is about more than our health—it is also a prescription for economic transformation, budget and tax reform, and public sector strengthening[28].

The securing and protection of health rely on policies, strategies and rules that are instated through national and international legislation, the public health system being bound and able to guarantee "a minimum level of health" to all human beings even when, by exercising their economic freedom, their health had been endangered by the manufacture and sale of goods and products that were harmful to their own health and to the health of others. Notwithstanding, economic freedom is exercised precisely for ensuring and protecting health, especially in the private sector.

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[17] Nevertheless, the European Social Charter (Revised) adopted on 3 May 1996 in Strasbourg, which guarantees, in article 11 and article 13, both the right to health protection and the right to medical and social assistance, bearing upon both the individual and the collective dimensions of the right to health, entered into force at the level of the Council of Europe and was afterwards ratified by Romania through Law no. 74/1999, published in the Official Gazette of Romania, Part I, no. 193/1999.

[18] F. Sudre, *Drept european şi internaţional al drepturilor omului*, "*European and International Law of Human Rgihts"*, Polirom Publishing House, Iasi, 2006, p.315.

[19] J. F. Renucci, *Tratat de drept european al drepturilor omului*, „*Treaty of European Law of Human Rights*", Hamangiu Publishing House, Bucharest, 2009, pp. 241-242

[20] See: McGinley and Egan v. The United Kingdom (case no.10/1997/794/995-996), June 9 th 1998, B2, § 101 at: http://www.hrcr.org/safrica/access_information/ECHR/McGinley.html, accessed on: 17.03.2017. In this case, ECHR stated that „where a Government engages in hazardous activities, such as those in issue in the present case, which might have hidden adverse consequences on the health of those involved in such activities, respect for private and family life under Article 8 requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information". Thus, a positive obligation of the states to engage in securing this dimension of the right to uphold private and family life by supplying necessary and relevant information was instated.

[21] I. Muraru, E.S. Tănăsescu, coordinators, *Constituţia României. Comentariu pe articole*, "*Romanian Constitution. Comment on articles"*, C. H. Beck Publishing House, Bucharest, 2008, p.319.

[22] G. Backman, P. Hunt, et al., op. cit., pp. 2047-2048.

[23] H. Matsuura, op. cit., pp. 16-17.

[24] Ibidem.

[25] Ibidem.

[26] A. J. Blaiklock, *The Right to Health: An Introduction*, p.4, article available at: https://cdn.auckland.ac.nz/assets/humanrights /Research/Right-to-health-blaiklock.pdf, accessed on: 10.03.2017.

[27] Wolfgang Hein und Lars Kohlmorgen, Global Health Governance: Conflicts on Global Social Rights in Working Papers. *Global and Area Studies*, pp. 7-8, article available at: https://www.giga-hamburg.de/de/system/files/publications/wp07_ hein_kohlmorgen.pdf, accessed on: 10.03.2017.

[28] A. Rudiger, *Human Rights and the Political Economy of Universal Health Care: Designing Equitable Financing* in *Health and Human Rights Journal* , vol 18, No 2, December 2016, p. 68, available at: https://cdn2.sph.harvard.edu/wp-content/uploads/sites/13/2016/12/Rudiger-final-1.pdf, accessed 10.03.2017.

2.2. Aspects regarding economic freedom

Whereas the right to health protection is considered a third-generation right, economic freedom is included into the category of first-generation rights[29], being regulated by the Constitution of Romania only after its revision in 2003.

Legally speaking, economic freedom is of interest insomuch as concerns its content as well as its limitations because article 45 of the republished Constitution of Romania[30] expressly provides that one's right to conduct economic activities, to exercise free enterprise and to conduct all within the limitations of the law are guaranteed[31]. This constitutional provision also indicates the fact that this freedom is not an absolute one[32]. Actually, by its very case law, the Constitutional Court of Romania has confirmed the constitutional provisions whereby the free access of a person to an economic activity, free enterprise as well as their enactment can be pursued only according to the conditions expressly provided by the law. Hence, by Decision no. 556/2007[33], the Constitutional Court held that the state is required to instate economic conformity regulations that economic agents have to abide by and, conversely, it is the prerogative of the lawmaker to decide upon the adequate sanctions to be applied for their breach, as the people's free access to economic activities and the free enterprise are guaranteed under the "conditions expressly provided by the law". Also, by Decision no.162/2011[34], the same constitutional court reiterated that the principle of economic freedom is not an absolute right of the individual, but it is conditioned by the observance of the limitations laid down by law, boundaries that target the assurance of a certain economic conformity or the protection of general interests as well as the guarantee that the rights and legitimate interests of all individuals are being respected. Therefore, any state, especially through Government and Parliament, has a central role to play in advancing and defending economic freedom and non-economic rights, such as the right to health[35].

However, as economic freedom is considered a fundamental freedom, it represents a type of economic right, but this freedom does not include all types of economic rights, otherwise distinctly regulated by the Constitution, even though it is their grounding and their very reason of existence[36]. Therefore, this type of freedom also comprises economic freedom as delineated by article 135 of the Constitution of Romania (Republished) as being "the general principle of the Romanian state, on which the organization of economic activities on its territory is founded"[37].

On the other hand, we have to mention that the objectives of European Union, as found in TFEU and foremost in TEU, article 1 and 3 Par. 3, indicate, among others, the aim to sustain an internal market and to promote social justice[38]. In this sense, article 16 of the Charter of Fundamental Rights of the European Union established the freedom to conduct commercial activities, which is acknowledged according to the law of the European Union and to national laws and practices. If economic freedoms are held to promote the internal market of the EU, where free trade and movement configure to aid the mutual aims and objectives of the member states of the EU, social rights, such as the right to health, advert to those serving to balance circumstances for citizens of the EU, conditions that are considered essential for human beings to live their life in dignity[39].

Economic freedom includes our freedoms to create, to explore our capabilities and talents through our choice of vocation, and to provide for ourselves and our family, but also involve the opportunity to acquire and own property, to exchange our goods and services with others in free markets at prices that are mutually agreeable, and to transact when and where we choose, but not least this freedom also involves our decisions that nurture those capacities, especially education and training, but also our lifestyle choices, health care, and nutrition[40].

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[29] M. Constantinescu, A. Iorgovan, I. Muraru, E. S. Tănăsescu, *Constituţia României revizuită – comentarii şi explicaţii*, „*Romanian Constitution revised – comments and explanations",* All Beck Publishing House, Bucharest, 2004, p. 97.

[30] Other constitutions also regulate this fundamental freedom. Thus, for instance, in article 31, the Constitution of Estonia provides that Estonian citizens, but also Citizens of foreign states and stateless persons who are in Estonia, unless otherwise provided by law, have the right to engage in enterprise and to form commercial undertakings and unions, but conditions and procedure for the exercise of this right may be provided by law. Also, article 18 of the Constitution of Finland acknowledges, alongside the right to work, the freedom to engage in commercial activity that consists in everyone's right to earn his or her livelihood also by commercial activity of his or her choice.

[31] I. Muraru, E.S. Tănăsescu, coordinators, *op. cit*, p. 461.

[32] Idem, p. 463.

[33] Decision no. 556 of 7 June 2007 on the constitutional challenge of the provisions of article 51(1), Par. A, of the Competition Law no.31/1990 on commercial companies, of the Constitutional Court of Romania, was published in the Official Gazette of Romania, Part I, no.560 of 15.08.2007.

[34] Decision no. 162 of 8 February 2011 on the constitutional challenge of the provisions of article 136 of the Law no. 31/1990 on commercial companies, of the Constitutional Court of Romania, was published in the Official Gazette of Romania, Part I, no. 272 of 19.04.2011.

[35] See J.D. Foster, J. A. Marshall, *Freedom Economics and Human Dignity. Economics for the Good of People*, p. 22, available at: http://thf_media.s3.amazonaws.com/2011/pdf/Freedom_Economics.pdf, accessed 10.03.2017.

[36] G. Gârleșteanu, Considerații privind libertatea economică, „Considerations regarding the economic freedom", published in Revista de Științe Juridice nr. 2/2006, pp. 151-152, available at: http://drept.ucv.ro/RSJ/images/articole/2006/RSJ2/0302GeorgeGarlesteanu.pdf, accessed 10.03.2017.

[37] Ibidem, p. 152.

[38] J. Andersson, *The economic freedoms and social rights within the EU – a study of the transformation and interplay between thse two interests*, JAEM01 Master Thesis, available at: https://www.mysciencework.com/publication/download/2d8abe3b5c41b9e378593a0830562262/471d3a0579dd562d5b23acb8d0849811, accessed on: 10.03.2017.

[39] J. Andersson, op. cit., p. 11.

[40] J.D. Foster, J. A. Marshall, *op. cit*, pp. 7-8.

The beneficiary of this fundamental right is, first and foremost, the individual who, when being considered from a legal perspective, is assimilated to the natural person[41]. However, taking into account the European legal framework, by article no.1, sentence I[42] of the First Additional Protocol to the European Convention on Human Rights and Fundamental Freedoms as well as the case law of the European Court of Human Rights, and the content of economic freedom, the congruity of the normative components of this freedom with the constitutional principle of pluralism[43], including the rather inconsistent case law of the Constitution of Romania[44], we also consider that "economic freedom concerns all the participants from the economic field, namely the natural person but mostly the moral person"[45]. In this context, the moral person is both the private as well the public person. On the other hand, economic freedom also involves state obligations that are subsumed to the principle of economic freedom[46], the fundamental lawmaker[47] implicitly ruling in this direction by characterizing the Romanian economy as a market economy within which the state must also guarantee the freedom of trade but it also has to create the necessary conditions for the improvement of the quality of life. Hence, in our opinion, it is mandatory that the state should intercede through the adoption of the necessary legislative measures, either on its own initiative or by enforcing policies which are in accordance with the objectives of the European Union regarding the warranty, safeguarding and protection of such fundamental rights as the right to health protection, even if it would thus infringe upon the exercise of others, such as economic freedom.

Therefore, the human rights frame thus occupies the intersection between universal values and vision on one side, and particular political demands and policy prescriptions on the other[48]. In the quest for universal health care, rights can be marshalled both as a normative and as an analytical force to be deployed on a politically contested terrain[49].

More than that, we must admit that today we are witnessing conflicts between neoliberalism, the dominant economic policy framework in the world today, and the international human right to health[50]. In this context a human rights approach rests on a conception of health and health care as social or public goods of special importance that are designed to benefit the whole population[51]. In contrast, neoliberalism tends to promote the view of health care as a commodity whose price, availability, and distribution, like other consumer goods, should be left to the marketplace[52].

2.3. Decision no. 29 of 27 January 2016 on the constitutional challenge of the provisions of the Law for the completion and amendment of Law no. 349/2002 on the prevention and control of the effects of the use of tobacco products, of the Constitutional Court of Romania[53]

Subsequent to the formulation of a constitutional challenge by 33 senators regarding the alleged unconstitutionality of the Law for the completion and amendment of Law no. 349/2002 for the prevention and control of the effects of the use of tobacco products, at point 31 of its Decision, the Constitutional Court of Romania held that "the right to economic freedom has to be understood in connection with the observance of other rights and fundamental freedoms such as the right to life, the right to health and to a healthy environment" and "smoking bans in closed public spaces does not constitute, per se, a limitation of economic freedom but it represents a condition for conducting economic activities" in the sense of the constitutional text of article no.45 in which this right is established.

Moreover, making reference to the case law of the Constitutional court of Macedonia, which is relevant to the case in question, the Court laid emphasis on the fact that "smokers are granted access to all the places that the lawmaker defined as public spaces in which smoking is banned, but they must correlate their conduct with the conduct of the other non-smoking citizens, in a manner which is conformant to the conditions laid down by the law and which regard all the citizens" precisely because "the aim of such regulations is to protect life and health (as supreme

[41] G. Gârleşteanu, op. cit., p. 152.
[42] According to this provision, the right to the protection of personal assets is an entitlement of every natural or legal person.
[43] This principle is established by article 8 of the (Republished) Constitution of Romania.
[44] For further details see G. Gârleşteanu, op. cit., pp. 153 -155.
[45] G. Gârleşteanu, op. cit., p.155
[46] Idem, pp.155-156.
[47] Article 135 (1) and (2), Par. a), b) and f) of the (Republished) Constitution of Romania stipulates that Romania's economy is a free market economy, based on free enterprise and competition, but also that the State must secure a free trade, protection of fair competition, provision of a favourable framework in order to stimulate and capitalize every factor of production, protection of national interests in economic, financial and currency activity, and creation of all necessary conditions so as to increase the quality of life.
[48] A. Rudiger, op. cit., p.70.
[49] Ibidem.
[50] G. MacNaughton, Advancing Global Health and Human Rights in the Neoliberal Era – book review of A. R. Chapman, Global Health, Human Rights and the Challenge of Neoliberal Policies, published by Cambridge University Press, 2016, in Health and Human Rights Journal, Vol. 18, No 2, december 2016, p. 255, available at: https://cdn2.sph.harvard.edu/wp-content/uploads/sites/13/2016/12/MacNaughton-final-1.pdf, on: 10.03.2017.
[51] A. R. Chapman, op. cit., p. 85, paper quoted by G. MacNaughton, op. cit., p. 256.
[52] Ibidem.
[53] This decision was published in the Official Gazette of Romania, Part I, no. 196 of 16.03.2016.

values) which could be jeopardized by the irresponsible behaviour of smokers"[54].

Actually, not only the law adopted by the Parliament of Romania for the amendment of Law no. 349/2002[55], but also the decision of the Constitutional Court of Romania are conformant to the provisions of the above mentioned Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014, whose main objective, provisioned by article no.1, is to approximate the laws, regulations and administrative provisions of the Member States in order to: facilitate the smooth functioning of the internal market for tobacco and related products, take as a base a high level of protection of human health, especially for young people, and to meet the obligations of the Union under the WHO Framework Convention for Tobacco Control ('FCTC')[56].

The constitutional regulations that guarantee the right to life and to living in a healthy and safe environment incur certain positive obligations of the state, yet smoking in public spaces is detrimental not only for the health of smokers but also to the health of others[57]. Many countries considered the smoking ban in public spaces a necessary step towards the protection of public health[58]. The smoking ban in pubs was considered to be a necessary and legitimate precaution for the protection of the right to live in a healthy environment, regarded, in our view, as a dimension of the right to health protection, as the commercial rights of the pub owners are not breached[59].

3. Conclusions

The right to health is a fundamental part of our human rights and of our understanding of a life in dignity[60]. Likewise, dignity and the value of the human being are fundamental values which are acknowledged and guaranteed as such by international and national regulations[61]. Furthermore, the same regulations warrant the recognition of all the rights and liberties of human beings, both collectively and individually, which does not entail that by exercising a right or liberty we are allowed to transgress the rights and liberties of others.

Economic freedom represents the condition for the achievement of other fundamental rights, such as even the right to health[62] or to the protection of health.

Nonetheless, this freedom cannot be exercised in an absolute manner either by natural persons or by their corresponding legal persons, much less when there is a risk of infringing on other fundamental rights and liberties, such as the right to health and to its protection. In such circumstances, it is the duty of the qualified international organizations and of the state to exercise their positive obligation to intervene, principally by legislative measures, in order to set boundaries for the exercise of economic freedom or, at least, to outline a legal framework in which this freedom could be exercised indiscriminately. Therefore, the exercise of economic freedom can be restrained by the public power, the guarantor of general interests and the guardian of the liberties of all, but only abiding by the principles of the democratic rule of law and by the "proceedings" established by article 53 of the (Republished) Constitution of Romania[63].

Whether it is the legal framework for the use of substances or products, such as tobacco and related products that could affect people's health, or the framework for securing the right to health and to its protection, their delineation must be carried out by taking into consideration the dimensions of economic freedom according to the constitutional provisions, without, however, jeopardizing the right to health and to its protection. Actually international human rights law is neutral, in principle, with regard to the type of economic system a state pursues, provided that it is

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[54] In this sense see section 33 of the Decision no. 29/2016 of the Constitutional Court of Romania.

[55] The overruling of the constitutional challenge by the above mentioned Decision issued by the Constitutional Court resulted in Law no.15/2016, which was published in the Official Gazette of Romania, Part I, no. 72 of 01.02.2016.

[56] The WHO Framework Convention on Tobacco Control (WHO FCTC) is the first treaty negotiated under the auspices of the World Health Organization. The WHO FCTC opened for signature on 16 June to 22 June 2003 in Geneva, and thereafter at the United Nations Headquarters in New York, the Depositary of the treaty, from 30 June 2003 to 29 June 2004. The Convention entered into force on 27 February 2005. According to art. 3 from WHO FCTC, the objective of this Convention and its protocols is to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures to be implemented by the Parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke. In order to achieve the objective of this Convention and its protocols and to implement its provisions, the Parties must also to develop and support, at the national, regional and international levels, comprehensive multisectoral measures and coordinated responses, taking into consideration the need to take measures to protect all persons from exposure to tobacco smoke (according to art. 4 para 2 lett.b). This document is available at: http://apps.who.int/iris/bitstream/10665/42811/1/9241591013.pdf?ua=1, accessed on 18.03.2017.

[57] In this sense see section 33 of the Decision no. 29/2016 of the Constitutional Court of Romania, specifically the arguments brought by the Constitutional Court of the Republic of Turkey.

[58] Ibidem.

[59] Ibidem.

[60] Office of the United Nations High Commissioner for Human Rights and the World Health Organization, Fact Sheet No. 31 from 2008, op. cit., p. 1.

[61] In this sense see, for instance, the Preamble to the Universal Declaration of Human Rights, or the Preamble to the Charter of Fundamental Rights of the European Union, or article 1(3) of the (Republished) Constitution of Romania, or the Preamble to the Constitution of the Czech Republic (the latter is available at: https://www.constituteproject.org/constitution/Czech_Republic_2013?lang=en, accessed 18.03.2017).

[62] Ş. Deaconu, *Drept constituţional*, „*Constitutional Law*", C. H. Beck Publishing House, Bucharest, 2011, p. 275.

[63] G. Gârleşteanu, op. cit., p. 163.

consistent with democracy and the realization of human rights[64].

We consider that whenever the health of a human being is affected or could be affected by any economic activities, first and foremost, it is the duty of the states to intervene in such a way as to secure this fundamental right.

Hence, under any circumstances, health, the right to health and to its protection must, in our view, prevail over economic freedom, yet without "obliterating" it if exercised under the conditions and limitations laid down by the law.

In actual fact, we believe that the term for this right should be the right to health and to the protection of health, in order to encompass both the individual dimension of this right which regards every human being, as well as its collective dimension which entails the positive obligation of the state to guarantee its protection, ideally at the highest standard.

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[64] The UN Committee on Economic, Social and Cultural Rights, General Comment No. 3, The Nature of States Parties' Obligations, UN Doc. E/1991/23 (1990), para. 8, paper quoted by G. MacNaughton, op. cit., p. 256.

UNHCR AND NON-GOVERNMENTAL ORGANIZATIONS ROLE AND THEIR JOINT EFFORTS IN TACKLING THE EUROPEAN REFUGEE CRISIS FROM IT`S INCEPTION UNTIL PRESENT TIMES

Patricia Casandra PAPUC[*]

Abstract

In this study we will analyse UNHCR and Non-Governmental Organizations role and their joint efforts in tackling the European refugee crisis from it`s inception until present times. Their work is extremely important because even if the recommendations made by UNHCR together with NGOs are not legally binding they still represent important tools available and at the disposal of member states. Furthermore the field work that they perform is of vital importance for the well-being of refugees. We will conclude this study with a set of recommendations.

Keywords: *UNHCR, NGOs, refugees, High Commissioner, European crisis.*

1. Introduction

Since 2015 until present times Europe has been confronted with the biggest refugee and migrant crisis after the end of the Second World War. In light of this development this study will cover two different types of institutions, institutions which are tackling together this crisis: on one hand the United Nations High Commissioner for Refugees (UNHCR) and on the other hand the international non governmental organizations (NGOs)

The end of the Second World War symbolizes the beginning of a new era in international relations, an era focused on mapping a new international legislation meant to promote human rights across the globe, the biggest promoter being the United Nations, through the Universal Declaration of Human Rights. After it`s adoption it became one of the most important documents in the world in terms of emphasizing the fundamental rights and liberties of each individual. Nowadays in the international community the Universal Declaration of Human Rights has received a special status, unlike any other document of it`s kind"[1].

The errors of the Second World War have taught the international community that the individual is the most important , even if the individual is not a subject in international law, but the individual benefits directly from all the decisions taken at the highest level, such as those taken by member states of the European Union in tackling the refugee crisis for instance.

In addition many other regional intergovernmental institutions, international tribunals have been created across the globe to monitor and sanction those not following international law or human rights law.

Analysing the work of UNHCR and NGOs is of great importance in trying to understand the magnitude of the refugee crisis. These two entities work together, while UNHCR has a more broad scope and international exposure NGOs differ, from international NGOs to small local NGOs offering assistance and advice to UNHCR. Their work is extremely important because even if the recommendations made by UNHCR together with NGOs are not legally binding they still represent important tools available and at the disposal of member states. Furthermore the field work that they perform is of vital importance for the well-being of refugees.

The article seeks to ask a number of questions, such as : How did this refugee crisis started? Why now? How come so many people came to Europe instead of going to the neighbouring countries? What institutions should be handling the refugee crisis and how do they collaborate between eachother? Is the current legislation suited to handle accordingly the refugee crisis and if the answer is no, how should this legislation be changed?

This study will underline the fact that the international legislation concerning refugees cannot cope with the aggravating current crisis so a new legislation is needed.

2. Analysis on the refugee crisis and the refugee legislation in force

Regarding the question how did this refugee crisis started, one of the main reasons is the conflict in Syria, which has been going on for the last 6 years. Besides the Syrian situation there are still endless conflicts and internal struggles in countries such as Afghanistan, Somalia, Eritreea, political instability, poverty and persecution, global warming, factors which made many people flee their country and seek for a better life in Europe.

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[1] See Coman, Florin; Jura, Cristian; Necsulescu, Ion; Stolojescu, Grigore, Purda, Nicolae, Instrumente practice de drept international public, Editura ProUniversitaria, 2015, pag 70.

Even if there are many people in need who have arrived to the European shores, not all of them can receive international protection and this study will look at the citizens who obtain the refugee status, thus the protection of that state.

People have the right to seek asylum in other states according to article 14 of the Universal Declaration of Human Rights, article which recognizes the right of people to seek asylum from persection in any other countries"[2].

In order to offer refugees a proper legal framework the international community drafted the Convention related to the Statute of Refugees from 1951 and it`s Protocol in 1967 and in this document the concept of refugee is defined. A refugee is a person who has a well founded fear of being persecuted for reasons such as: race, religion, nationality, membership of a particular social group or due to a political opinion and he is outside the country of his nationality and he cannot or due to this fear does not want to avail himself of the protection of that country[3].

Based on the definition given, refugees actually represent a different category of foreigners who at a specific time live on the territory of a state. The main feature of refugees is the fact that they cannot benefit from protection of their own country of origin or sometimes that they do not want that protection.

After analyzing this provision the following conclusion can be drawn, this provision is applicable under two circumstances generally speaking , the first one due to a fear of being persecuted and the second one due to a reasonable belief that the person is persecuted"[4].

Even if citizens have a right to asylum this does not mean that it has to be recognized by the international community. There is no general treaty which asserts the right to asylum, even if this right was proclaimed in the Universal Declaration of Human Rights, in article 14"[5].

Even if states have a wide margin of appreciation in terms of asylum requests, still since 2015 the European continent has been flooded with such requests. In trying to respond to the question why are asylum seekers coming to Europe and not the neighbouring countries there are several responses to this question: Europe is rich, is stable, some countries have a diverse job employment offer, also in some cases the neighbouring countries are not safe so asylum seekers do not go there. Globalization, internet access are also factors which lead many people to come to Europe. It was probably more difficult from a logistic point of view 20 years ago to leave Congo than it is now. Unfortunately also the smugglers are playing an important role in this situation. UNHCR and their NGO partners together with the European Union have taken numerous actions in order to respond to the refugee crisis.

Before starting to elaborate on the key activities performed by UNHCR together with NGOs the paper will first present the birth , structure and evolution of UNHCR.

3. UNHCR

3.1 UNHCR`s birth, structure and evolution

The Office of the High Commissioner for Refugees (UNHCR) was created in 1950 during the aftermath of the Second World War, in order to help millions of Europeans who had fled or lost their homes.

According to its Statute, UNHCR has two principal functions: the first one is to provide international protection to refugees within its competence and the second one is to seek lasting solutions for refugees in co-operation with the governments"[6].

The Statute calls upon Governments to co-operate with the United Nations High Commissioner for Refugees in the performance of his functions concerning refugees falling under the competence of his Office, especially by:

- Becoming parties to international conventions and taking all the steps needed in order to implement such conventions;
- Entering into agreements with the High Commissioner for the execution of measures calculated to improve the situation of refugees;
- Admitting refugees to their territories;
- Assisting the High Commissioner in his work to promote the voluntary repatriation of refugees;
- Promoting the assimilation of refugees;
- Providing refugees with travel and other documents;
- Permitting refugees to transfer their assets and mostly the assets necessary for their resettlement;
- Providing the High Commissioner with information related to the laws and regulations in different parts of the world"[7].

In 1954 UNHCR won a Nobel Prize for Peace for its work in Europe. Some of the major events where UNHCR took a leading role were: the Hungarian revolution, the decolonization of Africa, they also assisted the upproted people in Asia, Latin America,

[2] See United Nations General Assembly resolution 429 (V) of 14 December 1950, available at: http://www.unhcr/refworld /docid/3b00f08a27.html.

[3] See the Convention related to the Statute of Refugees, http://www.unhcr.org/3b66c2aa10.

[4] Constantin, Valentin, Drept International Public, Editura Universitatii de Vest, Timisoara, 2004.

[5] Bolintineanu, Alexandru, Nastase, Adrian, Aurescu, Bogdan, Drept International Contemporan, Curs Universitar, Editura AllBeck, Bucuresti, editia a 2-a, revazuta si adaugita, 2000, pag 328.

[6] http://www.refworld.org/pdfid/4950f39f2.pdf.

[7] See (Statute of the Office of the High Commissioner for Refugees, General Assembly Resolution 428 (V) of 14 December 1950), http://www.unhcr.org/4d944e589.pdf.

actions which helped them gain a second Nobel Prize for Peace.

Furthermore UNHCR got involved in the major refugee crisis in Africa, the Middle East and Asia, being also invited to offer their expertise in order to help many displaced people and statelessness people. A living proof of their development is represented by their projects and number of employees. UNHCR now has more then 10, 800 members representing staff and their employees work in 128 countries"[8].

In order to get a clear picture of the specific activities conducted by UNHCR in the next part of the article there will be a presentation of the role played by the High Commissioner.

3.2. The Role of the High Commissioner of UNHCR

The position of High Commissioner of the United Nations Refugee Agency is a position held for a period of 5 years and the High Commissioner is elected by the UN General Assembly. Article 8 of the Statute of the High Commissioner describes his functions:

- Advocating for the conclusion and ratification of international conventions for the protection of refugees;
- Lobbying for the execution of any measures required to improve the situation of refugees and to reduce the number requiring protection;
- Assisting governmental efforts to promote voluntary repatriation or assimilation;
- Promoting the admission of refugees;
- Struggling to obtain permission for refugees to transfer their assets and especially those necessary for their resettlement;
- Obtaining information concerning their number, conditions of refugees in their territories and the laws applicable to them;
- Maintaining a good cooperation with the Governments and intergovernmental organizations concerned;
- Establishing contact in a suitable manner with private organizations dealing with refugee questions;
- Aiding the coordination of the efforts of private organizations concerned with the well-being of refugees[9].

This description of the High Commissioner`s tasks has a complexe nature rather then a systematic one, but three general areas can be identified"[10]. First of all UNHCR`s High Commissioner has to facilitate the admission of refugees to the territories of the States where they can be protected, second of all it has to ensure that the rights of refugees are respected; third of all the High Commissioner has to work on finding a solution to the problem.

Because it is a subsidiary organ of the United Nations General Assembly, UNHCR does not only report to the General Assembly but it also may have its mandate modified through General Assembly resolutions. UNHCR`s Statute also provides for UNHCR to receive advice from the General Assembly in the form of resolutions and from the Executive Committee of the High Commissioner`s Programme, an advisory body created by the United Nations Economic and Social Council.

In order to respect it`s mandate, statute and mission the UNHCR drafted many important legal documents across it`s history, important legal documents, intitled by some the "UNHCR doctrine".

3.3. UNHCR`s doctrine and its importance in framing a better response to the crisis around the world

We introduced the UNCHR`s doctrine in this research because the legal work conducted by UNHCR since it`s beginnings has been highly valuable. But it was not taken into consideration to the greatest extent possible concerning the possible responses to the European refugee crisis. Furthemore there are still many debates pending on it`s status, if it represents a subsidiary source of international law or not. Our opinion is that the "UNHCR doctrine" represents a subsidiary source of international law and we will now present our arguments on this matter.

UNHCR developed through out the years a technique intitled the "UNHCR doctrine", which has significantly contributed to the evolution of UNHCR`s role in the development and evolution of international refugee law. "*They are often formulated as a result of questions posed by States, differing positions taken by States, or positions adopted by States and opposed by UNHCR. The formulation of doctrine by UNHCR is neither simple nor done in isolation. UNHCR doctrinal positions can be influenced by numerous factors including: the views of non-governmental organisations, academics, and government officials; political considerations; State practice, and even different views within UNHCR, to name a few"*[11].

The doctrinal positions of UNHCR are not legally binding on states. Due to the fact that these doctrinal positions are not created by States, they do not represent traditional sources of international law, as for example international customary law, treaties, conventions, or general principles of law. Article 38 of the International Court of Justice explains the international law sources:

- international conventions, whether general or particular;
- international custom;

[8] http://www.unhcr.org/history-of-unhcr.html.

[9] See The Statute of the Office of the High Commissioner for Refugees, General Assembly Resolution 428 (V) of 14 December 1950), http://www.unhcr.org/4d944e589.pdf

[10] See Lewis, Corrine UNHCR and International Law from Treaties to Innovation, ProQuest LLC, June 2010 (http://etheses.lse.ac.uk/2200/1/U613432.pdf) pag 59.

[11] See Lewis, Corrine UNHCR and International Law from Treaties to Innovation, ProQuest LLC, June 2010 , pag 119 (http://etheses.lse.ac.uk/2200/1/U613432.pdf).

− the general principles of law recognized by civilized nations;

− judicial decisions and the teachings of the most highly qualified publicists of the various nations which represent means for the determination of rules of law"[12].

We consider that UNHCR can have the same valuation as some academics. Actually looking at the international UNHCR personnel, the organization reflects a complexe and diverse perspective unlike a publicist for example who has a national approach. Even so, UNHCR doctrine is most of the times considered to be lege ferenda that is what the law should be rather than lex lata what the law actually is"[13].

„UNHCR doctrine" is influenced by so many factors. Most importantly UNHCR employees are doing a lot of ground work in terms of handling the European refugee crisis , this is why, we think that the doctrine, hence the doctrinal suggestions should be more valued by the international community. These recommendations made by UNHCR employees could be better put to use by the member states and maybe states could even consider making some of their suggestions mandatory through a legally binding document. Otherwise many recommendations made by UNHCR will remain as recommendations, never applicable due to the lack of the binding force on member states.

As previously mentioned the „UNHCR doctrine" has been developed also due to the ground work conducted by UNHCR employees, activities which we will now present.

3.4. UNHCR`s actions across the globe

The main actions taken by UNHCR across the globe are the following:

1. *Advocacy:* has as it`s aim to change policies and services that affect displaced and statelessness people on a national, regional and also international level.
2. *Cash based interventions*: refer to the fact that most refugees live in places where they have the same rights, including to markets and services as the local communities living there. For this reason refugees are provided with cash in order for them to live in a decent way and also to contribute as well to the local economy.
3. *Education* represents an important part of UNHCR`s mission because UNHCR reports show that "*refugees are five times more likely to be out of school than the global average. Only 50 per cent of the refugee children have access to primary education, compared with a global average of more than 90 per cent"*14
4. *Environment, disasters and climate change*: represent one of the most debated topics across the globe in present times. For this reason both climate change and the environment have a big impact on the work conducted by UNHCR.
5. *Livelihoods*: it is highly important for people to be given the opportunity to work and earn a living after fleeing war or persecution.
6. *Public health*: an example is given on the official website of UNHCR. The case of a family which fled conflict in the Democratic Republic of Congo and who now lives in a refugee settlement in Uganda.
7. *Shelter*: is vital in times of crisis and displacement and is also necessary in order to preserve personal security and dignity.
8. *Asylum and migration*: there is an expert staff team based in Geneva, intitled the Asylum Unit and Migration Unit. Their work entails addresing the many challenges encountered by refugees. In addition they offer support to regional teams in order to implement protection measures and also offer legal support and advice to UNHCR operations across the globe.
9. *Coordinating assistance*: is a necessary step in order to have a quick and effective intervention. This is why AID agencies can trully have a big impact when they collaborate between each other.
10. *Endind statelessness*: is a problem the world is confronted with. According to official numbers :" *today, at least 10 million people around the world are denied a nationality. As a result they often aren`t allowed to go to school, see a doctor, get a job, open a bank account, buy a house or even get married".*15
11. *Innovation*: UNHCR is trying to connect the refugees because most of the times these people live without being in contact with their families, access basic services and obtain relevant information for them.
12. *Protection* is given to refugees by UNHCR because even if governments normally offer basic human rights to their citizens this does not necessarily apply to refugees as well.
13. *Safeguarding individuals* refers to the fact that every human being deserves a life without the fear of discrimination and persecution.
14. *Solutions* are offered as well because it is not only relevant to protect and assist all the refugees but also to help them rebuild their lives.

In order for the UNHCR to perform all these activities the organization has various partners: governments, donors, private sectors supporters, UN sister organizations and last but not least international

[12] http://www.icj-cij.org/documents/?p1=4&p2=2.

[13] Lewis, Corrine UNHCR and International Law from Treaties to Innovation, ProQuest LLC, June 2010 , pag 119 (http://etheses.lse.ac.uk/2200/1/U613432.pdf).

[14] See http://www.unhcr.org/education.html.

[15] http://www.unhcr.org/stateless-people.html.

non governmental organizations, organizations that we will analyse at this stage of the article.

4. International Non Governmental Organizations and their role

The term „non-governmental organization" or NGO was born in 1945 due to a need for the UN to make a difference in it`s Charter between the participation rights for intergovernmental specialized agencies and those for private entities.

At the United Nations all types of private entites can be recognised as NGOs, the only conditions that they have to fulfil are the following: they have to be independent, non-profit-making and non-criminal.

NGOs are different one from another. Some can be global and have a central authority or they can have a federal system. NGOs can be national, regional, international, international umbrella NGOs, a network of NGOs which can lobby at the UN for example.

This term of non-governmental organization was not in use before the UN was formed. Even if there were agencies alongise the League of Nations (the predecessor of the United Nations) still the concept was introduced at the San Franscisco conference, which established the UN in 1945.

The conference which established the UN brought other changes as well. At this conference they enlarged the status of the Economic and Social Council (ECOSOC) and introduced an article related to the relationship between ECOSOC and NGOs, through article 71. The Economic and Social Council can make appropriate arrangements for consultation with non-governmental organizations., where there are common interests. These types of arrangements can be made with international organizations and when it is required also with national organizations after consultation with the member of the United Nations concerned"[16].

When refering to the structure of an NGO some elements may be taken into consideration. It starts from an agreement which is formed by its scope, the principles, how it is organized, how does it work, the application procedure if you want to became a member, how is the organization structured and it`s functions *"*[17].

Due to the importance of NGOs the Council of Europe adopted a Convention in 1986, Convention which recognizes the legal personality of the international non governmental organizations and establishes the conditions in order to receive this recognition: "*they must be non- profit, have an international utility, they must be created from an national agreement based on the legislation of one of the parties, they must exercise their authority in at least two states and have the headquarters on the territory of one of them and part of the activity on the territory of the other party"*[18].

An interesting fact when analysing NGOs is that there are international NGOs which also perform governmental duties and as a result their influence in the state is increasing. In agreement with the law, all the organizations which are founded by individuals are treated as NGOs even if some of them also perform governmental duties (such as the Red Cross or Interpol). Their increasing role contributes to the decrease of the state as an actor in terms of international relations *"*[19].

As previously mentioned in this article we are highlighting the importance of NGOs in the international sphere, importance which is constantly increasing. NGOs are advocating for the protection of rules and international conventions. In addition they are also asked for their expertise on this matter, they are also called upon by international tribunals as amicus curiaes *"*[20].

How do people start a venture of this kind? A venture of this kind starts from sharing a mutual interest, people get together and feel the need to be part of something, but in order for that organization to obtain a legal personality it can only be founded by respecting the national legislation of that specific state. *"*[21].

In the following part the study will cover the existing partnership between UNHCR and NGOs, focusing on their work in crisis areas across the globe, emphasizing their response to the European refugee crisis.

5. The partnership between UNHCR and NGOs and their work across the globe

As one historian of UNHCR has put it: "*No element has been more vital to the successful conduct of the programmes of the UNHCR than the close partnership between UNHCR and the non-governmental organizations*"[22].

This relevant partnership between the UNHCR and different NGOs has been underlined since the 50s, through out the declaration of Dr. Van Heuven

[16] See United Nations Charter, Article 71 at http://www.un.org/en/sections/un-charter/chapter-x/index.html.

[17] Coman, Florin, Jura, Cristian; Necsulescu, Ion , Stolojescu, Grigore, Purda, Nicolae, Instrumente practice de drept international public, Editura ProUniversitaria, 2015, pag 13.

[18] Bolintineanu, Alexandru, Nastase, Adrian, Aurescu, Bogdan, Drept International Contemporan, Curs Universitar, Editura AllBeck, Bucuresti, editia a 2-a, revazuta si adaugita, 2000, pag 76.

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[20] Bolintineanu, Alexandru, Nastase, Adrian, Aurescu, Bogdan, Drept International Contemporan, Curs Universitar, Editura AllBeck, Bucuresti, editia a 2-a, revazuta si adaugita, 2000, pag 331.

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[22] http://www.unhcr.org/partners/partners/41c162d04/ngo-partnerships-refugee-protection-questions-answers-2007-edition.html.

Groedhard, the first High Commissioner for Refugees in 1954: " *The UNHCR has had the most excellent relations with the voluntary agencies. Their work is in a true sense of the term indispensable and invaluable for refugees"*[23].

UNHCR has been working with NGOs since the early 50s when the forcibly diplaced crisis erupted. Due to the fact that other emerging refugee crisis erupted in the 1960s, 1970s and 1980s especially in Africa, Asia and Central America so did the collaboration between UNHCR and a wide range of new humanitarian organizations and NGOs focused on refugees.

In order to uniformise the work conducted by UNHCR and set a standard in terms of work quality, in 2007 it adopted the Global Humanitarian Platform`s "Principles of Partnership" that set out the common standards of transparence, equality and an approach oriented towards results. This "Principles of Partnership" was afterwards added to the " Framework for Implementing with Partners" as an approach to collaborative partnerships.

There is also an Annual Consultation with NGOs and this consultation includes both national and international NGOs from across the globe. Furthermore it provides an important forum for NGOs and states to discuss, network, share opinions and views, from the perspective of equal partners.

Nowadays the UNHCR relies a lot on NGOs to implement a big diversity of projects, which include areas such as logistics, shelter, protection, aid distribution, sanitation and many others.

Due to the diversity of their projects there has been a section created on the website of UNHCR for partners interested to collaborate with them, so they are invited to register on the partner portal, a tool used to improve the communication between UNHCR and its partners.

6. UNHCR`s and NGOs responses to the European refugee crisis

The refugee crisis which erupted in 2015 lead over a million people to come to Europe half of them coming from Syria, all of them being forced by the same desire, that of seeking a better life for them and for their families.

The ongoing conflict and violence in Syria, Iraq and other places have caused a serious displacement, driving many refugees to seek safety in the immediate region. In addition a large number of families, women and unaccompanied children undertook dangerous journeys across several countries and were often exploited by smugglers, another problem on the UNHCR agenda.

In order to respond to this crisis UNHCR : "*mobilized over 600 staff and resources in 20 different locations to provide live-saving assistance and protection. This include provision of humanitarian assistance, efforts to improve accommodation and shelter during the winter months, establishing 24/7 presence at all countries entry points and in a number of exit points to ensure continuous protection monitoring and intervention, efforts to reunite separated families and identification of persons with specific needs, including separated and unaccompanied children and referral to appropiate services*"[24].

UNHCR also lobbyed at a European level, calling states to act together, in a responsable manner, with solidarity, following their international obligations.

In addition: "*following the closure of borders in countries in the Western Balkans in early March, UNHCR began immediately shifting resources to increase reception capacity and services to the more than 55 000 asylum seekers and refugees now in Greece in support of the efforts of the Greek authorities*"[25].

In the following year in 2016 a further 347, 000 refugees and migrants have arrived to Europe, following the one million who came in 2015.

UNHCR and other entities have tried to find solutions to the problem. One of the steps taken in this direction is adding the International Organization on Migration (IOM) to the UN family, initiative launched during the first summit on refugees and migration which took place in New York in 19/20 September 2016. Furthermore UNHCR together with IOM and their partners drafted a new plan to respond to Europe`s Refugee and Migrant situation, plan which we will shortly present in the following paragraphs.

The Regional Refugee and Migrant Response Plan was officially launched on the 19th of January 2017. The Regional Refugee and Migrant Response Plan aims at complementing government efforts in order to ensure safe access to asylum and the protection of refugees and migrants. The plan is also aimed at achieving long-term solutions for an orderly migration.

This plan emphasized the need for long-term solutions and it includes the following: a complexe relocation scheme, support for voluntary returns and reinforced alternative legal patways to perilous journeys, including as well resettlement and family reunification.

Special attention is given to vulnerable groups such as refugee and migrant children , women and girls.

Another new element is represented by the pilot projects included in the framework of the plan, pilot projects meant to respond to the needs of unaccompanied and separated children in Europe.

[23] http://www.unhcr.org/non-governmental-organizations.html.
[24] See http://www.unhcr.org/europe-emergency.html.
[25] http://www.unhcr.org/europe-emergency.html.

In addition the plan also has a diverse geographical exposure, since it covers diverse countries and areas , from Turkey to Southern Europen, Western Balkans and Central Europe, including Western and Northern Europe.

This response plan also has a big budget: "*The total financial requirements amount to UDS 691 million, with a population planning figure of up to 340, 000 people, based on previous arrivals trends and people present in countries who will receive support through the plan"*[26].

Furthermore UNHCR based on it`s work experience with NGOs and other entities drafted a document with recommendations for the EU, in terms of handling the refugee crisis, document intitled :" *Stabilizing the situation of Refugees and migrants in Europe*[27]". This document was released on the 7th of March 2017 to the EU Heads of State and Turkey in Brussels. The main recommendations are the following:

1. UNHCR will implement the hot spot approach and the relocation scheme which refers to:
   a) carry out proper registration;
   b) implement the relocation scheme for asylum seekers;
   c) ensure the effective return of individuals who are no longer in need of international protection;
2. They will support the emergency response in Greece;
3. Improve compliance with the EU asylum acquis;
4. Improve the opportunities for resettlement;
5. Improve the protection safeguards for individuals at risk;
   d) Enhance the operations for search and rescue;
   e) Develop systems which better protect unaccompanied and separated children;
   f) Develop measures meant to prevent and respond to sexual and gender-based violence;
   g) Develop protection measures in order to address smuggling and trafficking ;
   h) Develop protection measures against exclusion, racism, xenophobia and islamophobia;
6. Develop proper European systems in order to allocate responsability for asylum seekers in the mid-term.

7. Conclusion

The refugee crisis has shaken the European continent to a great extent. The continent , the EU particularly does not have a unified voice in terms of handling the refugee crisis. Even so there are powerful institutions and organizations meant to protect and offer a chance to those seeking for help.

Since the crisis erupted the international community has taken numerous steps. More funding has been allocated by the European Union and by other important actors to tackle this issue, UNHCR has deployed more people in crisis areas together with local, national and international NGOs, without which the work of UNHCR would be almost impossible. Furthermore the International Organization on Migration has been added to the extended UN family, which means more funding, more projects and a joint collaboration. Nowadays it is impossible to analyse the migration crisis apart from the refugee crisis, the difference between the two categories are the reasons which lead these people to flee their country, for migrants it is an option while for refugees it is a necessity.

In the study we have emphasized the fact that the new action plan taken by UNHCR, NGOs together with IOM and the action plan sent to the EU member states have many great recommendations, but the constant problem remains the fact that there are not binding documents. We consider some of the research conducted by UNHCR as pure doctrine and we consider it to be a subsidiary source of international law, more specifically international refugee law.

Given these considerations the Convention and Protocol related to the Status of Refugees should be amended, in terms of "who" qualifies for the refugee status. The definition is too broad, offering thus states a wide margin of appreciation and not only that. Climate change, one of the biggest issues of our days should be included in the general scope as well as female genital mutilation, a practice common in several african countries. We consider both climate change and genital mutilation as solid reasons which force people to flee their country because their life and human dignity are at stake. If the Convention and Protocol related to the Status of Refugees are improved than this will impact the European Union as well which afterwards has to pass new Directives, enlarging thus the scope of refugee protection.

Furthermore the Convention and Protocol related to the Status of Refugees should include a subsidiary protection provision for those asylum seekers who did not receive the refugee status but should receive some sort of international protection.

In order to respond to this crisis the collaboration between UNHCR, NGOs , IOM, the EU and other agencies has to improve. Desperate situations, require desperate measures and the international community should always keep in mind the fact that: refugee rights are human rights.

[26] http://www.iom.int.
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REFLECTIONS ON THE PRINCIPLE "JUSTICE IS EQUAL FOR ALL" IN THE ROMANIAN CONSTITUTIONS AND IN COMPARATIVE LAW – SELECTIVE ASPECTS

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Abstract

At the onset of the study it is necessary to mention that its topic will be circumscribed to regulations on the principle Justice is equal for all in the Romanian Constitutions and in comparative law – selective aspects.
By this approach, the proposed study opens a complex and complete vision, but not exhaustive, to the reflections on the principle Justice is equal for all in the Romanian Constitutions and in comparative law. In comparative law analysis, we will keep a symmetrical approach to identifying regulations on the principle Justice is equal for all in the Constitutions of other countries. The subject of the scientific endeavor will be circumscribed to the scientific analysis of its parts, as follows: 1. Introduction. 2. Identification of constitutional rules on the principle Justice is equal for all in the Constitution of Romania and comparative law. 3. Highlights Romanian doctrine and comparative law on the principle Justice is equal for all. 4. Jurisprudence of the Constitutional Court on the principle Justice is equal for all (selective aspects). 5. Conclusions.

Keywords: *constitutional, justice, principle, comparative law.*

1. Introduction

The object of study of this scientific approach will be circumscribed to the scientific analysis of its three main parts, as follows:

1. Identification of constitutional rules on the principle Justice is equal for all in the Constitution of Romania and comparative law.
2. Highlights Romanian doctrine and comparative law on the principle Justice is equal for all.
3. Highlights Romanian doctrine and comparative law on the principle Justice is equal for all.
4. Jurisprudence of the Constitutional Court on the principle Justice is equal for all (selective aspects).

As per the bibliographic research, the principle justice is equal for all is new in its formulation, but it is not new in its existence. Starting from this axiom, and paraphrasing K. Mbaye we may say that: „The history of the principle justice is equal for all is confounded with the history of people".

Concerning the requirement justice is equal in constitutional doctrine the following specifications are made: "The requirement justice is equal, reflects the principle written down in the Human Rights Proclamation which sets forth that Law should be equal for all, whether it protects, or defends, but also the general provision set out by art. 16 par. (1) of the Constitution according to which Citizens are equal before the law and of public authorities, without privileges or discriminations"

Also referring to the requirement justice is equal, it is worth mentioning that the Constitution of the United States of America, the first Constitution in writing worldwide, which in Section I, entitled Defining the citizen status; the states' ban to restrict the citizens privileges, of Amendment 14 entitled Citizen rights protection – ratified in 1868 establishes the following principles: "no state can deprive any individual from life, freedom or property without following the natural course of legal procedures; or can it refuse any individual under its jurisdiction equal protection of laws". Moreover, in our opinion, these principles are components of the right to a fair trial.

Further on, referring to the requirement justice is equal, we intend to mention the Constitution of Belgium of 7 February 1831, a constitution recognized as the third written constitution in the world, which in art. 6 par. (1) thesis I establishes the following constitutional principle: "There is no distinction of class within the state, Belgians are equal before the law".

Concerning the requirement justice is equal, I selected for this paper from among the international documents in the line of Human Rights, the Universal Declaration of Human Rights, an iconic document in the history of human rights, which establishes the following principle regarding the requirement, justice is equal, in the contents of art. 7 par. (1) thesis I: "All humans are equal before the law and have, with no discrimination, the right to equal protection of the law".

What seems relevant for us to highlight in this paper is the approach to the requirement justice is equal, in Romanian constitutional and legal system starting with the first document with constitutional value, i.e. The developer Statute of the Paris Convention from 7/19 August 1858 until this day, i.e. The Romanian Constitution revised in 2003, form of republished Romanian Constitution of 1991.

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Considering the debate on this generous topic for over 145 year of constitutional evolution of the requirement justice is equal, in Romania it should be mentioned since the beginning the need of a diachronic approach of this topic by the identification of all the Romanian Constitutions which regulated the constitutional status during this.

Moreover, we should specify that during the mentioned period, Romania experienced several forms of government, i.e., monarchy, people's republic, socialist republic and semi-presidential republic.

In the field of comparative law, in order to maintain a symmetry of approach with the Romanian constitutional system, the regulations at the constitutional level, concerning the requirement justice is equal, were identified in the normative content of the selected constitutions, i.e.: 1. The Belgian Constitution as updated following the constitutional revisions of 6 January 2014, containing the latest revisions. 2. The French Constitution of 4 October 1958, in force at the date of constitutional review of 23 July 2008 containing the latest revisions.

For a full but not exhaustive coverage of the field of study, doctrinal and jurisprudential landmarks are presented on the requirement justice is equal.

It is also worth mentioning that the jurisprudence of the Constitutional Court of Romania will contribute to constitutionalizing the requirement justice is equal.

This research opens by this approach a complex and complete view, but not exhaustive in the current scope regarding the requirement justice is equal.

In our opinion, the studied field is important for the constitutional doctrine, for the doctrine of parliamentary law, for the doctrine of comparative law, for the general theory of law, for the legislative work of elaboration of the legislative measures, for the legislative technique, and for the research in the field covered by the theme of this research.

Even if the regulation and theorization of the requirement justice is equal goes back in time to the first constitutions written in the world, the theoretical interest for resuming it is determined by the fact that the existing field literature has not always paid enough attention to the three aspects, regulatory, theoretical and jurisprudential regarding the requirement justice is equal, analysed in this paper.

2. Identification of constitutional rules on the principle Justice is equal for all in the Constitutions of Romania and comparative law

2.1. Identification of constitutional rules on the principle Justice is equal for all in the Constitutions of Romania

2.1.1. The developer Statute of the Paris Convention of 7/19 August 1858[1]

A special discussion is required in relation with the *Developer Statute of the Convention of 7/19 august 1858*. In our opinion, *the Statute* may be considered a Constitution, considering the provisions of art. 17 stating the following: All civil servants, with no exception, on taking office, *are liable to swear allegiance to the Constitution and laws of the country and faith in God (Prince)*.

The systematic analysis of the normative content of the Statute shows that this content includes no provisions regarding the requirement *justice is equal.*

2.1.2. The Romanian Constitution of 1866[2]

We should state that the Fundamental Law of Belgium of 1831 was a source of inspiration for the constitutions of other states among which the Romanian Constitution of 1866.

The systematic analysis of the normative content of the Constitution shows that the latter includes in art. 10 theses II of Title II, entitled *On the rights of the Romanians* the following principle regarding the requirement, *justice is equal,* under the following phrasing: "*All Romanians are equal before the law….*"

2.1.3. The Romanian Constitution of 23 March 1923[3]

At the onset of the study it is imperative to specify that the Fundamental Law of Romania of 1866 remained effective for 57 years, while important economic and political transformations occurred.

The systematic analysis of the normative content of the Constitution shows that in art. 8 par. (2) Title III, entitled *On the rights of the Romanians* enshrines the following principle regarding the requirement, *justice is equal*, under the following phrasing: "*All Romanians, irrespective of ethnic origin, language or religion, are equal before the law ...."*

2.1.4. The Romanian Constitution of 28 February 1938[4]

We should specify in the introduction of the study that the Fundamental Law of Romania of 1923 remained effective for 15 years.

[1] Ioan Muraru and Gheorghe Iancu, *The Romanian Constitutions*, Texts, Notes. Comparative presentation, (Bucharest: Actami, 2000), 7-14.
[2] Ioan Muraru and Gheorghe Iancu, op. cit. 31-60.
[3] *Ibidem*, op. cit. 63-92.
[4] *Ibidem*, op. cit. 95-119.

Under the historic circumstances of 1938, the new Constitution draft was submitted to plebiscite on 24 February 1938. The Constitution is promulgated and was published in the Official Gazette Part I, no. 48, from 27 February 1938.

The systematic analysis of the normative content of the Constitution shows that in art. 5 par. (1), Chapter I, of Title II, entitled *On the duties of the Romanians*, enshrines the following principle regarding the requirement *justice is equal*, under the following phrasing: "All Romanian citizens, *irrespective of ethnic origin and religious faith are equal before the law….".*

2.1.5. The Constitution of 13 April 1948[5]

The systematic analysis of the normative content of the Constitution shows that in art. 16 of Title III, entitled *Fundamental rights and duties of the citizens*, enshrines the following principle regarding the requirement *justice is equal*, under the following phrasing: "*All the citizens of the People's Republic of Romania, irrespective of gender, nationality, race, religion or cultural background are equal before the law ".*

2.1.6. The Constitution of 24 September 1952[6]

The systematic analysis of the normative content of the Constitution shows that it does not enshrine the principle regarding the requirement *justice is equal.*

2.1.7. The Constitution of 21 August 1965, republished[7]

The systematic analysis of the normative content of the Constitution shows that it does not enshrine the principle regarding the requirement *justice is equal.*

2.1.8. The Constitution of Romania of 8 December 1991[8]

The systematic analysis of the normative content of the Constitution shows that in art. 16 par. (1) having the marginal phrasing *Equal rights,* in Chapter I of Title II, entitled *Common provisions*, enshrines the following principle regarding the requirement *justice is equal*, under the following phrasing: "*The citizens are equal before the law and public authorities, without privileges or discriminations"*.

2.1.9. The Constitution of Romania of 2003[9]**, the republished form of the Constitution of Romania of 1991**

The systematic analysis of the normative content of the Constitution of Romania of 2003, the republished form of the Constitution of Romania of 1991, includes that *following dual regulations*:

a) in the content of art. 16 par. (1) having the marginal phrasing *Equal rights,* of Chapter I, Title II, entitled *Common provisions*, enshrines the following principle regarding the requirement *justice is equal*, under the following phrasing: "*The citizens are equal before the law and public authorities, without privileges or discriminations"*.

We may notice that the text of this article is identical with the text of art. 16 par. (1) of the Constitution of Romania of 8 December 1991.

b) in the content of art. 124 par. (2) having the marginal phrasing *Realization of justice,* in Section I of Chapter VI, entitled *The Courts*, explicitly enshrines for the first time in Romanian constitutional system the principle *Justice is equal for all.*

2.1.10. The Draft Law on revision of the Constitution of Romania[10]

The systematic analysis of the normative content of the Draft Law on the revision of the Constitution of Romania shows that art. 124 par. (2) of the Constitution is not proposed for revision.

2.2. Identification of constitutional rules on the principle Justice is equal for all in comparative law.

In the field of comparative law, in order to maintain a symmetry of approach with the Romanian constitutional system, the regulations at the constitutional level, regarding the requirement *justice is equal*, were identified in the normative content of the selected constitutions, i.e.: 1. *The Belgian Constitution as updated following the constitutional revisions of 6 January 2014*, containing the latest revisions. 2. *The French Constitution of 4 October 1958, in force at the date constitutional review of 23 July 2008* containing the latest revisions.

At the onset of the subparagraph, we emphasize that the principle *Justice is equal for all*, is not provided in the above-mentioned in the Constitutions.

2.2.1. The Belgian Constitution as updated following the constitutional revisions of 6 January 2014, containing the latest revisions[11]**.**

The requirement *justice is equal* reflects the principle set out by art. 10 par. (2) thesis I, under the following phrasing: "*The Belgians are equal before the law*".

[5] *Ibidem*, op. cit. 123-139.
[6] *Ibidem*, op. cit. 143-166.
[7] The Constitution of the Socialist Republic of Romania of 21 August 1965, was republished in Official Gazette no. 65 of 29 October 1986.
[8] The text of the Constitution of Romania was published in Official Gazette of Romania, Part I, no. 233 from 21 November 1991.
[9] The text of the Constitution of Romania, revised in 2003, was published in the Official Gazette of Romania, Part. I, no. 767, of 31 October 2003.
[10] Draft Law on Revision of the Constitution of Romania, was published in the Official Gazette of Romania, Part. I, no. 100, of 10 February 2014.
[11] Accessed, http:// www.const-court.be/.../belgian_constitution.pdf (*author's translation.*

2.2.2. The French Constitution of 4 October 1958, in force at the date constitutional review of 23 July 2008 containing the latest revisions[12].

The analysis of the normative content of the Constitution of France of 4 October 1958 shows that this constitution between the content of the Constitution and the Preamble the following three documents' titles are inserted:

1. The Declaration of the Rights of Man and of the Citizen of 26 August 1789
2. The Preamble to the Constitution of 26 October 1946
3. The Environmental Charter of 2004 This triad was called by the Constitutional Council of France *Block of constitutionality*.

The theory of the *Block of constitutionality* was analysed by the Constitutional Council, by the study regarding *Reflections on the constitutionality by reporting*13.

The „*Block of constitutionality*" does not exist; defined as the set of norms with constitutional value, it is not even certain that it would have ever existed. The Rules for Reference of the constitutionality review, which are above all constitutional rules, are not limited to the constitutional rules; they also cover rules outside the Constitution it refers to.

Although old, this situation has experienced these last years a considerable expansion, so that today it is allowed to distinguish three sources of constitutionality:

a) the first – in every sense of the term – refers to the constitutional rules set forth by the Constitution of 4 October 1958 as well as those set forth by texts, old or modern, provided in its Preamble.
b) the second category contains norms with no original constitutional value, but which serve as the foundation of the constitutionality review because the Constitution imposes it.
c) the third regroups the general principles, unsolicited in the constitutional texts, but inferred from certain constitutional provisions by the judge. It is not useful to go back to the first category of such sources so long as their existence is known; it is more interesting instead the enrichment of the sources of constitutionality based on certain constitutional provisions which aim at norms outside the Constitution which are deprived, at least initially, of constitutional value. This technique is not new and it is actually the source of the expression „block of constitutionality".

3. Highlights of Romanian doctrine and comparative law on the principle Justice is equal for all.

3.1. Highlights of Romanian doctrine on the principle Justice is equal for all.

We will select from the Romanian doctrine the opinions of certain well-known, reputed authors, who studied the principle *Justice is equal for all*

3.1.1. A first opinion[14] mentioned for this study analyses the principle *Justice is equal*.

The requirement *justice is equal,* reflects the general provision set forth by art. 16 par. (1) of the Constitution according to which "Citizens are equal before the law and public authorities, without privileges or discriminations ".

The idea is resumed in Law no. 304/2004 which, in art. 2 par. (1), sets forth that justice is equal for all, in art. 7 par. (1) provides that all persons are equal before the law, without privileges or discriminations, and in art. 7 par. (2) which sets out that justice is served equally for all persons, irrespective of race, ethnic origin, language, religion, gender, sexual orientation, opinion, political affiliation, wealth or origin or social status or other discriminatory criteria.

Moreover, art. 4 par. (1) of Law no. 304/2004 sets out for the judges and prosecutors the obligation to assure a non-discriminatory legal treatment for all the participants in legal proceedings.

The principle of equal justice means that all persons having equal vocation should be judged by the same courts and according the same legal provisions, either substantive or procedural.

Equality does not mean uniformity, so that the existence of special legal provisions or provisions of certain jurisdictional bodies, even courts, specialized does not mean disregarding this principle.

If from the legal point of view the principle of equality is enshrined, the more delicate issue is to actually achieve equality before the law, because starting and running a trial involve costs and specialized knowledge.

3.1.2. A second opinion[15] mentioned for this study analyses *equal justice.*

Equal justice implies the same procedural rules and granting procedural rights equally to all the parties involved in a trial. Equality is one of the principles of law enshrined both in the international legal documents and in the domestic legislation of the states.

The Constitution of Romania provides in art. 16 that "Citizens are equal before the law and public authorities, without privileges or discriminations". Based on the principle of equal justice, all persons are entitled to be judged by the same courts and according to the same legal proceedings.

[12] Accessed, http:// www.conseil-constitutionnel.fr/...constitutionnel... (*author's translation*).
[13] Accesare: http://www.conseil-constitutionnel.fr › ... ……› Cahier n° 22 (*author's translation*).
[14] Coordinators: I. Muraru and E. S. Tănăsescu, The Romanian Constitution, Comment on articles, op. cit. 1220 - 1221.
[15] Ştefan Deaconu, *Political Institutions* (Bucharest, CH Beck, 2012) 378-379.

Any provisions which would make a person unable to benefit from the same procedural rules as another person would be incompatible with the principle of equal justice. The jurisprudence of the European Court of Human Rights mentions about "equality of arms" before the courts.

But equality does not mean uniformity because every litigation brought before the courts has its own characteristics.

3.2. Highlights of comparative law doctrine on the principle Justice is equal for all

3.2.1. A first opinion[16] mentions this study analyses the *Block of constitutionality.*

The Constitutional Council of France and the constitutional judge cannot exercise control on the norms presented in the confrontation with the reference constitutional norms, which are as a whole the block of constitutionality.

About this, the Constitutional Council plays an essential role. Indeed, the norms of reference certainly derive from the Constitution, but it often happens that this might need an interpretation. It is the Council which must do it, which determines it to phrase a certain number of constitutional norms and in so doing established the contours and limits of the block of constitutionality.

The admitted norms will be examined, the excluded ones and the problems which might cause potential divergences among some of these norms.

a) Accepted norms

They all originate in the Constitution noticing that if many are expressly set out here, others are present implicitly or abusively, which requires an intervention of the Constitutional Council.

1) *The norms set out by the constitutional text* – These norms are the most numerous ones and are found not only in the body of the Constitution itself, but also in the texts referred to by its Preamble.

In relation with the constitutional text proper, the fact that every article integrates, irrespective of its content, in the *block of constitutionality* belongs to the obvious truth.

Besides, the Constitutional Council quotes a certain number in its decisions. In relation with this subject, we will hold that certain provisions act more often than others due to their content as norms of reference and it happens to the Council to assess globally the conformity with the Constitution, without referring to a specific article.

As regards the preamble and the texts it refers to, i.e the Declaration of 1789, the preamble of 1946 and henceforth the Environmental Charter of 2004, it is important to point out that they are an important part of the block of constitutionality.

2) The norms set by the Constitutional Council – three hypotheses may be distinguished.

Most often the Council limits itself to specifying the meaning of the constitutional text, a meaning unknown until then, and which can be quite different from that resulting from simply reading.

b) Non-accepted norms

They are in particular the regulations of the parliamentary meetings and international or community norms.

c) Potential divergences and contradictions among the constitutional norms.

These divergences and contradictions may actually produce because it often happens that this reference of the Constitutional Council should discuss several norms with constitutional value.

3.2.2. A second opinion[17] mentioned for this study analyses the principle *Justice is equal*.

The general principles of public law are no longer enshrined in a written rule. This is their very originality. It could be them, such as the principle of *equality before the law*, put in relation with a constitutional text similar to that of art. 10 of the Constitution, that it would lose what is the clearest in their utility: *to be a source of subsidiary law.*

By definition, these principles apply only in the absence of an express text. Among the general principles of public law which have no relation with any text of positive law, the principle of consistency was highlighted which affects the state, public services and public function as well as that of their adaptation to the needs of the mission it assumes.

Two issues draw the attention in relation with that. The first is related to the delimitation of the general principles of public law.

It is jurisprudence which highlights them and expresses them and, in its absence, the doctrine.

The second problem refers to the juridical value of these principles. Where these fundamental principles find their juridical value expressly or implicitly enshrined by the Constitution – as in the preamble to the French Constitution of 1946 – their authority could not be questioned: they have the same value as the other constitutional provisions.

Where, just like in Belgian law, the value of the fundamental principles remains undetermined, their authority raises discussions.

It would seem advisable to recognize their identical value to that of the written rules from where they are induced.

The general principle will be conferred, where the case may be, the value of a constitutional text, of legislative provisions or of a regulatory measure.

[16] Pierre PACTET and Ferdinand MELIN-SOUCRAMAINEN, *Constitutional Law*, (Paris: Sirey, 2007) 503-507. (*author's translation*).
[17] Francis DELPÉRÉ, *The Constitutional Law of Belgium*, (Brussels: General Library of Law and Jurisprudence, 2000) 55-56.

4. Jurisprudence of the Constitutional Court on the principle Justice is equal for all (selective aspects).

In the decision of the Constitutional Court, selected for this study, I mentioned only the motivations of the Court which are directly related to the principle *Justice is equal for all,* regulated by the fundamental law.

4.1. *Decision of the Constitutional Court no. 711/2016 regarding the exception of unconstitutionality of the provisions of art. 18 par. (2) third thesis of Law no. 2/2013 regarding certain measures for relieving the courts, and to prepare the enforcement of Law no. 134/2010 regarding the Code of civil procedure, as published in the Official Gazette of Romania, Part I, no. 166 of 7 March 2017*[18].

The Constitutional Court was notified by the High Court of Cassation and Justice – First Civil Division, on the exception of unconstitutionality of the provisions of art. 483 par. (2) Code of civil procedure.

Considering the elements held by the Constitutional Court, the court finds that it cannot be argued that the provisions which regulate only the possibility of phrasing the appeal in the case of labour disputes would contravene the constitutional provisions of art. 124 par. (2) according to which "*Justice is unique, impartial and equal for all* ".

For the above-described, the Court overrules as groundless the exception of unconstitutionality.

4.2. *Decision of the Constitutional Court no. 635/2016 regarding the exception of unconstitutionality of the provisions of art. 22 par. (2) of Law no. 85/2006 on the insolvency procedure, as published in the Official Gazette of Romania, Part I, no. 37 of 12 January 2017*[19].

The Constitutional Court was notified by the Insolvency Consultant - S.P.R.L. and YNA Consulting - S.P.R.L. (the trustee of Izometal Magellan - S.R.L.), with the exception of unconstitutionality of the provisions of art. 22 par. (2) of Law no. 85/2006 on the insolvency procedure.

The Court deems that as it is groundless and the criticism of the authors of the exception of unconstitutionality according to which the possibility of replacing the trustee by the syndic judge, ex officio, would contravene the provisions of art. 24 and of art. 124 par. (2) of the Constitution, as this duty of the syndic judge circumscribes, in accordance with art. 11 par. (2) of Law no. 85/2006, the judicial review of the trustee's and/or liquidator's activity, a review exercised by the syndic judge.

Considering the above, the Court overrules as groundless the exception of unconstitutionality.

5. Conclusions

5.1. The objective of the study entitled: Reflections on the principle Justice is equal for all in the Romanian Constitutions and in comparative law – selective aspects, was in our opinion attained.

5.2. The main directions of study to attain the proposed objective were the following:

1. The identification of constitutional rules on the principle Justice is equal for all in the Constitution of Romania. I approached this theme, for the reason that the fundamental law of Romania – the Constitution, sets out the fundamental principles referring to the principle Justice is equal for all, which will be developed in the legislation or other subsequent regulations.

Moreover, I proceeded to the diachronic approach of the identification of these principles in the Romanian Constitutions, to turn to good account the evolution of the Romanian constitutional system for a term of over one hundred years, starting with *The developer Statute of the Paris Convention of 7/19 August 1858,* and ending with the work *The Constitution of Romania as revised in 2003, the republished form of the Constitution of Romania of 1991*.

2. *The identification of constitutional rules on the* principle Justice is equal for all *in comparative law***.** Approaching the principle of symmetry, I proceeded to the *identification of constitutional rules on the* principle Justice is equal for all *in comparative law***.**

I selected from comparative law the following: The Belgian Constitution as updated following the constitutional revisions of 6 January 2014, containing the latest revisions**. 2.** The French Constitution of 4 October 1958, in force at the date constitutional review of 23 July 2008 containing the latest revisions. This selection may be motivated considering that these states are deemed in the doctrine among the first three states in the world which elaborated a written constitution.

3. The highlights of Romanian doctrine and comparative law on the principle Justice is equal for all.

In this paragraph, we highlighted the Romanian contributions in the line of comparative law, concerning *the principle Justice is equal for all*, in the Romanian, Belgian and French doctrine.

4. The jurisprudence of the Constitutional Court of Romanian on the *principle Justice is equal for all*. In this paragraph, the last Decision of the Constitutional Court were selected, which in our opinion, contributed to the constitutionalization of the subsequent regulations *on the principle Justice is equal for all*.

5. The four parts of the work may be considered a contribution to the extension of the research in the matter of *Reflections on regulation of the principle Justice is equal for all, in the Romanian Constitutions and in comparative law,* in accordance with the current trend in the field.

[18] Decision no. *711/2016* was published in the Official Gazette Romania, Part I, no. 166 from March 7, 2017.
[19] Decision no. *635/2016* was published in the Official Gazette Romania, Part I, no. 37 from January 12, 2017.

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- Francis DELPÉRÉ, *Le Droit Constitutionnel de la Belgique,* (Bruxelles: Librairie Générale de Droit et de Jurisprudence, 2000) 55-56;
- Decizia Curții Constituționale nr. 711/2016 referitoare la referitoare la excepția de neconstituționalitate a dispozițiilor art. XVIII alin. (2) teza a treia din Legea nr. 2/2013 privind unele măsuri pentru degrevarea instanțelor judecătorești, precum și pentru pregătirea punerii în aplicare a Legii nr. 134/2010 privind Codul de procedură civilă, publicată în Monitorul Oficial al României, Partea I, nr. 50 din 25 februarie 1994, a fost publicată în Monitorul Oficial al României, Partea I, nr. 166 din 7 martie 2017 ;
- Decizia Curții Constituționale nr. 635/2016 referitoare la excepția de neconstituționalitate a prevederilor art. 22 alin. (2) din Legea nr. 85/2006 privind procedura insolvenței, a fost publicată în Monitorul Oficial al României, Partea I, nr. 37 din 12 ianuarie 2017.

ECJ CASE-LAW ON THE CONCEPT OF „PUBLIC ADMINISTRATION" USED IN ARTICLE 45 PARAGRAPH (4) TFEU

Roxana-Mariana POPESCU[*]

Abstract

According to Article 45 of the Treaty on the Functioning of the European Union (TFEU), „the freedom of movement for workers shall be secured within the Union". This freedom entails the abolition of any discrimination based on nationality between the workers of Member States as regards to employment, remuneration and other working conditions. However, Article 45 paragraph (4) establishes an exception in the sense that its provisions do not apply to employment in the public administration. The concept of public administration is autonomous in the sense that it is determined by the Court of Justice of the European Union, and not by the Member States.

Keywords: *ECJ case-law; the concept of „public administration"; Article 45 paragraph (4) TFEU.*

1. Introduction

As already known, one of the main rights of citizens[1] of Member States of the European Union is to be gainfully employed anywhere in the European Union, under conditions equal to those imposed by the host Member State, to its own nationals. This is possible under Title IV – The free movement of persons, services and capital, Chapter 1 - Workers, Article 45 and under the following articles of the Treaty on the functioning of the European Union. Thus, pursuant to Article 45 paragraph (1) „the free movement of workers shall be secured within the Union". Next, paragraph (3) stipulates the provision meant to give insight to the free movement of workers, namely: „the free movement of workers entails the right:

- to accept real employment offers;
- to move freely for this purpose in the Member States;
- to stay in a Member State for the purpose of employment in accordance with the laws, regulations and administrative provisions governing the employment of workers in that state;
- to remain on the territory of a Member State after having been employed in that state, under the conditions which will be subject to rules adopted by the Commission".

„Therefore, the free movement of persons, as a fundamental freedom in the EU, includes the right of every citizen of a Member State of the European Union to move to another Member State with the purpose to accept a genuine employment offer, to reside within the host State for the purpose of employment in accordance with the laws, regulations and administrative provisions governing the employment of workers of that state and to remain in that Member State after having been employed in that state"[2]. However, according to paragraph (4) of the same Article 45 TFEU, „provisions (...) [mentioned] do not apply to employment in the public administration". Otherwise said, Article 45 paragraph (4) TFEU constitutes an exception from the free movement of workers.

At national level there is, however, a list that includes jobs involving state sovereignty and that can, therefore be reserved only to its own citizens, being thus „closed" for citizens of other European Union Member States. It is the competence of the administration to determine, from case to case, according to the nature of duties and responsibilities involved in the job concerned, whether it can be offered to nationals[3] of the European Union, or only to its own

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[1] The provisions of the EU treaties refer to citizenship, and not nationality, and condition the EU citizenship of the existence of citizenship of a Member State (Art. 9 TEU and art. 20 paragraph (1) sentences 2 and 3 TFEU: „any person holding the nationality of a Member State is citizen of the Union. The citizenship of the Union does not replace the national citizenship but it is additional to it"). Thus, in strictly constitutional terms, the citizenship of the Union, established by the Treaty of Maastricht of 1992 and developed by the Treaty of Lisbon of 2007, it is not comparable to that given to a citizen of one of the 28 Member States. EU citizenship puts people under the protection of EU law (according to **Augustin Fuerea**, *Dreptul Uniunii Europene – principii, acțiuni, libertăți*, Universul Juridic Publishing House, Bucharest, 2016, p. 193). EU citizenship confers a number of rights to citizens of the Member States and strengthens the protection of their interests. Systematized, these are: the right to movement and to reside freely within Member States; the right to vote and to be elected to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State; the right to enjoy, on the territory of a third country in which the Member State of which they are nationals, is not represented, protection by the diplomatic and consular authorities of any Member State under the same conditions as nationals of that State; the right to petition the European Parliament, to apply to the Ombudsman and the right to address the institutions and advisory bodies of the Union, in any of the Treaty languages and to obtain a reply in the same language. For details, see Elena Emilia Ștefan, *Rolul jucat de Ombudsman în îmbunătățirea activității administrației publice*, Revista de Drept Public, no. 3/2014, pp.127-135.

[2] Augustin Fuerea, *op. cit.*, p. 192.

[3] In the Romanian law, the concept of „national" is defined in Law no. 157/2005 ratifying the Treaty of Accession of Romania to the European Union, art. 3 according to which 'within the meaning of the Accession Treaty, of the Treaty establishing a Constitution for Europe,

citizens. This situation is compounded by the fact that, at EU level, the content of the concept of „public administration" is not in the content of primary or secondary legislation. That is why the „basic principles of interpretation of Article 45 paragraph (4) have been set[4] „judicially".

2. The scope of the exception regarding the „public administration"

In 1973, the Court of Justice in Luxembourg[5] was asked the question „whether, under the exception provided in Article 48 paragraph (4) of the Treaty [now Article 45 paragraph (4) TFEU] can be excluded from the rule of non-discrimination[6] formulated (...) [in a legal instrument of secondary law] workers employed in the public service of a Member State (...) under an employment contract governed by private law"[7]. To answer that question, the Court considered it necessary to establish the scope of the exception relating to public administration. Thus, according to the Court, 'the scope of the exception provided in Article 48 paragraph (4) can be determined by the setting of the legal relation between the employee and the administration which employs him/her[8]. In the absence of any difference in the above provision, there is of no interest whether a worker is employed as a worker, employee or official[9], much less if the employment relation is subject to public law or private law [and that is because] those legal classifications vary depending on national laws, and therefore cannot provide the requisite criteria of interpretation of Community law". The Court held that the „exception under that provision envisaged employment only for jobs in public administration and that the legal nature of the relation between worker and administration was irrelevant in that regard"[10].

Therefore, under the Court of Justice of the European Union, „in the system of the Treaty, the principles of free movement and equality of treatment of workers within the Community, exemptions permitted [Article 45 paragraph (4) TFEU] cannot cover a scope going beyond the purpose for which that exemption clause was introduced. Interests that it protects allow Member States to respect them through the possibility of restricting the admission of foreign nationals to certain activities in the public administration. This provision cannot justify discriminatory measures on remuneration and other conditions of employment against workers, once admitted in the administrative service"[11].

3. Limits of the notion of „public administration"

The Court of Justice of the European Union was not pleased only with identifying the scope of the exception relating to public administration and, in 1982, it resumed the issue of the exception provided in Article 45 paragraph (4) TFEU in the case *Commission v./Belgium*[12]. In the present case, the Commission brought an action to declare that Belgium, „by requiring or permitting the imperative claim of the Belgian citizenship as a condition of recruitment for jobs not covered by Article 48 paragraph (4) EEC Treaty [now Article 45 paragraph (4) TFEU] did not fulfill its obligations under Article 48 of the Treaty and Regulation (EEC) No. 1612/68 on the free movement of workers within the Community"[13]. In fact, holding the Belgian citizenship represented a condition of access to jobs in the Belgian local authorities and public enterprises, regardless of the nature of duties that were to be fulfilled. Examples of such jobs were those of unskilled workers in rail, nurses and guards at night. The permanent Representation of the Kingdom of Belgium replied to the accusations which were brought, in particular, that:

- „the condition of citizenship found in dispute meets the requirements of the Belgian Constitution, which states that" ... only Belgians can be admitted to be employed in the civilian and military service, with some exceptions that can be established by law, for special cases";
- the Commission's interpretation of Article 48 paragraph (4) of the Treaty requires establishing a

the Treaty establishing the European Community, the Treaty establishing the European Atomic Energy Community and the Treaty on European Union and other legally binding Community rules, the following terms are defined as follows:

a) national of a State means a natural or legal person having the citizenship or nationality of that State in accordance with its national law;

b) Romanian national means a natural or legal person having the Romanian citizenship or nationality, according to Romanian legislation".

[4] Paul Craig, Grainne de Burca, *Dreptul Uniunii Europene, comentarii, jurisprudență și doctrină,* edition IV, Hamangiu Publishing House, Bucharest, 2009, p. 950.

[5] On the role of the EU Court of Justice jurisprudence in the development of EU law, see Mihaela-Augustina Dumitrașcu, *Dreptul Uniunii Europene și specificitatea acestuia*, second edition, revised and enlarged, Universul Juridic Publishing House, Bucharest, 2015, pp. 182- 188; Laura-Cristiana Spătaru-Negură, *Dreptul Uniunii Europene – o nouă tipologie juridica,* Hamangiu Publishing House, Bucharest, 2016, pp. 156-165.

[6] To analyze the concept of „discrimination", see Elena Comșa, *The principle of freedom and equality*, Lex et Scientia no. 1/2009, Prouniversitaria Publishing House, Bucharest, 2009.

[7] Judgment of the Court of February 12, 1974, *Giovanni Maria Sotgiu v./ Deutsche Bundespost*, Case 152/73, ECLI:EU:C:1974:13, pt. 6.

[8] Ibid, pt. 5.

[9] For details, see Elena Emilia Ștefan, *Reflections on the European Dimension of the Public Office*, Elsevier, Procedia Social and Behavioral Sciences, Volume 92, 10 October 2013, pp. 899-902 (http://www.sciencedirect.com/science/article/pii/S1877042813029042).

[10] Ibid, pt. 6.

[11] Ibid, pt. 4.

[12] Judgment of the Court of May 26, 1982, *Commission of European Communities v./ Kingdom of Belgium*, Case 149/79, ECLI:EU:C:1982:195.

[13] Ibid, pt. 1.

distinction within each administrative entity, between jobs related to the exercise of public authority and those which do not belong to it, and thus raises a problem the solution of which should be found by all Member States, at Community level"[14].

In turn, the Commission argued that the exception concerning the public administration[15] „refers only to jobs the practice of which requires effective participation in public authority, implying the existence of the power of decision on persons of private law or which questions the national interests, especially those involving the internal or external security of the state. In addition, the Commission added that the conditions for applying that exemption clause were not met for jobs such as those covered by the offers of jobs concerned"[16].

According to the Court, Article 45 paragraph (4) TFEU „brings out of the scope of the first three paragraphs of this article, several jobs involving direct or indirect participation in the exercise of public power and functions which are meant to protect the general interests of the State or of other public authorities. Such jobs involve, indeed, from the holders' side, the existence of a special solidarity relation with the State, as well as reciprocity of rights and obligations, which represent the ground of the citizenship bond. Thus, depending on the objective pursued by [art. 45 paragraph (4) TFEU] (...) it must be set the scope of the exemption that the article brings to the principles of free movement and equal treatment enshrined in the first three paragraphs of that article. Determining the scope of the article [Article 45 paragraph (4) TFEU] generates, however, particular difficulties because, in different Member States, the public authorities assume responsibilities with economic and social character or engage in activities that cannot be identified with those of the typical functions of the public administration, but which, on the contrary, by their nature, are within the scope of application of the Treaty. Under these conditions, the extent of the exception provided by [Article 45 paragraph (4) TFEU] on functions related to the State or other bodies governed by public law, but which, at the same time, does not involve any association with tasks of the public administration itself, would result in the circumvention of the application of the Treaty principles, of a considerable number of jobs and in creating inequalities between Member States, depending on the disparities that characterize the structure of the State and certain sectors of economic life"[17].

The Court remained consistent to this view, resuming it in other cases. Thus, in *Lawrie-Blum*[18] case, the Court stressed that „the positions in the public service within the meaning of Article 48 paragraph (4) excluded from the scope of paragraphs (1) to (3) of this article, mean in fact a series of jobs involving direct or indirect participation in the exercise of public powers and functions which are conceived to protect the general interests of the State or of other public collectivities and involving therefore, from the holders' part, the existence of a special solidarity with the State, and reciprocity of rights and obligations grounding the bond of citizenship. The jobs excluded are only those which, having regard to their respective duties and responsibilities, may take specific characteristics of administration activities in the areas described above"[19]. In the case of *Allué and Coonan* [20], the Court answered the national Court that „jobs for teachers do not involve a direct or indirect participation in public authority and functions which aim at protecting the general interests of the State and other public authorities, and do not imply the existence of a special relation of solidarity with the State and the reciprocity of rights and obligations underlying the bond of citizenship"[21].

Also, in the case *Commission v./Luxemburg*[22], the Court noted that „according to its case-law, (...) [the notion of public administration] for jobs involving direct or indirect participation in the exercise of public authority and functions designed to protect the general interests of the State or other public authorities, and which entails assuming from those occupying them, the existence of a special relation of solidarity with the State, and reciprocity of rights and duties that are the foundation of the citizenship bond. However, the exception provided in Article 48, paragraph 4, does not apply to jobs which, although covered by the State or other public bodies, still do not involve any association with tasks within the public administration itself"[23].

The Court held in Case *Bleis*[24] that jobs excluded from the scope of Article 45 paragraph (4) TFEU „ are those which, having regard to the tasks and responsibilities involved, are apt to display the characteristics of the specific activities of the public service in the spheres described above"[25].

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[14] Ibid, pt. 6.
[15] For details, see Elena Emilia Ștefan, *Disputed matters on the concept of public authority*, LESIJ nr.1/2015, pp. 132-139.
[16] Ibid pt. 7.
[17] Ibid, section. 10-11.
[18] Judgment of the Court dated July 3, 1986, *Deborah Lawrie-Blum v./ Land Baden-Württemberg*, Case 66/85, ECLI:EU:C:1986: 284.
[19] Ibid, pt. 27.
[20] Judgment of the Court of May 30, 1989, *Pilar Allué and Carmel Mary Coonan v./ Università degli Studi di Venezia*, Case 33/88, ECLI:EU:C:1989:222.
[21] Ibid, pt. 7.
[22] Judgment of the Court of July 2, 1996, *Commission of the European Communities v./ Grand Duchy of Luxembourg*, C-473/93, ECLI:EU:C:1996:263.
[23] Ibid, pt. 2.
[24] Judgment of the Court of November 27, 1991, *Annegret Bleis v./ Ministère de l'Education nationale* C-4/91, ECLI:EU:C:1991: 448.
[25] Ibid, pt. 6.

In the judgment *Colegio de Oficiales de la Marina Mercante Española*[26], the Court stated that 'the concept of public administration, within the meaning of [Article 45 paragraph (4) TFEU] must be interpreted and applied uniformly in all Member States of the [European Union] and therefore this cannot be left entirely to the sole discretion of Member States"[27]. This is why further, the Court repeats that the exception provided in Article 45 paragraph (4) TFEU „does not apply to jobs, which, although related to a public body or otherwise, does not involve any association with tasks of the public administration itself"[28]. According to the Court, a Member State can reserve to its nationals, the job of captain and first mate on ships from the private field, flying its flag only if the rights and powers conferred under public law are effectively exercised regularly and do not represent a very small part of their activities.

Therefore, „a State cannot fit certain activities, for example, of economic or social type, within the derogation provided by the Treaty, by simply including them in the field of public law of the State and by their implementation"[29]. The Court held that „regardless of their classification in the Member State, nurses, teachers – of primary school or high school - as well as language assistants at universities are not employed in the public service"[30] within the meaning of Article 45 paragraph (4) TFEU and that is because there is no „special bond of loyalty and reciprocity of rights and obligations between the State and the employee"[31]. From the Court's case-law, it results that „jobs of which it can be said that they require such loyalty and that they depend on the nationality bond"[32] shall include, cumulatively, two aspects, namely: 1. the participation in the exercise of powers conferred by public law and 2. it must assume duties designed to protect the general interests of the state"[33].

4. Conclusions

Under a constant case-law of the Court of Justice of the European Union, the concept of „public administration" within the meaning of Article 45 paragraph (4) TFEU concerns the employment which implies direct or indirect participation in the exercise of public powers and duties which have as object the preservation of the general interests of the State or of other public authorities and imply, thus from their holders, the existence of a special solidarity relation with the State, as well as reciprocity of rights and obligations which underlie the bond of citizenship. These criteria must be evaluated, from case to case, depending on the nature of the tasks and responsibilities involved in the job in question.

However, the notion of „public administration" within the meaning of Article 45 paragraph (4) TFEU must be given a uniform interpretation and application throughout the Union and cannot therefore be left to the sole discretion of Member States. In addition, this exception must be given an interpretation which limits its scope to what it is strictly necessary in order to preserve the interests which the Member States can protect.

The case-law of the Court of Justice of the European Union should be taken into consideration by Member State authorities when they decide which jobs of the public sector are reserved for nationals. This aspect has been recognized including by the European Commission[34].

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[27] Ibid, pt. 38.
[28] Ibid, pt. 40.
[29] Paul Craig, Grainne de Burca, *op. cit*., p. 952.
[30] Allan Thatham, Eugen Osmochescu, *Dreptul Uniunii Europene*, Arc Publishing House, Chișinău, 2003, p. 180.
[31] Paul Craig, Grainne de Burca, *op. cit*., p. 952.
[32] Idem.
[33] Idem.
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JURISPRUDENTIAL ISSUES CONCERNING THE BENEFICIARIES OF PROVISIONS OF ARTICLE 49 TFEU

Roxana-Mariana POPESCU*

Abstract

From the interpretation of Article 49 paragraph (1) TFEU it results that restrictions on the freedom of establishment are removed for the purpose to pursue independent activities under conditions of equality with nationals of the Member State of establishment. The beneficiaries of Article 49 TFEU are people moving from the territory of the State of origin (nationals of a Member State) on the territory of another Member State in order to pursue an independent activity, but only under the case-law of the Court of Justice of the European Union; beneficiaries of these rights are also the Member State nationals who obtained qualifications or training in another Member State and then go back to their home state to conduct a business on grounds of that qualification or professional training.

Keywords: *Article 49 TFEU; beneficiaries; ECJ case-law; recognition of professional qualifications; recognition of professional training.*

1. General aspects

Under Article 49 of the Treaty on the Functioning of the European Union (TFEU), at the level of the European Union, „restrictions on the freedom of establishment of nationals of a Member State in another Member State are prohibited. This prohibition aims also at restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in another Member State. The freedom of establishment includes access to independent activities and their exercise, as well as the setting up and management of undertakings, and in particular of companies or firms[1] (...) under the conditions laid down for its own nationals, by the law of the country of establishment". Thus, from the interpretation of Article 49 paragraph (1) TFEU it results that, on the one hand, restrictions on the freedom of establishment are eliminated and, on the other hand, the right „to pursue independent activities on equal terms with nationals of the Member State of establishment"[2] is set. After first reading the article, it can be interpreted that the beneficiaries of the rights mentioned above are only those persons moving from the territory of origin (they are nationals of a certain Member State). Furthermore, „its requirements are satisfied if the person exercising the right of establishment is treated the same as citizens"[3] of the host State (the State where the person moved). In reality, after a careful study of the doctrine of specialty, but especially of the case-law of the Court of Justice of the European Union[4], it is clear that Article 49 TFEU „received a broad interpretation on the two issues"[5] within the meaning that „citizens can, under certain conditions, capitalize the provisions of Article 49 against their own state"[6].

2. The direct beneficiaries of provisions of Article 49 TFEU

As mentioned before, the main beneficiaries of provisions of Article 49 TFEU are people moving from the country of origin to another Member State of the European Union. Invoking this right, by its beneficiaries, before the national authorities[7], is now possible after the Court of Justice in Luxembourg has given direct effect to Article 49 TFEU since 1974 in his famous judgment ruled in *Reyners*[8] case. In that case, Conseil d'Etat in Belgium addressed the Court two

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[1] Companies covered by those provisions are those referred to in art. 54 second paragraph of the TFEU, namely „companies formed in accordance with provisions of civil or commercial law, including cooperative societies and other legal persons of public or private law, excepting the non-profit companies".

[2] Paul Craig, Grainne de Burca, *Dreptul Uniunii Europene. Comentarii, jurisprudență și doctrină*, edition IV, Hamangiu Publishing House, Bucharest, 2009, p. 992.

[3] Idem.

[4] On the role of the EU Court of Justice jurisprudence in the development of EU law, see Mihaela-Augustina Dumitrașcu, *Dreptul Uniunii Europene și specificitatea acestuia*, second edition, revised and enlarged, Universul Juridic Publishing House, Bucharest, 2015, pp. 182- 188; Laura-Cristiana Spătaru-Negură, *Dreptul Uniunii Europene – o nouă tipologie juridic,* Hamangiu Publishing House, Bucharest, 2016, pp. 156-165.

[5] Idem.

[6] Idem.

[7] With regard to the concept of public authority, see Elena Emilia Ștefan, *Disputed matters on the concept of public authority*, LESIJ no. 1/2015, pp. 132-139.

[8] Judgment of the Court dated June 21, 1974, *Jean Reyners v./ Belgian State*, Case 2/74, ECLI:EU:C:1974:68.

questions on the interpretation of Articles 52[9] and 55[10] of the Treaty establishing the European Economic Community (TEEC) concerning the establishment right, related to exercising the profession of lawyer. Those questions were raised in an action brought by a Dutch citizen, „holder of a legal degree under which in Belgium, the access to the profession of lawyer was granted, and who was excluded from that profession on account of his nationality, following the Royal Decree of August 24, 1970 regarding the title and the exercise of the legal profession of lawyer". Regarding the article that is the subject of our study, Conseil d'Etat wanted to know if Article 52 TEEC was, from the end of the transitional period, a „directly applicable provision". It must be mentioned that the question was raised on grounds of the absence, at that time, of certain directives adopted in accordance with the provisions of the Treaty, in order to attain the freedom of establishment as regards to a particular activity, although the transition period for adopting them had expired. In those circumstances, the Court considered that the Treaty had foreseen „that the freedom of establishment should be done at the end of the transitional period", which is why it asserted that Article 52 required such a precise obligation of result, the execution of which had to be facilitated, but not conditional to the implementation of a program of progressive measures"[11]. According to the Court, „the fact that this progressive character has not been complied with, leaves the obligation itself intact, after the deadline stipulated for its fulfillment"[12]. Therefore, „from the end of the transitional period, Article 52 of the Treaty has been a provision directly applicable, even despite the absence in a specific area, of directives set"[13] by the Treaty, though, added the Court", such directives have not lost all interest since they have preserved an important area of application of measures meant to facilitate the effective exercise of the right to the freedom of establishment"[14].

Two years later, in 1976, under the same conditions under which directives to attain the freedom of establishment concerning a particular activity were not adopted, the Court went back on the direct effect of Article 49 TFEU, in *Thieffry*[15] judgment. In that case, Cour d'appel de Paris formulated a question on the interpretation of article 57[16] TCEE on the mutual recognition of professional qualifications for the access to independent activities, especially for the purpose of admission in order to exercise the profession of lawyer. In fact, a Belgian lawyer was not admitted into the *Ordre des lawyers auprès de la Cour de Paris* (the Paris Bar), though he was the holder of a „Belgian degree of doctor of law, the equivalence of which to the university degree in French law was recognized by a French university, and who subsequently obtained „certificat d'aptitude à la profession d'avocat" (certificate of qualification for the legal profession of lawyer), after successfully passing that examination, in accordance with the French law"[17]. The reason to refuse the admission requirement was that „the person concerned did not hold a degree to justify a university degree or a PhD degree in French law"[18]. In *Thierry*, unlike *Reyners*, the reason for rejecting the application for registration in the bar was not that of citizenship, but the rejection was based on the recognition of professional qualifications. In those circumstances, the Court requested to be answered to the following question: „the fact to require a national of a Member State wishing to practice the profession of lawyer in another Member State, the national diploma provided by the law of the country of establishment, while the diploma which he obtained in his home country was the subject of recognition of equivalence by the university authorities of the country of establishment and allowed him to pass in that country the qualification examination for the legal profession of lawyer - examination which he passed - is it, in the absence of the directives set out (...) [by] the Treaty of Rome, an obstacle that goes beyond what is necessary to achieve the objective of Community provisions in question?"[19]. The Luxembourg Court held that „when the freedom of establishment provided in Article 52 [the current Article 49 TFEU] can be attained in a Member State either under the laws, regulations and administrative

[9] The current art. 49 TFEU. See also the comment of Augustin Fuerea, *Dreptul Uniunii Europene – principii, acțiuni, libertăți*, Universul Juridic Publishing House, Bucharest, 2016, pp. 202-203.

[10] The current art. 51 TFEU: „Activities that are associated in this state, even occasionally, with the exercise of the official authority are exempted from the provisions of this chapter, as regards to the Member State concerned.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may exempt certain activities from the application of provisions of this chapter".

[11] Pct. 26 of the judgment *Jean Reyners v./ Belgian State*, ECLI:EU:C:1974:68.

[12] Pct. 27 of the judgment *Jean Reyners v./ Belgian State*, ECLI:EU:C:1974:68.

[13] Pt. 32 of the judgment *Jean Reyners v./ Belgian State*, ECLI:EU:C:1974:68.

[14] Pt. 31 of the judgment *Jean Reyners v./ Belgian State*, ECLI:EU:C:1974:68.

[15] Judgment of the Court of April 28, 1977, *Jean Thieffry v./ Conseil de l'ordre des avocats à la Cour de Paris*, Case 71/76, ECLI:EU:C:1977:65. See also the comment of Augustin Fuerea, *op. cit.*, p. 203.

[16] The current art. 53 TFEU: „(1) In order to facilitate the access to independent activities and their exercise, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, issues directives for the mutual recognition of diplomas, certificates and other formal qualifications as well and on the coordination of laws, regulations and administrative provisions of the Member States relating to the access to and pursue of independent activities.

(2) With regard to the medical, paramedical and pharmaceutical professions, the progressive abolition of restrictions is dependent upon coordination of the conditions for their exercise in the various Member States ".

[17] Idem.

[18] Pt. 3 of the judgment of the Court *Jean Thieffry v./ Conseil de l'ordre des avocats à la Cour de Paris*, ECLI:EU:C:1977:65.

[19] Pt. 6 of the judgment of the Court Jean Thieffry v./ Conseil de l'ordre des avocats à la Cour de Paris, ECLI:EU:C:1977:65.

provisions[20] in force or under practices of the Government or of professional bodies, the genuine enjoyment of this freedom should not be denied to a person covered by Community law, just because, for a particular profession, the directives provided in Article 57 of the Treaty have not been adopted yet"[21]. The Court therefore prohibits national authorities of the host State to refuse access to the Bar of nationals of other Member States, on the grounds that they do not hold a French qualification, even if directives in this field have not been adopted yet.

In the same vein, the Court ruled in the case *Patrick v./ Ministre des affaires culturelles*[22]. In that case, a British national, holder of a diploma in architecture issued in the UK by the Architectural Association, requested permission to exercise the profession of architect in France and his permission „was refused on the ground that, under [a] law of (...) 1940, that authorization had (...) exceptional character (...) [because] there was no mutual agreement between France and the applicant's home country and that, in the absence of a specific convention to have that purpose, between the Member States of the EEC and, in particular, between France and the United Kingdom, the Treaty establishing the European Economic Community cannot replace it [and] art. TEEC 52-58, which refer to the freedom of establishment (...) [send] to achieve this freedom, to Council directives which have not been adopted yet". The Court wanted to know whether at the state of Community law on 9 August 1973 [...] a British national had reason to invoke in his favor, the benefit of the right of establishment to practice the profession of architect in a Member State of the Community"[23]. The Court's answer was emphatic in the sense that „a national of a (...) Member State, who holds a title recognized by the competent authorities of the Member State of establishment, equivalent to a degree issued and required in that State, shall enjoy the right of access to the architectural profession and to its exercise, under the same conditions as nationals of the Member State of establishment without having to meet additional conditions"[24].

In the same context, of beneficiaries of provisions of Article 49 TFEU, it is also included the recognition of equivalence of diplomas, aspect that has been the subject of the judgment ruled in the case *Heylens*[25]. „By its question, the referring Court seeks essentially to ascertain whether, when in a Member State, the access to a remunerated profession is subject to the holding of a national degree or of degrees obtained abroad, but recognized as its/their equivalent, the principle of free movement of workers enshrined in Article 48 of the Treaty [the EC][26] requires that the decision refusing to a worker, national of another Member State, the recognition of the equivalence of the degree issued by the Member State of which national he is, to be able to be subject to appeal in Court and to be motivated. The Court held that „since the requirement concerning the qualifications required to practice a certain profession must be reconciled with the imperatives of the free movement of workers, the recognition procedure of the equivalence of degrees should enable national authorities to ensure objectively that the degree obtained abroad attested that the holder had knowledge and qualifications if not identical, at least equivalent to those certified by the national degree. Assessing the equivalence of the degree obtained abroad must be made by taking into account exclusively the level of knowledge and skills that the degree, given the nature and duration of the studies and practical training which it attests as achieved, presumes to be acquired by its holder"[27]. The Court therefore considers that „when in a Member State, the access to a remunerated profession is subject to the holding of a national degree or of a degree obtained abroad recognized as its equivalent, the principle of free movement of workers enshrined in Article 48 of the Treaty requires that the decision refusing a worker, national of another Member State, the recognition of the equivalence of the degree issued by the Member State, the national of which he is, to be able to be subject to an appeal[28] in Court which may check its legality in relation to Community law and enables the party concerned to ascertain the grounds for the decision"[29].

Another important moment in the evolution of the direct effect of Article 49 TFEU is the judgment in the case *Vlassopoulou*[30]. *Vlassopoulou* represents the boundary between the period in which there was no legislation adopted to facilitate access to independent activities and their exercise and the period

[20] With regard to administrativ act, see Elena Emilia Ștefan, *Manual de drept administrativ. Partea II*, second edition, revised and enlarged, Universul Juridic Publishing House, Bucharest, 2015, pp.21-81.

[21] Pt. 17 of the judgment of the Court *Jean Thieffry v./ Conseil de l'ordre des avocats à la Cour de Paris*, ECLI:EU:C:1977:65.

[22] Judgment of the Court of June 28, 1977, *Richard Hugh Patrick v./ Ministre des affaires culturelles*, Case 11/77, ECLI:EU:C:1977:113.

[23] Pt. 7 of the judgment of the Court, *Richard Hugh Patrick v./ Ministre des affaires culturelles*, ECLI:EU:C:1977:113.

[24] Pt. 18 of the Judgment of the Court, *Richard Hugh Patrick v./ Ministre des affaires culturelles*, ECLI:EU:C:1977:113.

[25] Judgment of the Court of October 15, 1987, *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v./ Georges Heylens and others*, Case 222/86, ECLI:EU:C:1987:442.

[26] The current art. 45 TFEU on the free movement of workers which is guaranteed in the European Union.

[27] Pt. 13 judgment of the Court of October 15, 1987, *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v./ Georges Heylens and others*, ECLI:EU:C:1987:442.

[28] With regard to the object of the legal action, see: Elena Emilia Ștefan, *Drept administrativ. Partea a II-a*, Universul Juridic Publishing House, Bucharest, 2013, pp. 76-77.

[29] Pt. 30 of the Court Judgment, *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v./ Georges Heylens and others*, ECLI:EU:C:1987:442.

[30] Judgment of the Court of May 7, 1991 *Irène Vlassopoulou v./ Ministerium für Justiz, Bundes - und Europaangelegenheiten Baden-Württemberg*, C-340/89, ECLI:EU:C:1991:193.

characterized by the adoption of directives concerning the mutual recognition of degrees, certificates and other formal qualifications, as well as for the coordination of laws, regulations and administrative provisions of the Member States relating to the access to and exercise of self-employment. In that case, the Court pointed out that although on December 21, 1989, was adopted Directive 89/48 / EEC on the general system for the recognition of higher education diplomas awarded for professional training lasting at least three years[31], it „did not apply to facts from [that] case"[32] because the transposition deadline was January 4, 1991 and the facts occurred prior to that date. Thus, the Court held that „a Member State notified on an application for authorization to pursue a profession to which the access is conditioned under national law, by the possession of a degree or professional qualification, has the obligation to take into consideration the degrees, certificates and other titles which the person concerned has obtained in order to pursue the same profession in another Member State by comparing the abilities certified by those degrees with the knowledge and qualifications required by the national rules"[33]. „The examination procedure should allow host authorities to ensure, objectively, that the foreign diploma certifies that the holder has knowledge and qualifications if not identical, at least equivalent to those attested by the national diploma. Assessing the equivalency of the degree obtained abroad must be exclusively made by taking into consideration the knowledge and skills that this degree, by taking into account the nature and duration of studies and practical training referred to in the degree, permits to infer that they were acquired by its holder"[34].

The situation did not change even when, the Member States implemented the necessary legislation to facilitate access to independent activities and their exercise, i.e. those Directives on the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for coordination of the laws, regulations and administrative provisions of the Member States relating to the access to and exercise of self-employment. In this regard, we mention *Borrell*[35]judgment where the Court resumed the previous case, as follows: section 11 of the judgment resumed section 16 of *Vlassopoulou* judgment; section 12 resumed section 13 of *Heylens* judgment and section 13 was taken from section 17 of *Vlassopoulou*. The same happened in *Aranitis*[36] judgment, the Court providing the solution by resorting to the jurisprudence already established prior to adopting the legislation to facilitate the access to independent activities and their exercise: pt. 31 of the judgment resumed *Vlassopoulou* (pt. 16) and *Borrell* (pt. 11) jurisprudence.

The analysis of the Court's decisions required Member States, „despite the diversity of national educational systems and training, and in the absence of coordination legislation at EU level, Article 49 TFEU imposes a clear obligation on the national authorities, to examine thoroughly the qualifications held by an EU national, to inform the person concerned of the reasons for which its qualification was not considered equivalent and to comply with his/her rights during the procedure"[37]. Under the Court's case-law, Member States cannot refuse the access of a citizen of an EU Member State, on the territory of another Member State, the access to a profession, because he does not have a qualification obtained in the host country or because, in the host state, a national recognition of the equivalence of foreign qualifications does not exist yet.

3. Expanding the provisions of Article 49 TFEU to the citizens of their home state

As mentioned before, Article 49 TFEU „received a broad interpretation on the two issues"[38] in the sense that „citizens can, under certain conditions, capitalize the provisions of Article 49 against their own state"[39]. An important role went to the Court of Justice of the European Union, which, in the judgment ruled in the case *Knoors*[40] argued that the fundamental freedoms of the European Union „would not be fully achieved if Member States could refuse the benefit of provisions of Community law to those of their nationals who have used the existing facilities of free movement and establishment and who acquired, by their virtue, their professional qualifications, specified by the directive, in a Member State other than the one whose nationality they already hold"[41]. The Court added that while „it is true that the Treaty provisions relating to the establishment and provision of services cannot be applied to situations which are purely internal to a Member State, it is no less true that the reference in

[31] Published in OJ L 19, 24.1.1989.

[32] Pt. 12 of the Judgment of the Court, *Irène Vlassopoulou v./ Ministerium für Justiz, Bundes - und Europaangelegenheiten Baden-Württemberg*, ECLI:EU:C:1991:193.

[33] Pct. 16 of the Judgment of the Court, *Irène Vlassopoulou v./ Ministerium für Justiz, Bundes - und Europaangelegenheiten Baden-Württemberg*, ECLI:EU:C:1991:193.

[34] Pt. 17 of the Judgment of the Court of May 7, 1991 *Irène Vlassopoulou v./ Ministerium für Justiz, Bundes - und Europaangelegenheiten Baden-Württemberg*, Case C-340/89, ECLI:ECLI:EU:C:1991:193.

[35] Judgment of the Court of May 7, 1992, Colegio *Oficial de Agentes de la Propriedad Inmobiliaria v./ José Luis Aguirre Borrell and others*, C-104/91, ECLI:EU:C:1992:202.

[36] Judgment of the Court of February 1, 1996 *Georgios Aranitis v./ Land Berlin*, C-164/94, ECLI:EU:C:1996:23.

[37] Paul Craig, Grainne de Burca, *op. cit*., p. 995.

[38] Ibid, *op. cit*., p. 992.

[39] Idem.

[40] Judgment of the Court dated February 7, 1979, *J. Knoors v./ Staatssecretaris van Economische Zaken*, Case 115/78, ECLI:EU:C:1979:31.

[41] Pt. 20 of the Court judgment, *J. Knoors v./ Staatssecretaris van Economische Zaken*, ECLI:EU:C:1979:31.

Article 52 [now Article 49 TFEU] to „nationals of a Member State" who wish to establish themselves „in another Member State" cannot be interpreted so as to exclude from the benefit of Community law, the own nationals of a Member State, when they, by virtue of the fact that they resided legally in a Member State and gained a professional qualification recognized by the provisions of Community law are, in terms of their state of origin, in a situation that can be assimilated to that of all other subjects enjoying rights and freedoms guaranteed by the Treaty"[42].

4. Conclusions

Recognizing the right of establishment of persons practicing an independent activity was and still is an inexhaustible source for the Court in Luxembourg to enrich its case-law. Under the case-law[43] of the CJEU, Article 49 TFEU can be invoked by any citizen of a Member State of the European Union in another Member State, regardless of the country where the person concerned obtained a qualification or vocational training, as well as of citizens of a Member State who completed a qualification or professional training in another Member State and then returned to their home state to conduct a business under that qualification or professional training.

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[42] Pt. 24 of the judgment of the Court, *J. Knoors v./ Staatssecretaris van Economische Zaken*, ECLI:EU:C:1979:31.

[43] With regard to the role of jurisprudence, see Elena Anghel, *The reconfiguration of the judge`s role in the romano-germanic law system*, in LESIJ.JS XX – 1/2013, Pro Universitaria Publishing House, Bucharest, 2013, pp. 65-72.

THE POTENTIAL AND LIMITATIONS OF TRUTH AND RECONCILIATION COMMISSIONS IN GENERATING JUDICIAL AND NON-JUDICIAL EFFECTS. THE PRESIDENTIAL COMMISSION FOR THE ANALYSIS OF THE COMMUNIST DICTATORSHIP IN ROMANIA.

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Abstract

The transition periods that succeed totalitarian regimes are characterized by the efforts of new governments to recognize the violations of human rights that were committed in the past, to implement legitimate mechanisms to clarify the causes but also the consequences of the violation of human rights by the previous regimes, both at the individual and community level. The truth commissions represent one of these mechanisms, concentrating on the testimonies of the victims and on the recognition of their suffering. Depending on the case, the recommendations of the truth commissions have the role of generating judicial and non-judicial effects, of contributing and completing the bringing into effect of the penal justice, of facilitating the processes of restoration, of preventing the re-iteration of new abuses.

The present paper proposes to analyse the limitations and the transformative potential of the recommendations included in the report done by the Presidential Commission for the analysis of the communist dictatorship in Romania. We will analyse whether the information contained in this report has been useful in the judicial procedures (prosecutorial indictment and judges' motivation) which resulted in the conviction of Ioan Ficior and Alexandru Vișinescu, but also on other two civil sentences. The research approach imposes the use of a content analysis of the official and public documents, a comparative analysis and a historic analysis.

Keywords: *Truth and Reconciliation Commissions, Lustration Law, Presidential Commission for the analysis of the communist dictatorship in Romania, Ioan Ficior, Alexandru Vișinescu.*

1. Introduction

The Truth and Reconciliation Commissions represent the first complex process through which different segments of the population reunite to elaborate policies that are useful to reforms and new democratic constructs within a society. The activity of the Commissions exercises influences upon victims, but also on the community in general, upon the penal and civil trial cases, but also on non-judicial mechanisms. The central idea of the paper is to go beyond the description of the attributes of the Commissions and to capture how the activity of these Commissions can be useful in judicial processes. In the first part, we will argue for the necessity of these Commissions to exist, we will define the concept of a Truth and Reconciliation Commission and we will comment on its attributes. What we tried to do through the types of Commissions presented as examples (from Argentina and South Africa) was to underline the theoretical model of the paper. In other words, we will follow how the information contained in the report elaborated by the Commissions can supply evidence or can offer historic details that are useful in the penal and civil processes from transition periods (judicial effects) and how they can determine non-judicial effects as well (the feeling of justice, moral rehabilitation, the recognition of the sufferings of victims). In the second part of the paper we will analyse the impact of the activity and the report of the Presidential commission for the analysis of the communist dictatorship in Romania on the penal trials against Ioan Ficior and Alexandru Vișinescu, but also on other two civil sentences elaborated in the past years.

2. Content

2.1. Why are restoration devices needed during the transition periods that succeed abusive regimes?

The societies that have been marked by protracted and generalised violence, by abuses and violations of human rights directed towards their own citizens are often socially fragmented and unprepared to function under new governing regimes. The crossing from one model of societal stability to another model of stability is done during a period of time named political, judicial and economic transition. During this entire transition process, what is taken into account is the change at the level of the macrostructure (the crossing from a totalitarian/authoritarian government to a democratic government, from a state of conflict, violence to one of peace), the changes at the level of the medial structure (new institutions, the outlining of a democratic culture based on independence and the good collaboration between the three state powers, the judicial, executive and legislative power) and the change at the

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microstructure (citizens, and their support to legitimate the new forms of government).

This reconstructive stage of the new social and judicial order can only be achieved through the support of the citizens, by regaining their trust in the new institutions of government. However, a significant number of citizens have suffered abuses, and have been oppressed by the old regime. In many cases, their abusers are free or, what's more, they are in leadership positions, in the organisational structures that are responsible for the construction of new societies. At this point, divisions within the society interfere, citizens who suffered abuses in the old regime manifesting mistrust and a lack of will in supporting the new reforms. The latter wish for their suffering to be recognised, for their abusers to be identified and punished for crimes and abuses committed, they wish for the truth to be made public so as to distinguish between abusers and the abused, between criminals and victims in the new social and judicial order. Despite the fact that *that quest is dangerous, complex and often involves protracted advocacy by victims already marginalized by their societies.., those who demand an accounting for the past are increasingly prevailing*[1].

On the other hand, the states have the obligation to propose concrete measures to rectify the prejudice suffered by the victims or their descendants. These obligations are provided by relevant documents such as the Universal Declaration of Human Rights (Article 8), the International Covenant on Civil and Political Rights (Article 2), the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (Article 14).

The manner in which societies have chosen to confront the past, to manage the crises associated with periods of transition, to consolidate the citizens' trust in the act of justice and to create the basis for the new social institutions differ from one continent to another, from one country to another. Two such cases will be mentioned, the Cambodian case where the past was politically instrumented[2], and the case of South Africa, which is recognised for the most solid and functional Truth and Reconciliation Commission in the world.

After the fall of Khmer Rouge's regime in 1980, the new government from Cambodia, formed from the affiliates of the old leader, decided not to make the violent past public and to cut the young generations' access to the truth, proposing forgiving without confronting the past. The politics that was chosen was one of forgetfulness and of the fear of speaking about the atrocities previously committed, in spite of the fact that one fifth of the population had been killed by the old regime[3] and despite the recommendations from the UN experts to create a Truth and Reconciliation Commission. A special role was held by the international community which invested both human and financial resources, so that in 2006, 36 years after the fall of Rouge's regime, extraordinary chambers have started functioning in the Cambodian courts (after an accord signed in 2003 between the government and the UN) for the prosecution of those who are guilty of the atrocities committed by the old regime. The international community cannot however be a substitute for the lack of mobility from behalf of the majority of citizens. Without public support, without the support of citizens who are animated by the desire of knowing the truth, the processes of social reconstruction are difficult to carry through.

Over a period of 45 years in South Africa, the National African Congress conducted a politics characterised by treatments that were discriminatory, abusive, and criminal against a coloured majority population and activists who militated for their rights. In 1994, after Nelson Mandela was elected president, a central place in the public space and within groups of professionals was occupied by questions such as: how do we relate to the past?; can those who committed abuses and crimes during Apartheid be forgiven?; if yes, under what conditions?. The answers to such questions imposed the creation of a Truth and Reconciliation Commission. In 1995 the Promotion of National Unity and Reconciliation Act was voted in Parliament, and in 1996 the Commission formed of 17 members chosen through public nominalisation and selection started functioning, under the coordination of Archbishop Desmond Tutu. Being supported by a human and financial resource (300 employees and $1.8 million for the first two and a half years)[4], the Commission had as responsibilities to offer individual amnesties (a particularity of this committee), to cite witnesses, to collect evidence, to start a witness protection programme for those who decided to testify. 2000 out of the 21000 victims who decided to testify have done so publicly, a TV channel being specially created to familiarise the population with the purpose of hearings and with the steps taken by the commission[5]. Out of the 7115 requests for amnesty that were submitted, 4500 were rejected while for the ones that were accepted the Commission decided on amnesty only if the political factor occupied a determining place in the motivation of the crime. In the cases where the persons who submitted a request for individual amnesty had committed severe crimes, the individuals were heard publicly before the members of the Commission, the legal representatives of the victims or before the victims themselves.

There were numerous attempts to slow down the activity of the Commission from the representatives of

[1] Robin Kirk, "Commissioning Truths, Essays on the 30th Anniversary of Nunca Mas", (North Carolina: DHRC and FHIDUD, 2016), pp. 7-8.
[2] Agata Fijalkowski, "Truth and Reconciliation Commissions", in *An introduction to transitional justice*, (New York: Ed. Olivera Simic, Routledge, 2017), p. 101.
[3] Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the challenge of Truth Commissions*, (New York: Routledge, 2snd ed 2011), p. 204.
[4] Agata Fijalkowski, "Truth and Reconciliation Commissions", p. 103.
[5] Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the challenge of Truth Commissions*, p. 28.

the former government and of former leaders (former presidents P. Botha and F. Klerk, representative Mbeki, etc) and numerous questions about the efficiency of the Commission regarding the complex process of reconciliation in South Africa. *A relevant aspect however for the research approach of the present study is the presence of the complementariness between traditional justice and the Truth and Reconciliation Commissions. The Truth and Reconciliation Commission from South Africa offered evidence in the courts records of those who were guilty of severe crimes, such an example being former president Botha, who was convicted and fined.*

The two examples mentioned above had as a purpose to trace the ends of a vaster web of options. Between choosing not to confront the past and creating a model Truth and Reconciliation Commission, there are other ways as well that have been adopted by new governments during transition periods: lustration, public access to security archives, material and moral compensations for the victims, convictions of abusers, the rehabilitation of victims who had been detained, truth and reconciliation commissions.

Lustration and the access to security archives are more often encountered in Central and Eastern Europe. Lustration is based on the presumption according to which the new regime cannot be legitimate unless the access of former office holders to public positions is forbidden. After numerous difficulties regarding the implementation of such a law, the countries from Central and Eastern Europe have chosen different paths: the Czech Republic adopted a first lustration law in 1991, then renewed it in 1996, and subsequently in 2000 for 5 years; according to the political orientation of the government Hungary had several attempts, namely they voted the lustration law in 1994, in 1996 they restricted its applicability, while in 2000 they returned to the tougher variant of the law; Poland voted the law in 1997 and started applying it in 1998; Romania voted for the law in 2012).

Truth commissions on the other hand are methods that have become familiar after the 80s in Africa (Chad 1990, Nigeria 1999, Sierra Leone 2000, Ghana 2002, Congo 2003, Morocco 2004, Liberia 2006, Kenya 2008, Togo 2009, Ivory Coast 2011), Asia (South Korea 2000 and 2005, Panama 2001, East Timor 2002, Solomon Islands 2008, Thailand 2010) and South America (Argentina 1983, Uruguay 1984 and 2000, Chile 1989 and 2003, El Salvador 1992, Guatemala 1994, Ecuador 1996 and2007, Peru 2001, Paraguay 2003, Honduras 2010).

2.3. What are Truth and Reconciliation Commissions

Truth and Reconciliation Commissions (TRC) enlist in the current that promotes human rights in the 20th century and represent an instrument of transitional justice, a non-judicial instrument through which generalised abuses that have been committed in the recent past of a country are investigated. The International Centre for Transitional Justice (ICTJ) has pointed out around 40 such commissions at the international level starting with the 80s[6].

They are named Truth Commissions since their existence is justified by a wider concept about truth during periods of crisis, where the exceedance of abuses and the violence models from the recent past impose an approach to match. Certainly, the search for the truth finds itself at the centre of the functioning of traditional justice, but it occupies a special position during transition periods. The individuals who suffered want for the truth about their traumatic past to be revealed, a desire that is animated by a vast series of motives amongst which we can mention: moral rehabilitation, recovery of prejudice, the desire for these atrocities to not repeat themselves, liberation from the burden of the past, the desire for justice to be served for them, to participate in the construction of new institutions based on trust and under legitimate conditions.

Another objective of the Commissions is reconciliation, so that at a different level, a more profound one, the right to the truth could lead to a possible forgiveness from behalf of those who were abused. Although the abuser-victim encounter is commonly found as a desideratum in the theoretical models, and it is very rarely applied in practice, reconciliation can manifest itself under different forms: an official recognition of the traumatic past by those who committed violence or by the new governments, the adoption of a new constitution that guarantees fundamental rights and freedoms, free and transparent elections according to international standards, the freeing of political prisoners etc.

Priscilla Hayner systematizes the attributes of the Truth and Reconciliation Commissions within a comprehensive definition: *A truth commission concentrates its activity on events from the past, investigates models of violence that took place over a period of time, directly targets the affected population in a wider sense as well, basing itself on information about its experience, functions over a limited period of time, it is officially recognised and authorised to function by the governments of the states in question, and has as a final result the elaboration of a report which includes the results of the activities but also a series of recommendations for reforms*[7].

A series of clarifications are needed regarding the existence and functioning of Commissions.

A first aspect would be related to the moment in time when these commissions start their activity but also to the period of time that is necessary for them to function. In regards to the moment when the Commission starts functioning, researchers in the field consider that there is a connection of direct

[6] https://www.ictj.org/our-work, accessed in April 2017.
[7] Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the challenge of Truth Commissions*, p. 1.

proportionality between the former and the efficiency of the Commission. If a Commission starts to function at a moment that is as close as possible to the installation of the transition, its activity can benefit both from the support of the population whose memory is still connected to the events from the recent past and from political support, from easier access to information in order to establish the people responsibilities for the violence committed[8]. In regards to the period of time in which a commission can function, it is considered that on average it would not be indicated for it to exceed two-three years despite the fact that it has a complex series of responsibilities such as sorting and organising documents, processing the testimonies from the most important cases, elaborating a report with clear recommendations. The logic according to which the Commissions should have a clear deadline that is limited to a short period of time comes from the possibility that their recommendations could be implemented. If the functioning time of the Commission is very long as it was in the case of Uganda 1986 (9 years), there would be the risk for the public and the representatives of the government to lose their interest in its activity.

Another relevant aspect would be connected to the members of the Commission. The Commissions could be exclusively formed from national members, mixed or international. Depending on the case, the international members are associated with the neutrality and efficiency of the Commission's activity while national members are associated with a good knowledge of the complex situation of the transition from the countries in question. Advantages and disadvantages are encountered in both cases. We could recall the case of the Commission from El Salvador where all of the members were foreign. The moment when the Commission recommended in the final report that a meaningful number of members of the military forces should be excluded from the army since they had committed abuses, the members of the Commission received death threats, two of them leaving the country[9].

The members of the Commissions have the responsibility of collecting evidence, analysing files, ensuring the physical, psychological and moral protection of witnesses, elaborating a final report. The professional and moral profile of the members represents an important indicator in the functioning of the Commissions. In spite of the fact that such a Commission is decided by the executive powers of the state, its members must be chosen according to criteria of impartiality, through public selection, and by excluding political criteria. A positive example would be the one of the Commission from Ecuador where a part of the members of the Commission were representatives of non-governmental organizations, a hailed decision since the commissions represent an instrument of civil societies.

The third aspect that we will refer to is connected to the legitimacy of the existence of Commissions. Their creation depends on the society's history and cultural, economic and political particularities. For a Commission to be legitimate and efficient, it would have to be a response in the search for truth and justice from behalf of the society in general and of the victims in particular. An ideal model to follow would presuppose a preliminary consultation with the victims and their families, with the representatives of the civil society.

The last aspect that will be mentioned is related to the activities that the Commissions have the right to carry out: accessing archives; conducting public or private interviews; collecting information from the testimonies from the victims, their families, various witnesses or even from abusers, in certain situations; accessing official documents. Some Commissions also have the authority to send citations, to share the results of their work with the judicial authorities, to make recommendations for those responsible of crimes and violent acts to be legally convicted, to publish the names of those who committed abuses[10].

The first body that fulfilled the attributes of a Commission, even though it was not called a Truth and Reconciliation Commission, was the Commission from Argentina, created under President Raul Alfonsin in 1983. During the 1978-1983 military dictatorship, between 10000 and 30000 people were arrested, tortured or went missing. The Commission was named National Commission on the Disappeared (CONADEP) and functioned for a period of 9 months, its activity being widely disseminated to the public through mass-media. The CONADEP report, edited in 1984 and containing 50000 pages was entitled Nunca Mas (Never Again), was translated in various languages and was based on thorough investigations: documentation regarding the disappearing of 8961 people, 7000 testimonies, 1500 interviews about the approximately 300 torture centres and the methods used by the military dictatorship during 1976-1983.[11]

What is relevant for the present study is the manner in which the information concentrated in the CONADEP report came to be material presented to prosecutors and was used as key evidence in the trials that resulted in the conviction of those who were responsible for the abuses from the past. Despite the periods of pardon and amnesty that followed under the new president Menem, in 2009, 1400 of individuals guilty of crimes were convicted and 68% of them were arrested in 2011.

[8] Agata Fijalkowski, "Truth an Reconciliation Commissions", p. 96.
[9] Idem.
[10] Priscilla B. Hayner, "Truth Commission: a schematic overview", *International Review of the Red Cross*, volume 88, Number 862, (June 2006): pp. 295-296.
[11] Robin Kirk, "Commissioning Truths, Essays on the 30th Anniversary of Nunca Mas", pp. 6-16.

This report represented a first part of what Kathryn Sikkink calls "justice cascade" at both the national and international level, "a basis for the modern human rights movement"[12].

In Central and Eastern Europe the methods of the transitional justice through which the confrontation with the traumatic past was chosen differ from other regions. The countries chose to select and to locally apply either lustration laws, as aforementioned, or access to the security files and less the instrument represented by the Truth and Reconciliation Commissions, there having therefore been only three such commissions created (two in Germany) and one in Romania. The totalitarian regime was based on the control exercised by the political police that instituted terror and submission at a wide level, the state extending its tentacles in the private life of citizens as well. Any attempt at expressing an opinion that was in disagreement with the values of the state party or any act of resistance was severely punished either with acts of physical, psychological or moral violence or with the confinement of those in question. The access to educational and medical services was forbidden to individuals who came from other social mediums than the ones preferred by the regime.

The first Commission from Central and Eastern Europe was also the first German Commission called the Commission of Inquiry for the Assessment and Consequences of the Socialist Unity Party Dictatorship in Germany which functioned between 1992 and 1994. Created by the German Parliament and coordinated by Rainer Eppelman, the Commission did not have the right to cite witnesses, but investigated the 1949-1989 period by using archives, academic papers, testimonies from those involved, public hearings[13]. (Commission of Inquiry for the Assessment and Consequences of the Socialist Unity Party –SED- Dictatorship in Germany, 1992-1994).

In addition to investigating the acts, this Commission had a symbolic mission, namely the investigation of the consequences of the practices used by the old regime. In other words, it was not desired for the behavioural patterns of the oppressors as well as the generalised terror rooted in the old regime to have unwanted consequences on democratic reforms.

The report was finalised in June 1994 and it covered all of the initially proposed objectives: the practices of the Stasi security German forces and of the acting power, the role of the ideology in education and in day-to-day life, the functioning of the church, the relationship between state and church, the justice system, and the opposition[14].

One of the recommendations targeted the creation of another such commission, so that in 1995 the Commission of Inquiry for the Assessment and Elimination of the Consequences of the SED Dictatorship in the German Process of Unification started its activity, being formed from members of Parliament and independent members. Thus, the process of accepting the mistakes of the past was continued and the efforts to incorporate it in the new democratic construct materialized with the intention of not repeating the same mistakes.

2.4. The Presidential Commission for the Analysis of the Communist Dictatorship in Romania

The necessity to recognise the crimes committed during the communist regime, and their illegitimate traumatic character has been supported by a considerable number of intellectuals, who signed a petition that was pushed through in March 2006, before the acting President, T.Băsescu[15]. The Romanian civil society supported in turn this initiative of condemning the abusive acts that were perpetrated during the totalitarian regime which was temporally delimitated from 6 March 1945 to the Revolution of December 1989[16]. The Presidential Commission for the Analysis of the Communist Dictatorship in Romania (PCACDR) was thus founded in April 2006, by presidential decision[17].

The PCACDR was mandated to point out the violations brought to human rights by the totalitarian regime during its almost 50 years of existence, to elaborate a report about the manner in which the institutional practices that lead to "the perpetuation of the communist dictatorship" worked and how the political leaders of the time maintained the institutional structure and resorted to actions that resulted in abuses and crimes.

Throughout the few months it functioned, the members of the Commission concentrated on consulting the archives, and on the studies that had been previously published by them or by other experts. Unlike other Commissions, the PCACDR did not base itself on information obtained either from public or private hearings or from conducting interviews or visiting detention centres[18]. At the end of their activity, the members of the PCACDR elaborated a 666 page report with the following structure: An Introduction entitled "The nature, purpose and effects of the

[12] Idem.

[13] Lavinia Stan, "Truth Commissions in Central and Eastern Europe", Paper prepared for "La controverse dans l'après communisme: (re-) construction du lien social et production politique du vivre-ensemble" conference, (Laval University, 8-9 February 2007), pp.4-7.

[14] "Working Through the History and the Consequences of the SED Dictatorship," Act no. 12/2597, available at https://www.usip.org/publications/1992/05/truth-commission-germany-92, accessed in March 2017.

[15] Cristian Tileagă, *Analiza discursului și reconcilierea cu trecutul recent*, (Oradea: Ed. Primus, 2012), p.46.

[16] Vladimir Tismăneanu, "Sfârsitul tăcerii: Raportul Final si viitorul democratic al Romaniei", available at https://tismaneanu.wordpress.com/2011/12/17/raportul-final-si-viitorul-democratic-al-romaniei/ accessed April 2017.

[17] Administrația Prezidențială, Comunicat de presă, April 5, 2006, available at http://old.presidency.ro/index.php?_RID=det&tb=date_arhiva&id=7859&_PRID=arh accessed April 2017.

[18] Lavinia Stan, "Truth Commissions in Central and Eastern Europe", p. 8.

totalitarian communist regime: Ideology, power and political practice in Romania, 1945-1989", followed by three chapters (The Romanian Communist Party – chapter I, The Repression – chapter II, Society, Economy, Culture – chapter III) and a section of Conclusions entitled "The necessity to analyse, renounce and condemn the communist regime". The report ends with the biographies of the nomenclature[19].

The report was adopted by the president of Romania as an official document and was made public through the website of the Presidential Administration[20] being set to be published as a book in 2007. On 18 December 2006, during a common meeting between the Chamber of Deputies and the Senate from Parliament, the acting President, T. Băsescu, faced up to the conclusions of the final Report of the PCACDR[21]. This moment marked the official condemnation of the "inhumane, constantly, methodically and perseveringly repressive nature of the communist regimes"[22].

In the report it is mentioned that the "communist regime in Romania (1945-1989) was illegitimate and criminal", so that under its management there were "indefeasible crimes against humanity"[23] that were perpetrated. In the same final concluding section, in the subsection entitled "So as to not forget, to condemn, to never repeat", the report contains a set of recommendations centred on: 1. condemnation; 2. memorisation; 3. legislation and justice; 4. investigation and archives; 5. education.

In regards to the recommendations for legislation and justice, there were a series of changes that were made:

1.changes regarding the recommendation of "declaring the crimes and the abuses of the communist regimes – according to existing evidence – as being crimes against humanity and, in consequence, as judicially indefeasible".

On 25 June 2009 the Law no. 286 from the 2009-Penal Code was adopted, published in the Official Gazette, Part I, no. 510 from 24 July 2009, and came into effect on 1 February 2014. Under title XII (Crimes of genocide against humanity and of war) in Chapter I crimes of genocide and those against humanity are incriminated – art. 428 CP (genocide); art. 439 CP (infractions against humanity).

Article 153 par. 2 letter a of the 2009 Penal Code is devoted to the indefeasibility of the infractions against humanity: "*the prescription does not remove the penal responsibility in the case of genocide, crimes against humanity and of war no matter the date when they were committed.*"

2.changes regarding the recommendation of "immediately adopting the Lustration Law".

On 19 May 2010, the Romanian Parliament adopted the Lustration Law regarding the temporary limitation of access to certain positions and public offices for persons who were a part of the power structures and of the repressive apparatus of the communist regime during 6 March 1945- 22 December 1989.

Under art. 146 letter a from the Constitution, the law was submitted to the constitutionality examination and through the Decision no 820 from 7 June 2010, published in the Official Gazette of Romania, Part I, no. 420 from 23 June 2010, the Constitutional Court ascertained that the criticised law was unconstitutional.

The Constitutional Court retained the following arguments of unconstitutionality[24].

In the conception of the criticised law the judicial responsibility and the sanctioning are founded on the holding of a dignity or position in the structures and the repressive apparatus of the former totalitarian communist regime. The judicial responsibility, no matter its nature, is a responsibility that is mainly individual and exists only based on judicial incidents and judicial acts perpetrated by a person, and not on presumptions.

The Lustration Law is excessive in relation to its legitimate purpose, since it does not allow the individualisation of the measure. Even though the criticised law allows resorting to the justice system to justify the interdiction of the right to run for and be elected in positions and dignities, it does not bring under regulation an adequate mechanism with the purpose of establishing the carrying out of some concrete activities directed against fundamental rights and liberties. In other words, the law does not offer adequate guarantees for judicial control over the application of restrictive measures.

Lustration is allowed only in relation to those individuals who effectively took part, together with state organisations, in severe violations of human rights and liberties.

The dispositions of art. 2 from the Lustration Law exceeds the constitutional frame, providing a new interdiction of the right to access public positions, which does not respect art. 53 from the Constitution that refers to restraining the exercising of certain rights or some liberties.

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[19] Vladimir Tismăneanu (ed), Dobrin Dobrincu, Cristian Vasile (coeds), *Comisia Prezidențială pentru Analiza Dictaturii Comuniste din România (Raport Final*, (București: Humanitas, December 2006), pp. 644-663.

[20] Administrația Prezidențială, Comisia Prezidențială pentru Analiza Dictaturii Comuniste din România, valabil la http://old.presidency.ro/?_RID=htm&id=82, accessed March 2017.

[21] Discursul Preşedintelui României, T. Băsescu, prilejuit de Prezentarea Raportului Comisiei Prezidenţiale pentru Analiza Dictaturii Comuniste din România, Bucureşti, december 18 2006, available at http://old.presidency.ro/?_RID=det&tb=date&id=8288&_PRID=ag accessed in April 2017.

[22] Vladimir Tismăneanu (ed), Dobrin Dobrincu, Cristian Vasile (coeds), *Comisia Prezidențială*, p. 19.

[23] Vladimir Tismăneanu (ed), Dobrin Dobrincu, Cristian Vasile (coeds), *Comisia Prezidențială*, p. 628 and p. 637.

[24] Decizia nr. 820 from 7 June 2010, published in the Official Gazette of Romania, Part I, no. 420 from 23 June 2010, http://legislatie.just.ro/Public/DetaliiDocument/119786, accessed in March 2017.

The Lustration Law prejudices the principle of non-retroactivity of the law established in art. 15 par. (2) from the Constitution, according to which "The law rules only for the future, with the exception of the penal or misdemeanour law that is more favourable". The law is applied for acts and actions perpetrated after it came in effect.

The Lustration Law was adopted 21 years after the fall of communism. For this reason, the belated character of the law, without having a decisive role in itself, is considered by the Court as being relevant for the disproportionality of the restrictive measures, even though a legitimate purpose was pursued through them. The proportionality of the measure toward the pursued purpose must be looked at, in each case, through the prism of the evaluation of the political situation of the country, as well as through the prism of other circumstances. In this sense, the Court also invoked the jurisprudence of the European Court of Human Rights regarding the legitimacy of the lustration law in time, (the case of Zdanoka v. Latvia 2004, the case of Partidul Comuniștilor (Nepecerişti) v. Romania 2005).

As a result of the giving of the unconstitutionality decision, the Senate re-examined the Lustration Law and rejected it.

After the debates regarding the Lustration Law, the Chamber of Deputies adopted a regulation with a different judicial content on 28.02.2012.

Through the Decision no. 308 from 28 March 2012, published in the Official Gazette no. 309 from 9.05.2012[25], the Constitutional Court admitted notification forwarded by the President of the High Court of Cassation and Justice of Romania (I.C.C.J.) and ascertained that the Lustration Law regarding the temporary limitation of access to public positions and dignities for individuals who were a part of the power structures and the repressive apparatus of the communist regime during 6 March 1945 – 22 December 1989 is unconstitutional.

The Court ascertained that, by going through the re-examination procedure and adopting the law under the form that is the object of the examination of constitutionality in the cause in question, Parliament did not respect the constitutional provisions contained in art. 147 par. (2) regarding the effects of the decisions given by the Constitutional Court within the *a priori* constitutionality examination, which stipulate the Parliament's obligation to re-examine the dispositions from the law that have been determined as being unconstitutional.

The Court retained that, under the conditions where the Senate and the Chamber of Deputies proceeded to re-examining the Lustration Law regarding the temporary limitation of the access to public positions and dignities for individuals who were a part of the power structures and the repressive apparatus of the communist regime from 6 March 1945 – 22 December 1989 and to adopting the law, even though it was in a modified form, the two Chambers of Parliament did not respect the constitutional provisions that refer to the effects of the decisions made by the Constitutional Court.

In February 2013, the Senate rejected the Lustration Law, while on 6.03.2013, the Judicial Committee from the Chamber of Deputies rejected the Lustration Law as well.

3.changes regarding the recommendation of adopting laws that target reparations.

On 2 June 2009 the Law no. 221/2009 regarding convictions with a political character and the administrative measures that are related to them, and with verdicts given during 6 March 1945 – 22 December 1989 was adopted, then published in the Official Gazette of Romania, Part I, no. 396 from 11 June 2009, and it came into effect on 14.06.2009. This law underwent changes through the OUG no. 32/2010, the Law no. 202/2010, and the Law no. 42/2013.

The Romanian Parliament adopted the Law 226/2011 regarding moral and material restorations for the former active military force that had been abusively removed from the army during 23 August 1944 – 31 December 1961, which was published in the Official Gazette, Part I, no. 854 from 2 December 2011. This law was changed through the Law no. 27/2014, published in the Official Gazette, Part I, no. 201 from 21 March 2014 and through the Law no. 80/2015, published in the Official Gazette, Part I, no. 263 from 20 April 2015.

2.5.The activity of the Presidential Commission in Romania. Judicial and non-judicial effects.

2.5.1. Penal trials

Ficior Ioan

Through the penal sentence no. 58/F, given on 30 March 2016 by the Bucharest Appeal Court, 2nd Penal Division[26], under art. 358 par. 1 and par. 3 with the application of art. 41 par. 2 of the Penal Code from 1968 (with the regulations in effect during the period between the changes brought through the Decree-Law no. 6/1990 and the Law no. 140/1996), with the application of art. 5 from the Penal Code, sentenced the accused Ficior Ioan to 20 years in prison, for the infraction of illiberal treatments. It forbade the accused, under art. 65 of the Penal Code from 1968, the rights provided by art. 64 par. 1 letters a, b, c and e from the same code over a period of 7 years as a complementary sentence, after the execution of the main prison

[25] Decizia nr. 308 from 28 March 2012, published in the Official Gazette, Part I, no. 309 from 9.05.2012, https://www.ccr.ro/files/products/D0308_12.pdf, accessed at April 2017.

[26] Sentința penală nr. 58/F given on 30 March 2016 by the Bucharest Appeal Court, 2nd Penal Division, final through the Penal decision no. 102 given on 29 March 2017 by the High Court of Cassation and Justice-Penal Division, unpublished.

sentence or after the latter is considered as having been executed. Under art. 67 par. 1 and 2 of the Penal Code from 1968 the Court ruled for the military demotion of the accused, as a complementary sentence.

The Court forbade the accused, under art. 71 of the Penal Code from 1968, the rights provided by art. 64 par. 1 letters a, b, c and e from the same code, throughout the execution of the main prison sentence, as an accessory sentence. The Court admitted in part the civil actions formulated by the civil parties M.I., D.M., G.N., B.I.D., M.C.EV, R.I., S.M.M., H.M., it obligated the accused in solidarity with the parties responsible from a civil point of view the Romanian State (through the Ministry of Public Finance), the Ministry of Internal Affairs and the National Administration of Penitentiaries to pay €20. 000 to the civil party B.I.D., €40. 000 to the civil party M.I., €70. 000 to the civil party D.M, €30. 000 to the civil party G.N., €40. 000 to the civil party M.C.EV., €40 000 to the civil party R.I., €40. 000 to the civil party S.M.M., and €30. 000 to the civil party H.M., in its equivalent in lei, at the official exchange rate of the NRB (National Bank of Romania) at the moment of payment, under the title of moral compensations.

Under art. 404 par. 4 letter c the Court maintained as a measure of insurance a seizure on the pension of the accused as it was ruled through the closure from 16 October 2015, to guarantee the payment of compensations and of judicial expenses, up to the sum of €310. 000 (in its equivalent in lei at the official exchange rate of the NRB, at the moment of payment of compensations) and to the sum established under judicial expenses.

In order to give this sentence, the Court retained that, during 1958-1963, the accused, as a lieutenant and commander of the Work colony in Periprava, through repeated material acts, which consisted of actions and inactions that alternated in time, that were committed by violating or disregarding the law or the obligations imposed by the positions he held, as a result of discretionary and abusive exercise of his attributions, having as a warrant an adversity relationship declared not just by the accused but also by those who acted under his guidance, from political reasons, he submitted the collective of detainees, incarcerated in this camp, "the enemies of the people", who were categorically found under his power and at his discretion and that of the regime of the time, to illiberal, inhumane, and degrading treatments, to both physical and psychological torture, to extermination. In its motivation, *in regards to the penal side of the cause*, the Court assessed that:

- the actions of the accused were incriminated under all of the successive penal laws;
- the actions of the accused became indefeasible no matter the applicable law;
- to determine the penal law that is more favourable, what is imposed is not the examination of the incrimination conditions, but the penal treatment that is applicable under each law in part;
- the penal law that is more favourable for the accused from the point of view of the punishing treatment is the Penal Code from 1968, in the regulation existing during the time between the changes brought to the Code through the Decree-Law no. 6/1990 and the Law 140/1996, since during this period the special minimum was identical, but the special maximum was of 20 years, the lowest out of all the maximal punishments provided by law in the successive penal laws.

In regards to the civil side of the cause, the Court ascertained that the civil parties are entitled to receive moral compensations, based on the punishable civil responsibility, some of the parties being considered for direct prejudice, other civil parties being considered for indirect prejudice, since they are collateral victims of the actions from the present cause.

Comments: The research approach of this paper follows the role of the activity of the Presidential Commission and of the report it elaborated in generating judicial and non-judicial effects.

Regarding generating *judicial effects*, we can recall that:

In the indictment act drafted by the representative of the General Prosecutor's Office attached to the High Court of Cassation and Justice of Romania and presented in the reasoning of the Penal sentence, the Final Report of the Presidential Commission for the Analysis of the Communist Dictatorship in Romania is mentioned among the administered evidence. The Court listed also among the administered evidence, the Final Report of the Presidential Commission. The fragment taken from the Report emphasises both the historic context and the details regarding the extermination conditions and practices stipulated in the secret regulations. "The prison, the place where offenders carry out their sentence and are disciplined, became in communist Romania the place where what took place was the elimination, re-education, torture, surveillance, and physical and psychological destruction of all of those who opposed, could have opposed or could not accept the new political-economic-social order disposed by communist authorities. Naturally, by copying the Soviet model of the Gulag, Romanian communist leaders institutionally and procedurally transformed – in terms of the detention regime – the entire inherited penitentiary system, by gradually adding to it the form and substance of an infernal truth...The militarization of the penitentiary, and especially the new secret regulation intended for the prisons where the political detainees were taken, adopted in September 1948, copied from or inspired by the Soviet ones marked the passing toward the slow, physical and psychological extermination of opposers, through a complete isolation from families and society, through starvation and inhumane living conditions, through the lack of medical assistance and through constant surveillance." (p. 231, The Report of the Presidential Commission)

In regards to the role of the Report of the Presidential Commission in generating *non-judicial effects* it can be mentioned the latter are a direct consequence of the final judgement of the torturer Ioan Ficior and, thus, an indirect consequence of the adoption of the report and, implicitly, of the activity of the Presidential Commission. There are two directions that could be mentioned:

- At an *individual level*, for the individuals who represented civil parties in this trial, the moral compensations also signify the recognition of the moral, psychological and physical abuses suffered by the victims or their survivors. The official recognition brings with it the rehabilitation of the victims or of their relatives as well. As it can be observed from the theoretical model, the Commissions have the purpose of investigating and making the truth known but also of reconciling the parties. These moral compensations could be a path toward reconciliation;
- At a *collective level*, the fact that there was an official recognition of the abuses that were committed by the past regime could signify the shaping of a sense of justice, which is extremely important in receiving the vote of confidence from the population in order to legitimise the reforms and the new forms of governing. The sense of justice is the one that prevails, despite the fact that the torturer Ficior received a final verdict many years after the fall of communism, and in spite of the fact that this conviction cannot save the suffering of the victims and cannot neutralise the barbaric practices of the abusers. This conviction contains in itself a symbolic value: the promotion of the truth with the purpose of both rehabilitating the dignity of fellow men and understanding the past in order to not repeat the reproduction of regimes where torturers can use the law to commit crimes and destroy lives.

Vișinescu Alexandru

Through the penal sentence no. 122/F given on 20 April 2015 by the Bucharest Court of Appeal, 1st Penal Division[27], under art. 358 par. 1 and par. 3 corroborated with art. 41 par. 2 from the 1968 Penal Code (with the regulations in effect during the period between the changes brought through the Decree-Law no. 6/1990 and the Law no. 140/1996) with the application of art. 5 from the Penal Code, sentenced the accused Vișinescu Alexandru to the main sentence of 20 years in prison, for committing the infraction of illiberal treatments (infraction against humanity), on an ongoing basis.

Under art. 65 par. 2 and par. 3 from the 1968 Penal Code, the Court forbade the accused, under the title of complementary sentence, to exercise the rights provided by art. 64 par. 1 letter a, letter b, letter c and letter e from the same code, over a period of 5 years after executing his main sentence or after the latter is considered as having been executed. Under art. 67 par. 1 and par. 2 from the 1968 Penal Code, the Court disposed, under the title of complementary sentence, the military demotion of the accused (having the rank of lieutenant -colonel in reserve). Under art. 71 par. 1, par. 2 and par. 3 from the 1968 Penal code, the Court forbade the accused, under the title of accessory sentence, to exercise the rights provided in art. 64 par. 1 letter a, letter b, letter c and letter e from the same code, over the period when the main sentence is being executed.Under art. 397 par. 1 reported to art. 25 par. 1 and to art. 19 par. 1, par. 2 and par. 5 from the Code of penal procedure, the Court admitted, in part, the civil actions formulated in the penal trial by the civil parties I.E., E.N. and C.A.M. and obligated the accused, in solidarity with the parties responsible from a civil point of view the Romanian State (through the Ministry of Public Finance), the Ministry of Internal Affairs and the National Administration of Penitentiaries to pay €100 000 (in its equivalent in lei at the official exchange rate of the National Bank of Romania at the moment of payment) to the civil party I.E., €50 000 (in its equivalent in lei at the official exchange rate of the National Bank of Romania at the moment of payment) to the civil party E.N., and €150 000 (in its equivalent in lei at the official exchange rate of the National Bank of Romania at the moment of payment) to the civil party C.A.-M., under the title of moral compensations.

Under art. 404 par. 4 letter c reported to art. 249 par. 5 thesis I from the Code of penal procedure, maintained the ensuring measures (sequestration and seizure), instituted through the closing from 22 October 2014 for the restoration of the prejudice, on the assets of the accused up to the sum of €300 000 (in its equivalent in lei at the official exchange rate of the National Bank of Romania at the moment of payment of moral compensations toward the civil parties).

In order to give this sentence, the Court retained that, during 1 July 1956 – 13 April 1963, the accused, as commander of the Râmnicu-Sărat Pententiary, according to a unique resolution, through repeated material acts (consisting of actions and inactions), which alternated in time according to the specific nature of each type of such acts, committed by violating or disregarding the law or of the obligations imposed by that quality or as a result of a discretionary exercise, by abusing his position, of his attributions, having as a warrant an adversity relation taken on by him, submitted, due to political reasons, the collective of "counter-revolutionary" detainees imprisoned in the given penitentiary, the other side of the same relation, found under his power, to illiberal treatments (inhumane and degrading), torture (physical and psychological) and extermination.

In its motivation, *in regards to the penal side of the cause*, the Court assessed the following:

- the actions committed by the accused are

[27] Sentința penală nr. 122/F given on 20 April 2015 by the Bucharest Court of Appeal, 1st Penal Division, final through the Sentința penală nr. 51/A given on 10 February 2016 by the High Court of Cassation and Justice -Penal Division, unpublished.

incriminated by all the penal laws that succeeded from the first material acts of execution to present;

- the penal responsibility of the accused for the actions retained in his duty, is not removed through prescription;
- the determination of the more favourable penal law, according art. 5 from the Penal Code, must be done in relation to the criterion of the sanctioning treatment provided in the incrimination norms from the moment when the actions were committed;
- the penal law that is more favourable to the accused, by taking into consideration the criterion of the sanctioning treatment, is the 1968 Penal Code, in the regulation existing in the period between the changes brought by the Decree-Law no. 6/1990 and the Law no. 140/1996, since the incrimination norm contained in art. 358 par. 1 and par. 3 from that code provides, in the case of the prison sentence, the minimal special maximum of 20 years in prison, to which, only optionally, in considering the ongoing form of the infraction, provided by art. 41 par. 2, an increase of up to 5 years, according to art. 42 reported to art. 34 par, 1 letter a and par. 2 can be added.

In regards to the civil side of the cause, the Court ascertained that all the three civil parties are entitled to receive compensations, based on the punishable civil responsibility of the author of the illicit action (the accused) – art. 998 from the 1864 Civil Code and of the legal persons who answer from a civil point of view for the action in question together with the accused (art. 1000 par. 3 from the 1864 Civil Code).

Comments:

Just as in the previous case, following the theoretical model of the paper, we will take the role of the Report of the Presidential Commission in generating judicial and non-judicial effects.

Judicial effects:

If in the previous case we could observe that the information in the report was administered as inscribed evidence, in this case the situation is slightly different.

First of all, on page 186 from the Report it is mentioned that "Vișinescu, the director of the Râmnicu Sărat prison in 1951, personally tortured Ion Mihalache, and he also refused him medical assistance, even more, in the middle of winter, he would order for water to be thrown on him, in his cell.." Even though this information was not administered as inscribed evidence for the accused V.A., it is proof of the practices used by the latter, practices mentioned both in the speech for the prosecution and in the sentence motivation.

The label of torturer attributed to the accused V.A. is found both in the court decisions and in the Report of the Presidential Commission.

Second of all, the High Court of Cassation and Justice of Romania ascertained that the penal responsibility for the imputed actions to the accused V.A. was declared indefeasible by law, before the prescription date provided at the moment when the actions were committed to came to fruition. From that moment on one cannot discuss the prescription institution and its effect in relation to the more favourable penal law. In the part of the report of the Presidential Commission allotted to recommendations regarding legislation and justice, it is mentioned that it would be advisable to declare the crimes and abuses of the communist regime as being crimes against humanity and, as a result, judicially indefeasible. One cannot omit the consonance that exists between this conviction, the recommendations from the Report and the enactment of article 153 par. 2 letter a from the 2009 Penal Code whose content was aforementioned.

Non-judicial effects:

First of all, V.A. represents the first case where a torturer was sentenced for crimes against humanity directed towards the opponents of the communist regime who were imprisoned at the Râmnicu Sărat Penitentiary. In the theoretical model we mentioned the concept of "justice cascade", in other words of the inherent potential of these types of trials to generate other similar trials, with the purpose of instituting again the sense of justice with the community.

Second of all, the notification was done by the Institute for the Investigation of Communist Crimes and the Memory of the Romanian Exile, a governmental institution, but which is supported by the journalists from the Gândul Daily. This translated the fact that the civil society had an important role. As it was mentioned in the theoretical model, the Truth and Reconciliation represent an instrument that would not have existed in any country if it had not been supported by various organizations and associations of the civil society. This conviction represents a success for the actions undertaken by the civil society, with at least two relevant meanings. Without the civil society, the democratic systems cannot be called democratic, in other words what took place was a step toward consolidating the democratic levers in the Romanian society. The recognition of the suffering has an effect of absolution for both the victims and the civil society, and just as in the first case it can contribute to the activation of networks of trust in social institutions and especially in justice.

2.5.2. Civil Trials

Compensations, Law no. 221/2009

Through the civil sentence no. 192 from 15 June 2010, T.G.-Civil Division admitted in part the civil action formulated by the complainants P.C. and P.E. in contradiction with the defendant, the Ministry of Public Finance, and obligated the defendant to pay 80. 000 RON under the title of moral compensations to the complainants. The Court assessed that under art. 5 from the Law no. 221/2009 the complainants, as wife and

son, are entitled to demand the assignment of civil compensations for the moral prejudice they suffered by convicting the author of these actions. The civil sentence was change by the Craiova Court of Appeal – Civil Division, through the Civil Decision no. 333 from 25 October 2010, in the sense that the defendant was obligated to pay 40. 000 RON in moral compensations to the complainants, while the rest of the dispositions from the attacked Sentence were maintained. Through the Decision no. 6133/2011 from 25.10.2010 of the Craiova Court of Appeal, 1st Civil Division[28] and obligated the defendant to pay €40. 000, under the title of moral compensations to the complainants, in its equivalent in RON at the moment of payment.

In its motivation, the First instance court makes reference to the Final Report of the Presidentialc, a report that offers information about the inhumane conditions from communist prisons and about the physical, psychological and moral abuses to which political detainees were submitted. It is also mentioned that these abuses had as purpose the physical elimination of the detainees before they were to be freed from prison.

This case constitutes another example where the information from the Report of the Presidential Commission are useful for the act of justice.

The judicial effects can be highlighted through the fact that the complainants received, after the application of the restoration law, moral compensations.

Non-judicial effects are a consequence of the fact that the complainants have the feeling that justice has been served and that they benefitted from a moral rehabilitation from the prejudice suffered.

Restoration of prejudice from judicial errors

Through the Civil Sentence no. 1420/C/2011[29] given on 10.10.2011, the Neamț Court House, 1st Civil Division, admitted, in part, the action formulated by the complainant P.A.Ș. in contradiction with the defendant the Romanian State through the Ministry of Public Finance, and as a result ascertained the political character of the administrative measure of dislocation and establishment of mandatory residence, from commune H., District R., in P.N., between 2.03.1949-30.12.1958, of the author of the complaint, P.A.. The head of claim which had compensations as an object was rejected as unfounded.

In order to give this sentence, the Court appreciated that the administrative measure consisting in dislocation and establishment of mandatory residence taken in regards to the author of the complaint has a political character.

In its motivation, the Court in assessing the political character of the dislocations that took place on 2 March 1949 refers, beside other documents, to the Report of the Presidential Commission for the analysis of the communist dictatorship in Romania as well. The judge, based on the information from the report, highlights the conditions and the practices from 1945-1964 as well as the consequence of applying them, respectively the violation of fundamental human rights.

This is important for the research approach of the paper since it represents an example in which the information from the Report of the Presidential Commission contributes to carrying out the act of justice (the report generate *judicial effects*). The acknowledgement of the political character of the administrative measure also determines non-judicial effects such as the recognition of the sufferings and the moral rehabilitation of the complainant citizen.

3. Conclusions

During periods of crisis, justice abounds in cases that distinguish themselves both through their high number and through the particular severity of the actions that were committed. It is not just the traditional justice that experiences a particular challenge during these periods, but also a meaningful part of the citizens who lived in the old regimes, thus existing, from their part, a higher demand to receive justice and to have a functional justice system.

The Truth and Reconciliation Commissions are known as bodies that function over a limited period of time, with the purpose of helping society, in its entirety, to pass on to another stage of its reconstruction, after the fall of previous regimes. In the domain of Transitional Justice, one can notice a respectable number of studies about the history of Truth and Reconciliation Commissions or about the functions that they carry out. However, there are fewer studies that focus on the relationship between Truth and Reconciliation Commissions and traditional justice. The present study fits in the category of the latter, since it highlighted the bridges between Commissions and traditional justice. It highlighted how the activity of the Commissions can complement the classic act of justice just as the archives or the information provided by the Commissions can become evidence or can be useful to offer historic details or information that describes the context in which the abuses and the violation of human rights took place.

The reports that the Truth and Reconciliation Commissions encode the task of seeking out the truth of recent history and propose certain directions to follow in order to make the crossing to new social institutions and to new justice systems. The Presidential Commission for the analysis of the communist dictatorship in Romania (recognised for the limited

[28] Decizia nr. 6133/2011/ from 19 september 2011 given by High Court of Cassation and Justice, published in www.scj.ro from 19 september 2011, accessed April 2017.

[29] Sentința civilă nr. 1420/C/2011 given on 10.10.2011 by the Neamț Court House, 1st Civil Division, irreversible through the Decizia civilă nr. 169/23.01.2012 given by the Bacău Court of Appeal, 1st Civil Division, unpublished.

period of time when it operated – 3 months) elaborated a report that represents an official document of the Romanian State, a document through which the moral, psychological and physical abuses, the crimes and the cruelty acts committed by the communist regime were publicly condemned. Even though the Commission was created 7 years after the fall of the communist regime and a few months before Romania's admission to the EU, its activity marked on the one hand the acceptance of the totalitarian and traumatic past, the recognition of the abuses that were committed, and on the other hand it opened a new stage in the clarification of the historic truth and of the direction that should be followed by the Romanian society.

The micro-research undertaken within this study attained its proposed objectives , namely it highlighted the judicial and non-judicial effects generated by the Raport of the Presidential Commission in the case of two penal trials and some civil sentences. Thus, the inherent connection between the judicial (convictions, decisions) and the non-judicial (moral compensations, the recognition of sufferings), between the human rights perspective (the right to the truth, to rehabilitation, the right to know) and the legal one (trials against those who are guilty, the awarding of restorations) have been pointed out.

The research approach consisted in articulating a theoretical model of analysis (in the first part of the paper) and in its application on the cases that were selected for analysis, in the second part. Certainly, in order to extract solid conclusions, an analysis of more cases would have been called for. This could be considered as the limitation of the present study.

A first comment would be related to the fact that the convictions of the two torturers do not represent more than a fragment from a series of abominable abuses committed by individuals with the same behavioural pattern. There are questions that could be addressed, such as: what do these convictions solve, why so late, why are there only two trials that have final convictions? The paper does not wish to launch itself in such analyses that go beyond the scope of the established research objective. It could however be stated that these convictions represent a step forward in regards to the act of justice, the application of the new legislation, but also a moment with a particular symbolic charge so that, beyond the numbers that usually quantify efficiency, one could return trust to the citizens who wish and have the right to know the truth and to have the feeling that justice is being served.

Another comment would be related to the recommendations of the Report of the Presidential Commission regarding justice and legislation. It could be stated that these recommendations are similar overall with those made by the EU. It could also be stated that the Report of the Presidential Commission is not the one that triggered certain changes in this domain (new laws). As a final note of the conclusion, it is considered that it is not the competitions that are useful in these cases, but the complementations. As long as the direction is that of progress and of consolidating democracy, such complementations can only be beneficial.

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DELEGATED ACTS AND IMPLEMENTING ACTS – NEW LEGAL ACTS OF THE EUROPEAN UNION

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Abstract

The Lisbon Treaty has introduced a new generic title – "legal acts" referring to the secondary European Union Law acts (art. 288-289 TFEU), compulsory or not, but also to the new delegated acts and implementing acts.
These new acts could be adopted by the European Commission which generally has the legislative initiative power and, in special cases, by the Council, in accordance with the art. 290 TFEU and art. 291 TFEU.
It is obvious that new competences are allowed to the European Commission which is in charge with the application and protection of the European Union law on the basis of the art. 17 TEU; the power of the Commission to adopt compulsory acts, even that they are not legislative, could be used in order to increase the enforcement procedures against the Member States which do not respect the European Union law.
This new category of legal acts are adopted on the basis of the specific procedure and they could be entitled such as the "classic" secondary EU law acts, namely regulations or directives.
In conclusion, this new category of acts could represent an appropriate instrument used by the Commission ensuring the unitary application of the EU law and its respect by the Member States.

Keywords: *Lisbon Treaty, delegated acts, implementing acts, European Commission, compulsory acts, enforcement, Member States.*

1. Introduction

The European Union represents a special subject of international law having the features of an international intergovernmental organization with legal personality and, also, some peculiarities that any other organization does not present such as, for example, the direct application of the European Union law and its supremacy in the regard with the national law, the legislative procedure and direct election of the European Parliament by the people of the Member States, the specific compulsory sources of law and the European citizenship[1].

The European Union objectives are realized by the institutions in the respect of its competences laid down in the treaty in accordance with art. 13. 2 of the Treaty of the European Union (TEU): "Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them". The EU institutions have the role to adopt compulsory rules and specific soft law; the EU legal acts are mentioned in the art.288 Treaty on the functioning of the European Union (TFEU), art.290 TFEU and art.291 TFEU.

2. Content

The Lisbon Treaty did introduce the term of "legal acts" defining the legislative acts and the non-legislative acts including the new delegated acts and implementing acts[2].

The legislative acts are adopted on the basis of the legislative procedure, ordinary or specially, such as regulation, directive and decision[3]; they are compulsory acts for the institutions and Member States.

The new introduced acts increase the power of the European Commission in the regulatory field where

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[1] Augustin Fuerea, „BREXIT – trecut, prezent, viitor – mai multe întrebări și tot atâtea răspunsuri posibile-", Curierul Judiciar, 12 (2016): 633.

Augustin Fuerea, Manualul Uniunii Europene, București: Universul Juridic, 2016, 319: "In this way, at 1st December 2009, a new subject of international law appears, namely the European Union, with all specific prerogatives".

Oana-Mihaela Salomia, Augustin Mihalache, "Principiul egalității statelor membre în cadrul Uniunii Europene", Dreptul, 1(2016), 167: EU has the features which are specific to an international interguvernmental organization.

[2] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3Aai0032_:„Lisbon Treaty revised the classification of EU legal acts. In the interests of simplification, it reduced from more than 10 to 5 the number of legal acts at the EU institutions' disposal.

In addition, it enabled the European Commission to adopt a new category of acts: delegated acts. It also strengthened the Commission's competence to adopt implementing acts. Both these changes sought to improve the effectiveness of EU decision-making and of the implementation of these decisions".

Report from the Commission to the European Parliament and the Council on the implementation of Regulation (EU) 182/2011 COM (2016) 92 final: „The Lisbon Treaty substantially modified the framework for the conferral of powers upon the Commission by introducing a distinction between delegated and implementing powers".

Mihaela-Augustina Dumitrașcu, Dreptul Uniunii Europene și specificitatea acestuia, C.H. Beck, București, 2015, 168:„a new category of acts placed between the acts soley legislatives and soley executives".

[3] Louis Coutron, Droit de l'Union européenne, 1re édition, DALLOZ, 2011, 72. The acts adopted by the EU institutions are mentioned in the art. 288 TFEU and the other acts are considered out of nomenclature (hors nomenclature) being adopted by the EU organs or by the institutions which are not mentioned in the art. 288 TFEU.

The ordinary procedure is described by the art. 294 TFEU and supposes three steps: first reading, second reading and conciliation phase.

this institution has only the legislative initiative shared in some cases with the European Parliament, Member States or European Central Bank.

2.1 Delegated acts and implementing acts – general description

In conformity with the art.290 TFEU, "a legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act". It is obvious that this provision from the Treaty does not represent *per se* the legal basis for adopting by the Commission the delegated act and it is mandatory that a legislative act gives to the Commission this specific power; therefore, the European Parliament and the Council preserve the full competence in the legislative field.

This non-legislative delegation is limited in terms of purposes and duration[4] because the Treaty stipulates clearly that "the objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts" and "the essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power".

If the delegated acts with general application are adopted on the basis of a legislative act, the implementing acts are adopted in accordance with "the legally binding Union acts" which are not defined by the Treaty; if a delegated act represents a legally compulsory act it will be possible that an implementing act could have a delegated act as legal basis[5].

The implementing acts could be adopted by the Commission in order to ensure the uniform conditions for implementing the legally binding Union acts by the Member States (art. 291 TFEU)[6]; in accordance with art. 4.3 TEU laying down the fundamental "principle of sincere cooperation", "the Member States shall take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union", the lack of such measures giving to the European Commission the right to start the infringement procedure and propose the enforcement measures through a specific procedure at the Court of Justice of the European Union (art 258-260 TFEU). In this context, it is obvious that "The uniform application of EU law throughout all Member States is essential for the success of the EU. The Commission therefore attaches high importance to ensuring the effective application of EU law. The challenge of applying, implementing and enforcing European Union legislation is shared at EU and Member State level"[7].

The limits of the Commission's power to adopt such acts are mentioned in the art. 11 of the Regulation (EU) no 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers: "Where a basic act (a legally binding Union act) is adopted under the ordinary legislative procedure, either the European Parliament or the Council may at any time indicate to the Commission that, in its view, a draft implementing act exceeds the implementing powers provided for in the basic act. In such a case, the Commission shall review the draft implementing act, taking account of the positions expressed, and shall inform the European Parliament and the Council whether it intends to maintain, amend or withdraw the draft implementing act".

"In duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union" (on the common foreign and security policy), the Council has the power to adopt implementing acts.

The legislative or non-legislative trait of these acts is not specified by the Treaty, but, it seems that they are non-legislative acts taking into account the following:

- The Council cannot solely adopt legislative acts without the involvement/participation of the European Parliament[8] within the legislative ordinary or specially

[4] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3Aai0032: „The delegation of power to adopt delegated acts is nevertheless subject to strict limits".

[5] Guy Isaac, Marc Blanquet, Droit général de l'Union européenne, 10e édition, SIREY, 2012, 303.

[6] See for example the Commission Implementing Regulation (EU) 2015/983 of 24 June 2015 on the procedure for issuance of the European Professional Card and the application of the alert mechanism pursuant to Directive 2005/36/EC of the European Parliament and of the Council - http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AJOL_2015_159_R_0003 ; in this case, the legislative act is mentioned within the title itself of the implementing act.

The recital (33) of the Preamble of the Directive 2005/36/CE as amended (see Mihaela-Augustina Dumitrașcu, Legislația privind libertățile de circulație în Uniunea Europeană, București: C.H. Beck, 2015, 162) lays down the examination procedure for adopting the implementing act" Due to the technical nature of those implementing acts, the examination procedure should be used for the adoption of implementing acts concerning the introduction of European Professional Cards for particular professions, the format of the European Professional Card, the processing of written applications, the translations to be provided by the applicant to support any application for a European Professional Card….".

Article 4a.7 of the same Directive mentions in accordance with the art.291 TFEU that "The Commission shall, by means of implementing acts, adopt measures necessary to ensure the uniform application of the provisions on the European Professional Cards for those professions that meet the conditions…".

In Romania, the authorities in charge with the application of this implementing act are Ministry of National Education, Romanian College for Pharmacists, Romanian Order for Nurses Responsible for General Care, Midwives and Nurses and Ministry of Tourism - http://europa.eu/youreurope/citizens/work/professional-qualifications/european-professional-card/index_en.htm .

[7] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017XC0119(01)#ntr7-C_2017018EN.01001001-E0007

Communication from the Commission EU law: Better results through better application (2017/C 18/02).

[8] Article 289 TFEU.

procedure;

- The European Commission has not the competence to adopt legislative act having only the initiative power;
- In the field of the common foreign and security policy, the "decisions … shall be taken by the European Council and the Council acting unanimously…. The adoption of legislative acts shall be excluded".

On the adopting procedure of the delegated and implementing acts, the Treaty lays down specific provisions:

- "Legislative acts shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows:
  a) the European Parliament or the Council may decide to revoke the delegation;
  b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act[9].

For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority".

- "The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers"; this type of the control exercised by the Member State is not mentioned for the delegated act because the terms of the delegation are very clearly stipulated by the legislative act which gives that power to the Commission. In this context, it is necessary to mark out the role of the Commission as "Guardian of the Treaties"[10] acting for the EU interests and the status of the Council as institution representing the Member States interests.

The reform of the comitology procedure

The Regulation (EU) no 182/2011 of the European Parliament and the Council lays down "the rules and general principles concerning mechanisms for control by EU countries of the Commission's exercise of implementing powers". "This control is performed by means of what is known in EU jargon as 'comitology' procedures[11], i.e. the Commission is assisted by committees consisting of EU countries' representatives and chaired by a representative of the Commission[12]".

According with the art. 2 of the this Regulation, „a basic act (a legally binding Union act) may provide for the application of the advisory procedure or the examination procedure, taking into account the nature or the impact of the implementing act required[13].

The examination procedure[14] applies, in particular, for the adoption of:

a) implementing acts of general scope;
b) other implementing acts relating to:

1. programmes with substantial implications;
2. the common agricultural and common fisheries policies;

1. The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. This procedure is defined in Article 294.

2. In the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, shall constitute a special legislative procedure.

[9] Dumitrașcu, Dreptul Uniunii Europene și specificitatea acestuia, 176: this right could be considered as a suspensive condition.

[10] http://www.europarl.europa.eu/aboutparliament/en/20150201PVL00022/The-EP-and-the-treaties

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017XC0119(01)#ntr7-C_2017018EN.01001001-E0007

Communication from the Commission EU law: Better results through better application (2017/C 18/02): "The Commission promotes the general interest of the Union and ensures the application of the Treaties. As guardian of the Treaties, it has the duty to monitor the Member States' action in implementing EU law and to ensure that their legislation and practice complies with it, under the control of the Court of Justice of the European Union".

Fuerea, Manualul Uniunii Europene, 160.

[11] Andrew Duff, The logic of the Lisbon Treaty, London: Shoehorn, , 2009, 57: „Lisbon makes one important improvement to the existing comitology procedure....This is a big step forward for the Parliament and, by implication, a significant step forward for the Commission. It should lead to the rationalization of the burdensome comitology system and encourage the use of „sunset" clauses that would mandate the legislator to review a law after a certain, specified time"/

[12] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3Aai0032

[13] Report from the Commission to the European Parliament and the Council on the implementation of Regulation (EU) 182/2011 COM(2016) 92 final:

Acts adopted under examination procedure		Acts adopted under the advisory procedure
2011	1 311	77
2012	1 591	121
2013	1 579	143
2014	1 437	122

The examination procedure is clearly the procedure applicable in the majority of cases, only about 10% of the opinions are adopted by advisory procedure. This reflects largely the split of management/regulatory versus advisory procedure under the previous regime.

[14] Art. 5 of the Regulation (EU) no 182/2011

1. Where the examination procedure applies, the committee shall deliver its opinion by the majority laid down in Article 16(4) and (5) of the Treaty on European Union and, where applicable, Article 238(3) TFEU, for acts to be adopted on a proposal from the Commission. The votes of the representatives of the Member States within the committee shall be weighted in the manner set out in those Articles.

2. Where the committee delivers a positive opinion, the Commission shall adopt the draft implementing act.

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:ai0043: „Commission implementing acts must receive the support of a qualified majority (a weighted system of voting where 16 of the 28 EU countries must vote in favor and these votes must represent at least 65 % of the EU's population) of the committee".

3. the environment, security and safety, or protection of the health or safety, of humans, animals or plants;
4. the common commercial policy;
5. taxation".

„The advisory procedure[15] applies, as a general rule, for the adoption of implementing acts not falling within the ambit" of the previous fields; the advisory procedure may apply for the adoption of the mentioned implementing acts in duly justified cases.

The Regulation lays down also the rules on the "appeal committee", "adoption of implementing acts in exceptional cases" and the situations requiring "immediately applicable implementing acts".

The "comitology" procedure has been set up at the EU level in order to guarantee the participation of the Member States at the regulatory processes ensuring the respect of the repartition of the competences between the Member States and European Union under the principle of conferral and, implicitly, the respect of the principle laid down in the art.1 TEU which provides with that the decisions must be "taken as openly as possible and as closely as possible to the citizen".

2.4 The respect of the proportionality principle

On the adoption procedure of the legal acts, it also important to stress tha the Lisbon Treaty introduces the compulsory respect of the principle of proportionality mentioned by the art. 5.4 TEU; "where the Treaties do not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality" (art. 296 TFEU). Also, the "legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties"; the text of the art. 296 TFEU does not distinguish the legal acts, legislative or not and, consequently, this obligation for the EU institutions applying also to the delegated and implementing acts.

2.5 The designation of the delegated acts and implementing acts

Other important issue regarding the new acts introduced by Lisbon Treaty concerns the nomenclature[16]/designation of the acts – they are regulations, directives and decisions[17] which are *per se* legislative acts and accordingly the general traits of the EU law apply to these acts, namely supremacy or primacy, direct effect, direct applicability and immediately application[18]; the Member States must ensure the respect of these acts in the same conditions as for the typical legislative acts in accordance with the art.4.3 TEU[19].

In this context, the hierarchy of the legal acts or secondary EU law seems to be clear and the Lisbon Treaty puts on the top the legislative acts followed by the non-legislative acts and implementing acts[20]; it could be considered as a theoretical hierarchy taking into account the fact that in practice all these acts are compulsory for the Member States.

The mandatory trait of these acts gives the possibility to the Court of Justice of the European Union to hear and determine an action brought by natural or legal persons against acts of the institutions, bodies, offices or agencies of the European Union (which are addressed to them or are of direct and individual concern to them) and against regulatory acts (which concern them directly and which do not entail implementing measures)[21].

Accordingly with the art. 263 TFEU[22], it still remains under discussion if a citizen of a Member State could introduce such action on the basis of the general

[15] Art. 4 of the Regulation (EU) no 182/2011

1. Where the advisory procedure applies, the committee shall deliver its opinion, if necessary by taking a vote. If the committee takes a vote, the opinion shall be delivered by a simple majority of its component members.

2. The Commission shall decide on the draft implementing act to be adopted, taking the utmost account of the conclusions drawn from the discussions within the committee and of the opinion delivered.

[16] Isaac, Blanquet, 303: The Lisbon Treaty introduces a double nomenclature.

[17] See for example, Commission Delegated Decision (EU) 2016/790 of 13 January 2016 amending Annex V to Directive 2005/36/EC of the European Parliament and of the Council as regards the evidence of formal qualifications and the titles of training courses (notified under document C(2016) 1) - http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016D0790

This delegated decision is adopted by the Commission on the basis of the art. 21a.4 of the Directive 2005/36/EC as amended which mentions: "In order to take due account of legislative and administrative developments in the Member States, and on condition that the laws, regulations and administrative provisions notified pursuant to paragraph 1 of this Article are in conformity with the conditions set out in this Chapter, the Commission shall be empowered to adopt delegated acts in accordance with Article 57c in order to amend points 5.1.1 to 5.1.4, 5.2.2, 5.3.2, 5.3.3, 5.4.2, 5.5.2, 5.6.2 and 5.7.1 of Annex V….". The art. 2 of the delegated decision lays down that „This Decision is addressed to the Member States" and it is clear that this act applies directly into the legislation of the Member States.

[18] Fuerea, Manualul Uniunii Europene, 250.

[19] Duff, 56: „In theory, the Commission is responsible for overseeing the implementation of the legal acts at the European level. In practice, of course, the Commission needs the participation of the states both o formulate the necessary implementing measures and to monitor their efficacy."

[20] Mihaela-Augustina Dumitrașcu, Roxana-Mariana Popescu, Dreptul Uniunii Europene. Sinteze și aplicații, C.H. Beck, București, 2015, 131.

[21] http://curia.europa.eu/jcms/jcms/Jo2_7033/en/

Art. 263 TFEU

„The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties".

[22] Art. 263 TFEU

„Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures".

application[23] of the delegated acts and the fact that the implementing acts are addressed to the Member States in order to ensure the correct and uniform application of the EU law by these subjects of law.

If the delegated acts are defined as "regulatory acts" mentioned by the art.263 TFEU, having general application, it will be possible to introduce such as action respecting the decision of the Tribunal which stated that "It must be concluded that the fourth paragraph of Article 263 TFEU, read in conjunction with its first paragraph, permits a natural or legal person to institute proceedings against an act addressed to that person and also (i) against a legislative or regulatory act of general application which is of direct and individual concern to them and (ii) against certain acts of general application, namely regulatory acts which are of direct concern to them and do not entail implementing measures. Furthermore, such an interpretation of the word 'regulatory', and of the equivalent word in the different language versions of the FEU Treaty, as opposed to the word 'legislative', is also apparent from a number of other provisions of the FEU Treaty"[24].

4. Conclusions

These new categories of acts introduced by the Lisbon Treaty increase the power of the European Commission as executive institution[25] and impose to the Member States the obligation for respecting these acts adopted by the Commission in the same conditions as for the acts adopted by the Council and European Parliament – the EU legislative institutions.

In this regard, it is very important to stress that the new Communication from the Commission EU law: Better results through better application (2017/C 18/02) refers directly to the implementing act when it lays down that "The Member States have the primary responsibility for transposing, applying and implementing EU law correctly"[26].

It is obvious that the EU rules addressed to the Member States could contain some rights for the citizens of those States and for that it is compulsory to apply or transpose in time and correctly these rules; the new perspective of the European Commission on the EU's future underlines also the necessity to adapt the content and the form of the acts adopted by the institutions to the expectations of the European citizens namely in the field of Single Market: "Given the strong focus on reducing regulation at EU level, differences persist or increase in areas such as consumer, social and environmental standards, as well as in taxation and in the use of public subsidies. Citizens' rights derived from EU law may become restricted over time. Decision-making may be simpler to understand but the capacity to act collectively is limited. This may widen the gap between expectations and delivery at all levels"[27].

These competences in the regulatory field could transform the Commission into a national executive institution taking into account that at national level it happens the same situation where the Government[28] – the executive power adopts compulsory normative acts which, for example in Romania, have not the same nomenclature as for the acts adopted by the Parliament; nevertheless, "as the subtle re-balancing of the

[23] In the case-law Jégo-Quéré vs Commission, T-117/01, the Tribunal did stated that a legal person could claim the annulation of a legislative act with a general application in some conditions: „It is, however, necessary to consider whether, notwithstanding their general scope, the contested provisions may nevertheless be regarded as being of direct and individual concern to the applicant. According to settled case-law, the fact that a provision is of general application does not prevent it from being of direct and individual concern to some of the economic operators whom it affects"(para. 25). "It must be concluded that the criterion of direct concern is fulfilled in the present case. For a person to be directly concerned by a Community measure, the latter must directly affect the legal situation of the individual and leave no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules" (para.26).

The Court did pronounced the annulment of the Tribunal's decision in the case law C-263/02: „However, it is not appropriate for an action for annulment before the Community Court to be available to an individual who contests the validity of a measure of general application, such as a regulation, which does not distinguish him individually in the same way as an addressee, even if it could be shown, following an examination by that Court of the particular national procedural rules, that those rules do not allow the individual to bring proceedings to contest the validity of the Community measure at issue".

[24] Case T-18/10, para. 45 and 46.

[25] Duff, 56: "The Treaty of Lisbon makes progress in clarifying who could delegate executive authority to the Commission an under what terms. A greater willingness on behalf of the legislator to delegate technical minutiae to the Commission has been recorded in the new treaty".

[26] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017XC0119(01)

„....the Commission attaches importance to ensuring that national legislation complies with EU law since incorrect national legislation systematically undermines citizens' ability to assert their rights including their fundamental rights, and to draw fully the benefits from EU legislation".

„Under the recently signed Inter-institutional Agreement on Better Law-Making (Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ L 123 of 12.5.2016, p. 1), the European Parliament, the Council and the Commission recognize their joint responsibility in delivering high-quality Union legislation. The Joint Declaration on the EU's legislative priorities for 2017 reiterates the commitment to promoting the proper implementation and enforcement of existing legislation (Joint Declaration on the EU's legislative priorities for 2017 signed by the Presidents of the European Parliament, the Council and the Commission on 13 December)".

[27] White Paper on the Future of Europe. Reflections and scenarios for the EU27 by 2025

Scenario 2: Nothing but the single market

https://ec.europa.eu/commission/sites/beta-political/files/white_paper_on_the_future_of_europe_en.pdf

Fuerea, Manualul Uniunii Europene, 89.

[28] Emilia Lucia Cătană, "Forme de activitate ale Comisiei Europene din perspectiva Tratatului de la Lisabona. Privire specială asupra controlului administrativ exercitat în domeniul gestionării de către statele membre a relațiilor cu petiționarii", Revista de Drept Public, 2 (2015): 53: The European Commission is the executive institution of the European Union being considered "the government of the Union".

comitology system illustrates, the treaty establishes a good balance between the demands of enhanced democracy and the needs of greater efficiency in a larger and more complex Union-while all the time understanding the principle of the separation of powers between legislature and executive"[29].

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[29] Duff, 58.

THE EUROPEAN COURT OF HUMAN RIGHTS AND ITS CASE-LAW ON ENVIRONMENTAL MATTERS

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Abstract

Only recently the environmental protection has become a real concern of the international community. Despite the fact that no human rights treaties, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, contain a right to the environment explicitly, they have been interpreted as including environmental protection obligations for the Contracting States. Very often we hear about environmental degradation. The purpose of this article is to provide the most relevant examples from the European Court of Human Rights case-law in this field in order to strengthen the environmental protection at the national level.

Keywords: *environment, European Court of Human Rights, Convention, case law, health.*

1. Introductive Remarks

The main purpose of this article is to increase the understanding between the protection of human rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the "*Convention*") and the environment. We consider that this is necessary in order to strengthen the environmental protection at the national level, having in mind that the European Court for Human Rights (hereinafter the "*ECHR*" or the "*Court*") represents the most developped regional jurisdiction on human rights[1]. To achieve this purpose, the present paper seeks to provide examples from the European Court of Human Rights case-law in this field.

Although the European Convention on Human Rights does not expressely guarantee a right to a healthy, quiet and sound environment, very often the European Court of Human Rights has been called to judge if the Contracting States have violated certain individual[2] rights in cases with impact on environmental issues. As it is stated in the European Court for Human Rights's (hereinafter the "*ECHR*" or the "*Court*") case-law and it is widely recognized, the European Convention on Human Rights is "a living instrument (…) which must be interpreted in the light of present-day conditions"[3]. Therefore the Convention indirectly offers a certain protection degree for environmental matters as it may be discovered from a research of the Court's evolving case-law.

As it is stated in the legal doctrine, "the human being is the central area of interest for the lawmaker"[4].

Through time, individuals have filed complaints against the Contracting States arguing that a breach of the Convention rights has resulted from adverse environmental factors.

As stated in the legal doctrine "human rights concern the universal identity of the human being and are underlying on the principle of equality of all human beings"[5], therefore all individuals have the right to complain if the domestic authorities[6], natural or legal persons violate their rights under the Convention in certain conditions.

Through time, individuals have filed complaints against the Contracting States[7] of the Convention, arguing that a breach of the Convention rights has resulted from adverse environmental factors, among others. This thing is due to the fact that each individual has the right to enjoy a healthy environment[8].

Among the topics that we have discovered in the ECHR's case-law, we mention the following, without

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[1] For general information on the European system of human rights protection instituted by the Council of Europe, please see Raluca Miga-Besteliu, *Drept international public*, 1st volume, 3rd edition, C.H. Beck Publishing House, Bucharest, 2014, p. 184-185, and Bogdan Aurescu, *Sistemul jurisdictiilor internationale*, 2nd edition, C.H. Beck Publishing House, Bucharest, 2013, p. 211 and following.

[2] Please see Nicolae Popa coordinator, Elena Anghel, Cornelia Beatrice Gabriela Ene-Dinu, Laura-Cristiana Spataru-Negura, *Teoria generala a dreptului. Caiet de seminar*, 2nd edition, revised and enlarged, C.H. Beck Publishing House, Bucharest, 2014, p. 129-130.

[3] *Tyrer v. The United Kingdom*, application no. 5856/72, judgment 25.04.1978, para. 31, available at http://hudoc.echr.coe.int/eng?i=001-57587.

[4] Elena Anghel, *The notions of "given" and "constructed" in the field of the law,* in the Proceedings of CKS eBook, 2016, Pro Universitaria Publishing House, Bucharest, 2016, p. 341.

[5] Augustin Fuerea, *Introducere in problematica dreptului international al drepturilor omului – note de curs*, Editura ERA, Bucuresti, 2000, p.4.

[6] The domestic authorities can breach individual rights trough juridical acts, material and juridical facts, material and technical operations or political acts; in this respect, please see Marta Claudia Cliza, *Drept administrativ*, Partea a 2-a, Pro Universitaria Publishing House, Bucuresti, 2011, p. 14 and following, and Marta Claudia Cliza, *Revocation of administrative act*, in the Proceedings of CKS eBook, 2012, Pro Universitaria Publishing House, Bucharest, 2012, p. 627.

[7] For an interesting study on the European Union law infringements that caused damages to individuals, please see Roxana-Mariana Popescu, *Case-law aspects concerning the regulation of states obligation to make good the damage caused to individuals, by infringements of European Union law,* in the Proceedings of CKS eBook, 2012, Pro Universitaria Publishing House, Bucharest, 2012, p. 999-1008.

[8] Bogdan Aurescu, *Sistemul jurisdictiilor internationale*, 2nd edition, C.H. Beck Publishing House, Bucharest, 2013, p. 213.

being exhaustive: dangerous industrial activities, exposure to nuclear radiation, industrial emissions, natural disasters, environmental risks, industrial pollution, noise pollution[9], urban development, waste collection, management, treatment and disposal, water supply contamination, mobile phone antennas, passive smoking in detention. The most invoqued articles of the Convention in this respect are: the right to life (Article 2), the prohibition of inhuman or degrading treatement (Article 3), the right to liberty and security (Article 5), the right to a fair trial (Article 6), the right to respect for private and family life and home (Article 8), the freedom of expression (Article 10), the freedom of assembly and association (Article 11), the right to an effective remedy (Article 13), the protection of property (Article 1 of Protocol No. 1 to the Convention).

2. The ECHR and the Environmental Matters

It is obvious that the Contracting States have the obligation to protect the victims from adverse environmental factors, otherwise their legal responsibility may be invoked[10]. The ECHR's case-law on environmental matters is quite significative and for the purposes of this paper we have chosen certain matters to exemplify the position of the Court. In order to investigate this, we will proceed to a category analysis of the most relevant cases dealt by the Court. We are aware that our analysis is not exhaustive.

2.1. Waste collection, management, treatment and disposal

The waste is an important issue in our daily life. Our current society undeniably produces more trash than any other to date. But sometimes waste collection, management and disposal can give rise to human rights violation.

A first case that we mention in this regard is a case against Romania, the *Branduse*[11] case. The applicant, Mr. Branduse complained among others about the offensive smells created by a former refuse tip situated about 20 metres away from the prison he was incarcerated, arguing that its quality of life and its well-being were affected by the respective smells. Although at the beginning not many specialists believed that Mr Branduse will win this case, the Court held that there had been a violation of Article 8 of the Convention because the Romanian authorities failed to take the adequate measures to solve the problem. From the file investigation, it was revealed that the tip was operated effectively between 1998 and 2003, and that after 2003 it was used by private individuals because the Romanian authorities did not ensure the effective closure of the respective site. It is important to retain that it had been operated without proper authorization, and closed without the necessary closing authorization. Additionally, although the authorities should have carried out preliminary studies to measure the pollution effects, this was done only in 2006 after a fire on the site. According to the studies, the high level of pollution exceeded the standards established and the persons living near the site had to put up with considerable levels of nuisance caused by offensive smells, therefore the activity was incompatible with the environmental requirements.

In a case against Italy, *Di Sarno and Others*[12], the Court had to rule again on the collection, treatment and disposal of waste. The case regarded the state of emergency during 15 years in relation to waste collection, treatment and disposal in Campania, an Italian region, where the applicants lived and worked, including a five months period in which rubbish piled up in the streets. The applicants complained that the Italian State had caused serious damage to their environment and jeoperdied their lives and health because it did not take the necessary and adequate measures to ensure the waste management and it did not implement the appropriate legislation and administrative policies. Considering that these waste activities were hazardous, the Court established that the Italian State had a duty to adopt reasonable and appropriate measures capable of safeguarding the right of those concerned to a healthy and protected environment. In the absence of such measures, the Court found that Article 8 of the Convention was violated in its substantive aspect, especially because for a very long period of time the authorities were unable to ensure the proper functioning of the waste collection, treatment and disposal service, fact that resulted in the breach of the right to respect the private lives and homes of the applicants. It is also interesting that the Court held that the Article 8 in its procedural aspect had not been violated because the studies made by the authorities had been published, therefore the information obligation has been respected, the people concerned being able to learn about the potential risks to which they were exposed in continuing to live there. Because the applicants did not have access to an effective remedy in the Italian legal system, by which to obtain redress for the damage incured, the Court also retained that Article 13 of the Convention was breached.

[9] About noise pollution, more precisely on air traffic and aircraft noise pollution, I have written a recent paper which will be published shortly in the Aviation and Space Journal, available at http://www.aviationspacejournal.com/archive/.

[10] For general information on the legal responsability of states, please see Raluca Miga-Besteliu, *Drept international public*, 2nd volume, 3rd edition, C.H. Beck Publishing House, Bucharest, 2014, p. 29-56.

[11] *Branduse v. Romania*, application no. 6586/03, judgment dated 7.04.2009, available at http://hudoc.echr.coe.int/eng?i=001-92073.

[12] *Di Sarno and Others v. Italy*, application no. 30765/08, judgment dated 10.01.2012, available at http://hudoc.echr.coe.int/eng?i=001-108480.

There is a pending application that arouses our curiosity, *Locascia and Others v. Italy*[13]. This case was brought by 19 applicants who lived in the same province as above, Campania. They complained about the danger to their health and the interference with their private life and home caused by the operation of a private waste disposal plant and by the failure of the Italian authorities to secure, clean-up and reclaim the area after its closure. We look forward to the Court's judgment in this case.

2.2. Water supply contamination

In the case of *Dzemyuk v. Ukraine*[14], the applicant argued that the construction of a cemetery near his house had led to the water supply contamination, which left his home virtually uninhabitable and his land unusable. He further alleged that the burial ceremonies were quite disturbant and that the authorities failed to enforce the final and binding judgment declaring the cemetery illegal. The Court considered that the interference with the applicant's right to respect for his private and family life and for his home had not been lawful and therefore Article 8 of the Convention was breached. At the analysis of the submissions of the Ukrainian Government, it resulted that it did not even dispute the fact that it was built and used in breach of the domestic regulations; moreover the Court underlined that the conclusions of the environmental authorities had also been disregarded, and the final and binding judicial decisions ordering to close the cemetery had never been enforced.

2.3. Industrial pollution

A very well known environmental case dealt by the Court is *Lopez Ostra v. Spain*[15], in which the applicant, who lived in a heavy concentration leather industry city, complained of the municipal authorities inactivity in respect of the nuisance caused by a waste-treatment plant situated a few metres away from her home (that she beard for three years, before moving away). She considered the national authorities as being responsible because they adopted a passive attitude regarding this matter. The Court held that Article 8 of the Convention was violated in her respect because the State had not succeeded in striking a fair balance between the economic well-being of the town and the applicant's effective enjoyment of her right to respect for her home and her private and family life. In the end, they decided to move out from their home at the advice of the applicant's daughter's paediatrician and when they realized that the situation could continue indefinitely. Although the applicant tried to construe an argument that the situation amounted to degrading treatment, the Court firmly rejected this perspective, by helding that no violation of Article 3 of the Convention had been in the case.

In a case against Russia, *Fadeyeva v. Russia*[16], the applicant complained that the operation of a steel plant in close proximity of her home endangered her health and well-being. The Court held that there had been a violation of Article 8 of the Convention since Russia failed to strike a fair balance between the community's interests and Ms Fadeleyeva's effective enjoyment of her right to respect for her home and her private life. The Court underlined that Russia should not have authorized the operation of a polluting enterprise in the middle of a densely populated town, and if it did so, then a certain territory around the plant should be free of any dwelling, since the toxic emissions from that enterprise exceeded the safe limits provided by the domestic legislation. The Court noted that in this case, the Russian State did not offer the applicant any effective solution to help her move from the dangerous area and did not design or apply effective measures which would take into account the interests of the local population.

In *Giacomelli v. Italy*[17], the applicant (who lived for more than 50 years in a house located 30 metres away from a plant used for the storage and treatment of "special waste" classified as either hazardous or non-hazardous), complained that the persistent noise and harmful emissions coming from the plant represented a serious threat to her environment and a permanent risk to her health and home. The Court held that Article 8 of the Convention was violated in this case because Italy had not succeeded in stricking a fair balance between the interest of the community in having a plant for the treatment of toxic industrial waste and the applicant's effective enjoyment of her right to respect for her home and her private and family life. Along the time, the authorities discovered on two occasions that the plant's operation was incompatible with environmental regulations on account of its unsuitable geographical location and that there was a specific risk to the health of the local residents. Thus, for several years, the applicant's right to respect for her home had been seriously impaired by the dangerous activities carried out at the plant built very near her home.

In *Tatar v. Romania*[18], the applicants alleged that the tehnological process used by a company in their gold mining activity, in the vicinity of their home, put their lives in danger. In 2010 an environmental accident occurred at the site. A UN study underlined that a dam had breached, releasing into the environment about 100,000 m^3 of dangerous substances, cyanide-contaminated tailings water. Additionally, the applicants also complained that the authorities did not act regarding the numerous complaints lodged by the

[13] *Locascia and Others v. Italy*, application no. 35648/10, communicated to the Italian Government on 05.03.2013.
[14] *Dzemyuk v. Ukraine*, application no. 42488/02, judgment dated 04.09.2014, available at http://hudoc.echr.coe.int/eng?i=001-146357.
[15] *Lopez Ostra v. Spain*, application no. 16798/90, judgment dated 09.12.1994, available at http://hudoc.echr.coe.int/eng?i=001-57905.
[16] *Fadeyeva v. Russia*, application no. 55723/00, judgment dated 09.06.2005, available at http://hudoc.echr.coe.int/eng?i=001-69315.
[17] *Giacomelli v. Italy*, application no. 59909/00, judgment dated 02.11.2006, available at http://hudoc.echr.coe.int/eng?i=001-77785.
[18] *Tatar v. Romania*, application no. 67021/01, judgment dated 27.01.2009, available at http://hudoc.echr.coe.int/eng?i=001-90909.

first applicant about the threat to their lives, to the entire community environment and to his son's health who suffered of asthma. After analyzing the case, the Court held that there had been a violation of Article 8 of the Convention, stating that the Romanian authorities failed in their duty to assess the risks that such activity might entail, as well as to take the adequate measures in order to protect the individual rights of the persons living near the site to respect for their private lives and homes and their right to enjoy a healthy and protected environment. Therefore, the State had a duty to ensure the protection of these persons especially by regulating, authorizing, setting-up, operating, safety and monitoring this industry activity which was dangerous to the human health and to the environment. The Court noted that after the accident in 2000, the company continued to operate in breach of the precautionary principle and it pointed out that the Romanian authorities had to ensure public access to the results of the studies done because Romania had a duty to guarantee the right of members of the public to participate in the decision-making process concerning environmental issues.

In *Dubetska and Others v. Ukraine*[19], the applicants complained that their health had suffered and their house and living environment had been damaged because of a State-owned coal mine operating near their houses. The claimants also complained that the national authorities had done nothing to prevent or to remedy this situation. The Court found that Article 8 of the Convention was breached in this case and it established that the Ukrainian Government had an obligation to take appropriate measures to remedy the applicant's situation. The Court observed in its analysis that the national authorities had been aware of the adverse environmental effects of the mine and factory, but had not found a solution to diminish the level pollution in order not to be harmful for the people living in the vicinity of the facilities. Although the Government took some measures in the 12 years analysed in the case (i.e. penalizing the factory director, order the applicants' resettlement, building up of a centralized aqueduct), the Court considered that Ukraine had not found an effective solution to the applicants' situation.

In a case against Poland, the *Apanasewicz*[20] case, the Court had to deal again on environmental matters. In 1988, the owner of a land plot adjacent to the one of the applicant built a concrete works, without having any building permit. The owner started operating it immediately and enlarged it gradually. In 1989 the applicant brought domestic proceedings in order to put an end to the environmental harm that she had suffered (e.g. pollution, health problems, inedible harvest). The domestic courts ordered in 2001 to close the factory, but despite the two sets of enforcement proceedings, not even at the moment of the ECHR judgment the factory had not been closed. The applicant also complained of a failure to enforce the 2001 judgment. The Court held that Article 6 paragraph 1 and Article 8 of the Convention were violated (Article 6 because of the overall duration of the proceedings, the State's lack of diligence, the insufficient use of the coercive measures available that conduct to the fact that the applicant did not have effective judicial protection; Article 8 because the authorities had not discharged their obligation to protect the applicant's right to respect for her private and family life against the interference caused by her neighbour's activity).

2.4. Dangerous industrial activities

Environmental cases brought to the ECHR have sometimes raised sensitive problems such as death of the close relatives. Such case is *Őneryildiz v. Turkey*[21], when a methane explosion which occurred at a rubbish tip used jointly by four district councils, in April 1993, and the refuse erupting from the pile of waste engulfed more than ten houses situated below it (including the applicant's dwelling built without any authorization on the land surrounding it). The applicant lost nine close relatives and he complained in particular that no measures had been taken to prevent an explosion despite the expert report that drawn the authorities' attention to the need to act preventively because the risk to occur such explosion was not unlikely.

The Court found that there had been a violation of both sides of Article 2 of the Convention: under its substantive limb (for the lack of appropriate procedure to prevent the accidental death of the applicant's relatives), and under its procedural limb (for the lack of adequate protection by law safeguarding the right to life). The Turkish authorities did not inform the inhabitants about the risks they ran by living there, and even if they did, they did not take the practical measures to avoid the risks of explosion and the inhabitants' death. Overall, the regulatory framework proved to be defective and inadequate. Aditionally, the Court ruled that other articles of the Convention have also been violated: Article 1 of Protocol No. 1 and Article 13.

3. Concluding Remarks

From the analysis of the Court's case-law, we can derive three conclusions. *Firstly*, the human rights provided by the Convention can be directly affected by adverse environmental factors (*e.g.* chemical factories with toxic emissions). *Secondly*, the adverse environmental factors give rise to certain procedural rights for the injured individuals (*e.g*. the right to be informed by the authorities, the possibility to

[19] *Dubetska and Others v. Ukraine*, application no. 30499/03, judgment dated 10.02.2011, available at http://hudoc.echr.coe.int/eng?i=001-103273.

[20] *Apanasewicz v. Poland*, application no. 6854/07, judgment dated 03.05.2011, available at http://hudoc.echr.coe.int/eng?i=001-104672.

[21] *Őneryildiz v. Turkey*, application no. 48939/99, Grand Chamber judgment dated 30.11.2004, available at http://hudoc.echr.coe.int/eng?i=001-67614.

participate in the decision-making processes, the access to justice). *Thirdly*, the environment protection can be a legitimate aim justifying the State's interference with certain individual human rights (*e.g.* Article 8 of the Convention can be restricted if it is necessary for environmental protection).

After analyzing the ECHR's relevant case-law, we can underline that although the Convention does not define the term *environment*, the only thing that matters is the impact on the individual, than the environment that the Court is concerned with.

In a nutshell, the extent of each State's obligations depends on factors such as the harmfulness of the dangerous activities and the foreseeability of the risks to life. Moreover, the States must ensure that the administrative and legislative framework is properly implemented and that violations of the Convention are repressed and punished as appropriate.

Despite the concerted efforts of the national public authorities[22] with the international organizations, in the following years we will still encounter many varieties of environmental adverse factors, and many States that do not act with responsibility[23] towards their nationals or other categories of individuals found on their territory[24]. But the question related to the present study is how will the Court deal those cases? The answer is simple: TIME will answer this question.

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[22] For more details on public authorities, please see Elena Emilia Stefan, *Disputed matters on the concept of public authority*, in the Proceedings of CKS eBook, 2015, Pro Universitaria Publishing House, Bucharest, 2015, p. 535 and following.

[23] For more details regarding the responsibility principle, please see Elena Anghel, *The responsibility principle*, in the Proceedings of CKS eBook, 2015, Pro Universitaria Publishing House, Bucharest, 2015, p. 364 and following. For more details regarding responsibility in general, please see Elena Emilia Stefan, *Raspunderea juridica. Privire speciala asupra raspunderii in Dreptul administrativ*, Pro Universitaria Publishing House, Bucharest, 2013, p. 25-39.

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HUMAN BEINGS TRAFFICKING IN THE EUROPEAN COURT OF HUMAN RIGHTS CASE-LAW

Laura-Cristiana SPĂTARU-NEGURĂ*

Abstract

After last year's analysis regarding the European Union's commitment to fight against the human beings trafficking, we have considered to further explore the human beings trafficking approach in the European Court of Human Rights case-law, the most developped regional jurisdiction on human rights.
Surprisingly, the European Convention for the Protection of Human Rights and Fundamental Freedoms does not make an express reference to the human beings trafficking. However, we have to bear in mind that the Convention is a living instrument, its interpretation being made in the light of the present-day conditions. Thus, taking into consideration the global threat of this phenomenon, it is more obvious than ever that the Convention could not neglect this issue.

Keywords: *human beings trafficking, European Court of Human Rights, Convention, case-law.*

1. Introductive Remarks

Through this study, we propose an analysis to increase the understanding between the protection of human rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the "*European Convention on Human Rights*" or the "*Convention*") and one of the most serious global threats, the human beings trafficking. This is really necessary in order to strengthen human protection at the national level, having in mind that the European Court for Human Rights (hereinafter the "*ECHR*" or the "*Court*") represents the most developped regional jurisdiction on human rights[1]. To attain this purpose, the present study seeks to provide the most relevant examples from the Court's case-law.

Right from the beginning, we underline that the Convention does not make any express reference to the human beings trafficking (although the Convention prohibits "slavery and the slave trade in all forms" under Article 4). This should not surprise us, having in view that the Convention was inspired by the Universal Declaration of Human Rights proclaimed in 1948 by the General Assembly of the United Nations, which does not expressely address the human beings trafficking problem either.

However, as it is stated in the Court's case-law and it is widely recognized in the legal doctrine, the Convention is "a living instrument (…) which must be interpreted in the light of present-day conditions"[2], fact that raises many challenges for its judges.

As underlined in the legal doctrine "human rights concern the universal identity of the human being and are underlying on the principle of equality of all human beings"[3], therefore all individuals have the right to complain if the domestic authorities[4], natural or legal persons violate their individual rights under the Convention in certain conditions.

Through time, individuals have filed complaints against the Contracting States of the Convention[5], arguing that a breach of the Convention rights has resulted from human trafficking, among others. As it is easy to imagine, this thing is possible because each individual has the right not to be submitted to slavery.

2. ECHR's Relevant Case-law

It is obvious that the Contracting States have the obligation to protect the victims of trafficking, otherwise their legal responsibility may be invoked[6]. In

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[1] For general information on the European system of human rights protection instituted by the Council of Europe, please see Raluca Miga-Besteliu, *Drept international public*, 1st volume, 3rd edition, C.H. Beck Publishing House, Bucharest, 2014, p. 184-185, and Bogdan Aurescu, *Sistemul jurisdictiilor internationale*, 2nd edition, C.H. Beck Publishing House, Bucharest, 2013, p. 211 and following.

[2] *Tyrer v. The United Kingdom*, application no. 5856/72, judgment dated 25.04.1978, para. 31, available at http://hudoc.echr.coe.int/eng?i=001-57587.

[3] Augustin Fuerea, *Introducere in problematica dreptului international al drepturilor omului – note de curs*, Editura ERA, Bucuresti, 2000, p.4.

[4] The domestic authorities can breach individual rights trough juridical acts, material and juridical facts, material and technical operations or political acts; in this respect, please see Marta Claudia Cliza, *Drept administrativ*, Partea a 2-a, Pro Universitaria Publishing House, Bucuresti, 2011, p. 14 and following, and *Marta* Claudia Cliza, *Revocation of administrative act*, in the Proceedings of CKS eBook, 2012, Pro Universitaria Publishing House, Bucharest, 2012, p. 627.

[5] On the other side, it is important to have in mind also the European Union. For an interesting study on the European Union law infringements that caused damages to individuals, please see Roxana-Mariana Popescu, *Case-law aspects concerning the regulation of states obligation to make good the damage caused to individuals, by infringements of European Union law*, in the Proceedings of CKS eBook, 2012, Pro Universitaria Publishing House, Bucharest, 2012, p. 999-1008.

[6] For general information on the legal responsability of states, please see Raluca Miga-Besteliu, *Drept international public*, 2nd volume, 3rd edition, C.H. Beck Publishing House, Bucharest, 2014, p. 29-56.

order to investigate this topic, we will proceed to a chronological analysis of the most relevant cases dealt by the Court during the time.

One interesting case is *Siliadin v. France*[7], in which the Court found that it involved a servitude situation, therefore not exactly slavery. The applicant was a Togo minor citizen brought to France by a relative of her father, where she had been forced to work as a maid for many years, thirteen hours a day, and seven days a week. She was vulnerable and isolated, with her identification papers confiscated, no financial resources and afraid to contact the authorities because of her irregular imigration status. The Court recognized that Ms Siliadin was held in servitude, because of the lack of freedom and of the work hours on every week day. This case represented a significant milestone with regard to the increase of the human beings trafficking phenomenon, the victim being considered to be placed in a state of servitude.

The most relevant case in this respect is the case of *Rantsev v. Cyprus and Russia*[8]. On short, the applicant was the father of a young lady who died in Cyprus, where she went for working as a cabaret "artiste". The applicant complained that the Cypriot authorities had not done everything they could to protect his daughter from trafficking while she was alive, as well as to punish the responsible persons for her ill-treatment and death. Moreover, Mr Rantsev complained that the Russian authorities failed to protect his daughter, Ms Rantseva, from trafficking, as well as to investigate her trafficking and death.

As underlined in *Rantsev v. Cyprus and Russia*, in 2010, the Court recognized that the global phenomenon of trafficking in human beings "has increased significantly in recent years"[9], fact that determines the Court to be very cautious. In the same judgment, the Court appreciated that "trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere (…). It implies close surveillance of the activities of victims, whose movements are often circumscribed (…). It involves the use of violence and threats against victims, who live and work under poor conditions (…)"[10].

Moreover "[t]here can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention"[11].

The ECHR held that human beings trafficking was prohibited by Article 4 of the Convention (the prohibition of slavery and forced labour), therefore Cyprus was found guilty for violating its positive obligations set under this article for two aspects: (i) its failure to set up an appropriate legal and administrative framework to combat trafficking and (ii) the failure of the police to take operational measures to protect Ms Rantseva from trafficking, although there was a credible suspicion that she might have been a victim of trafficking in human beings. Cyprus was also found guilty for violating Article 2 of the Convention (the right to life), as a result of the authorities to effectively investigate Ms Rantseva's death.

Additionally, the Court held that Russia also violated Article 4 of the Convention (the prohibition of slavery and forced labour) because it failed to investigate how Ms Rantseva had been recruited and to take steps to identify the recruiters and the recruitation methods.

In 2011, the Court ruled in the case *V.F. v. France*[12], which concerned the applicant's procedure for deportation to country of origin, Nigeria. The applicant underlined that if she were deported to Nigeria, she would be at risk of being forced back to prostitution that she managed to escape very hardly, being also subject to reprisals, and without being protected by the Nigerian authorities, she considered that the French authorities were not allowed to expel potential victims of human trafficking. Although the Court was aware of the high level of Nigerian women trafficked to France and acknowledged their difficulties for obtaining protection from the authorities, the Court declared the application inadmissible because it was manifestly ill-founded. The reason, for which the Court did that, was because the applicant did not manage to prove that the police knew or, at least, should have known, that she was a human trafficking victim. As for the risk of being forced into prostitution once arrived in Nigeria, the judges considered that she would have received assistance from the Nigerian authorities on her return, despite the fact that the specific domestic legislation had not fully achieved its aims.

Another interesting case dealt by the Court is *M. and Others v. Italy and Bulgaria*[13]. The applicants, M. and her parents, Bulgarian citizens of Roma origin, arrived to Italy in order to find work, following a promise of work in the villa of a Roma man of Serbian origin. They alleged that six days later, beaten and threaten with death, they were forced to leave the Italian village and to return to Bulgaria, leaving their daughter there. They complained that their daughter was detained at gunpoint, forced to work and to steal,

[7] Case of *Siliadin v. France*, application no. 73316/01, judgment dated 26.07.2005, available at http://hudoc.echr.coe.int/eng?i=001-69891.
[8] Case of *Rantsev v. Cyprus and Russia*, application no. 25965/04, judgment dated 07.01.2010, available at http://hudoc.echr.coe.int/eng?i=001-96549.
[9] *Idem*, para. 278.
[10] *Idem*, para. 281.
[11] *Idem*, para. 282.
[12] *V.F. v. France*, application no. 7196/10, judgment dated 29.11.2011, available at http://hudoc.echr.coe.int/eng?i=001-108003.
[13] *M and Others v. Italy and Bulgaria*, application no. 40020/03, judgment dated 31.07.2012, available at http://hudoc.echr.coe.int/eng?i=001-112576.

as well as sexually abused by the respective Roma family, claiming that the Italian authorities failed to investigate the case in an adequate manner. More specifically, they complained that Italy had breached Article 3 of the Convention (prohibition of torture and inhuman or degrading treatment) because it did not prevent M.'s ill-treatment by securing her speedy release, Article 4 of the Convention (prohibition of slavery), based on human beings trafficking, as well as Article 14 of the Convention (prohibition of discrimination) for racial discrimination. Although the Court agreed that the circumstances could have amounted to human trafficking, the Court rejected all the complaints (except on Article 3 found as a violation on the grounds of ineffective investigation) because the evidence submitted was not enough to prove the truthfulness of their allegations. Thus, the Court did not accept that the respective circumstances had amounted to the recruitment, transportation, transfer, harbouring or receipt of persons for the purpose of exploitation, forced labour or services, slavery, servitude or the removal of organs.

Another case that could have been interesting is *F.A. v. the United Kingdom*[14], which raised the question of human beings trafficking of a Ghanaian national to United Kingdom. Unfortunatelly the Court found the complaints inadmissible because they had not been raised in an appeal to the Upper Tribunal, fact that drove to the failure of meeting the admissibility criteria set in the Convention.

In a very recent case, *L.E. v. Greece*[15], the Court had to deal again on human beings trafficking. The case concerned a complaint made by a Nigerian citizen who was forced into prostitution in Greece. Although she was recognized as a human trafficking victim for sexual exploitation, the applicant had been required to wait almost one year after informing the authorities about her situation, before she was granted the status of a victim. The Court found that there had been a violation of Article 4 of the Convention because the effectiveness of the preliminary inquiry and subsequent investigations of the case had been compromised by several shortcomings and it found several delays and failings of the Greek State's procedural obligations. Moreover, the Court held that in the case there were also violated (i) Article 6 paragraph 1 of the Convention (because the length of the proceedings had been excessive and did not meet the "reasonable time" requirement) and (ii) Article 13 of the Convention (because of the absence in the Greek legislation of a remedy by which the applicant could have enforced her right to a reasonable time hearing).

Another relevant case dealt very recently by the Court is *J and Others v. Austria*[16], which concerned the investigation made by the Austrian authorities into a human trafficking allegation (human trafficking and forced labour). Two Filipino nationals who were working as maids or au pairs in the United Arab Emirates were the applicants in this case. They alleged that their employers confiscated their passports and exploited them, facts that reminded us about the *Siliadin* case. The applicants claimed that this treatment continued during a short trip to Vienna, where they managed to escape. Following a criminal complaint against their employers, the Austrian authorities found that they do not have jurisdiction over the alleged offences commited abroad, deciding also to discontinue the investigation in this case concerning the events in Vienna. The applicants argued that the Austrian authorities had failed to protect them and to carry out an effective and exhaustive investigation based on their allegations, especially that they had a duty under international law to investigate also those events which had occurred abroad. The Court found that there had been no obligation under the Convention for the Austrian authorities to investigate the foreign elements (the recruitment made in Philippines or the exploitation in the United Arab Emirates), because the States are not held under Article 4 of the Convention to provide for universal jurisdiction over the human trafficking cases commited abroad. As for the Austrian events, the Court noted that the authorities were diligent, taking all the reasonable steps in the respective situation: supported the applicants through a Government funded NGO, interviewed them by special police officers, granted them residence and work permits, imposed a personal data disclosure ban for their protection. Since no mutual legal assistance agreement existed between Austria and the United Arab Emirates, no further steps in this case were possible. For these reasons, the Court found that the Austrian authorities had complied with their duty to protect the applicants; therefore there had been no violation of Articles 4 and 3 of the Convention.

Although not finalized, two other cases against Greece are interesting for our research and we are waiting for the Courts' judgments.

The first case is the *Chowdury and Others v. Greece*[17], in which the applicants, 42 Bangladesh nationals, were recruited in Greece, without having a Greek work permit, in order to work at the main strawberry farm in Manolada. They alleged that the respective work amounted to forced or compulsory labour. In the application, the claimants argued that Greece failed to comply with its positive obligation to prevent them from being subjected to human trafficking, to adopt preventive measures to that end or to penalize their employers.

[14] *F.A. v. the United Kingdom*, application no. 20658/11, decision dated 10.09.2013, available at http://hudoc.echr.coe.int/eng?i=001-127061.
[15] *L.E. v. Greece*, application no. 71545/12, judgment dated 21.04.2016, available at http://hudoc.echr.coe.int/eng?i=001-160218.
[16] *J and Others v. Austria*, application no. 58216/12, judgment dated 17.01.2017, available at http://hudoc.echr.coe.int/eng?i=001-170388.
[17] *Chowdury and Others v. Greece*, application no. 21884/15, communicated to the Greek Government on 09.09.2015.

The second case is *T.I. and Others v. Greece*[18], in which the three applicants, Russian nationals, who were recognized as victims of human trafficking, complained of the Greek State's failure to discharge its obligations to penalize and prosecute acts relating to human trafficking in their case. The applicants invoked the violation of Articles 4, 6 and 13 of the Convention.

We look forward to discover the Court's approach in those two cases.

But in the Court's case law there were times when the Court had to analyse the respect of the Convention as for the measures taken by the Contracting States against traffickers, for instance *Kaya v. Germany*[19] and *Tas v. Belgium*[20].

In the *Kaya* case, the applicant, a Turkish national living in Germany for thirty years, was convicted for attempted aggravated trafficking in human beings and battery. After he has served two thirds of his prison sentence, he was expelled from Germany to Turkey, because the courts considered that he could continue to pose a serious threat to the public. The applicant alleged that his deportation to Turkey had breached Article 8 of the Convention (the right to respect his private and family life). Having in mind that the applicant's expulsion was based because he had been sentenced for serious offences in Germany and that he had been eventually able to return to Germany, the Court held that the German authorities' actions were in conformity with the Convention and that no violation of Article 8 could be retained.

In the *Tas* case, which concerned the confiscation of the premises used in the connection with human trafficking, the Court declared the application as inadmissible, being manifestly ill-founded. The arguments held by the Court were that taking into account the States' margin of appreciation in controlling the use of property in combating criminal activities, then the interference with the applicant's right to the peaceful enjoyment of his possessions had not been disproportionate to the legitimate aim pursued, *i.e.* to combat human trafficking.

3. Concluding Remarks

After the analysis of the Court's case-law we can conclude that, although the Convention does not mention if there is a formal hierarchy of the human rights enshrined in it, it is recognized the fact that "a balance has to be achieved between conflicting interests, usually those of the individual balanced against those of the community, but occasionally the rights of one individual must be balanced against those of another"[21]. As it is stated in the legal doctrine, "the human being is the central area of interest for the lawmaker"[22].

The doctrine divides the rights set out in the Convention into *unqualified rights* (some of which are non-derogable) and *qualified rights*[23].

In the category of *unqualified rights* we can include the human beings trafficking under the umbrella of prohibition of slavery and forced labour as defined in Article 4 (prohibition of torture), which is also an absolute right, because no derogations under Article 15 (derogation in time of an emergency) are permitted. Other unqualified rights are the right of life in Article 2 (subject to some exceptions), prohibition of torture, inhuman or degrading treatment in Article 3, the right to liberty and security in Article 5, the right to a fair trial in Article 6, the prohibition of punishment without law in Article 7, the right to marry in Article 12, the right to an effective remedy in Article 13, the prohibition of discrimination in Article 14, the right to education and the right to free elections in Article 3 of Protocol 1; and the prohibition of the death penalty in Protocols 6 and 13.

Qualified rights are the ones which are mentioned in the Convention, but the Contracting States may interfere with it for the purpose of securing certain interests: the right to respect for private and family life enshrined in Article 8, together with the freedom of thought, conscience and religion in Article 9, freedom of expression in Article 10, freedom of assembly and association in Article 11, protection of property in Article 1 of the Protocol 1, freedom of movement in Article 2 of Protocol 4.

Any interference with a qualified right will require that the Contracting State prove that the interference was justified: the interference was according to law, the aim was to protect a recognized interest and the interference was necessary in a democratic society.

Despite the concerted efforts of the national public authorities[24] with the international organizations, in the following years we will still encounter many varieties of the human beings trafficking (from prostitution to organ harvesting), and many States that do not act with responsibility[25]

[18] *T.I. and Others v. Greece*, application no. 40311/10, communicated to the Greek Government on 06.09.2016.

[19] *Kaya v. Germany*, application no. 317532/02, judgment dated 28.06.2007, available at http://hudoc.echr.coe.int/eng?i=001-81338.

[20] *Tas v. Belgium*, application no. 44614/06, decision on the admissibility dated 12.05.2009, available at http://hudoc.echr.coe.int/eng?i=002-1551.

[21] Robin C.A. White and Clare Ovey, *The European Convention on Human Rights*, fifth edition, Oxford University Press, 2010, p. 9, *Evans v. United Kingdom*, application no. 6229/05, judgment dated 10.04.2007, available at http://hudoc.echr.coe.int/eng?i=001-80046.

[22] Elena Anghel, *The notions of "given" and "constructed" in the field of the law,* in the Proceedings of CKS eBook, 2016, Pro Universitaria Publishing House, Bucharest, 2016, p. 341.

[23] Robin C.A. White and Clare Ovey, *The European Convention on Human Rights*, 5th edition, Oxford University Press, 2010, p. 10.

[24] For more details on public authorities, please see Elena Emilia Stefan, *Disputed matters on the concept of public authority*, in the Proceedings of CKS eBook, 2015, Pro Universitaria Publishing House, Bucharest, 2015, p. 535 and following.

[25] For more details regarding the responsibility principle, please see Elena Anghel, *The responsibility principle*, in the Proceedings of CKS eBook, 2015, Pro Universitaria Publishing House, Bucharest, 2015, p. 364 and following. For more details regarding responsibility in general,

towards their nationals or other categories of individuals found on their territory[26].

As a response to the importance of trafficking in human beings, international organizations try to move forward. For instance, the Council of Europe had also adopted the Convention on Action against Trafficking in Human Beings in 2005 which was the first convention to recognize in an express manner the fact that the human beings trafficking represents a violation of human rights and an offence to the dignity and integrity of each human being.

But the question related to the present paper is how will the Court deal those cases? The answer is simple: TIME will answer this question.

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ROMANIA – RIGHTS AND OBLIGATIONS AFTER 10 YEARS FROM JOINING THE EUROPEAN UNION

Alexandra STĂNCIULESCU[*]

Abstract

On the 1st of January 2017, Romania celebrated 10 years of being a member of the European Union. The European Union is both, a major and important subject of international law and an international organization, which created a legal system that regulates economic, political and social issues, binding 28 members. The main purposes of becoming a part of the European family include a significant growth of living standards, a strong accent on the respect of fundamental rights and equity between the citizens of the European Union, of social politics, environment protection and nevertheless support in developing a countryâ s economy. After the fall of communism, Romania saw the opportunity of becoming a member of the European Union and started the long process of joining this organization. After 10 years from the completion of the accession process, the results can be interesting. So, the purpose of the following paper is to highlight the advantages and disadvantages of being a member of the European Union and the objectives are to determine which were the conditions that Romania had to fulfill in order to become a EU member, how this membership changed our legal system, which are our rights and obligations as a EU member today and which are the effects from 2007 and now.

Keywords: *rights, obligations, European Union, Romania, member*

Introduction

The following paper's objective is to analyze the road that Romania had to walk on and to adapt to in order to become a full member of the European Union, with all the rights and obligations that come with this status. As a country with an emerging economy and with a history that changed so much the power mechanism, after the 1989 Revolution, Romania had the opportunity to fast forward onto being a part of the European family. Steps toward a relationship with the European Economic Community were made since the 1970`s. Both the Socialist Republic of Romania and the EEC[1] were interested in concluding agreements, still Romania saw this entity as if it were another subject of international law, such as a country, but with much more to gain from, seeing its foundation and with no intention of being a part of it. Through this article, we will try to present, explain and comment the last 10 years and more since the EU-Romania relationship has started, going over the starting conditions that this country had to fulfill in order to become a member, the harmonization process of the Romanian legislation, the rights and obligations that came along with the new status and, in the final, some conclusions on all the facts and information presented above.

Taking into consideration the current context, the turning and evolution of the EU in the present and, also, the fact that it is a decade long since Romania took a step to be a part of the European family, the studied matter tends to create an overall on Romania's past, present and future and tries to underline the importance of its actions regarding the EU. In the highlight of Winston Churchill's famous speech at the University of Zurich, when he said, and we quote, "We must build a kind of United States of Europe…The structure of the United States of Europe, if well and truly built, will be such as to make the material strength of a single state less important…If at first all the States of Europe are not willing or able to join the Union, we must nevertheless proceed to assemble and combine those who will and those who can.", we are able to observe that, in order to obtain the final stage of unification, each country plays an important part. So, it is a matter of will and ability, two attributes that a state can choose to have or not. After 10 years, Romania can still make a choice in any direction, taking into consideration the current circumstances and, even though, it isn't a major actor on the political scene of the European Union, it can make a difference.

We will try to approach as many sources as we can in order to achieve a fully documented research and, for that matter, a series of relevant conclusions.

The studied subject, as presented in the article's title, "Romania – rights and obligations after 10 years from joining the European Union" has a quite recent approach, because the decade anniversary was on 1st of January 2017. You will find that the article's content has a variety of specialized literature references, but all in all, the object and final conclusions of the article are marked by a personal touch.

Paper content

"The moment of out integration to the European Union will probably be celebrated as a sensational event and, the politicians, officials and other major

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[1] EEC = Economic European Community.

players with our emotions will present to the Romanians this historical victory as the result of their generosity and heroism. In fact, the becoming of our country as an EU member and of each of one of us as a European citizen is the result of the efforts, aspirations and endeavor of each and all of us"[2]. This quote futures two important ideas, which are found kind of antagonistic and these are: firstly, the idea that, at the surface, only the politicians, officials and other major players on the political scene have contributed to our realizations as a nation towards an united European future and secondly, that the entire populations, each and one of us as individuals have played our part in Romania's current status. In our opinion, both ideas have their root in truth. Mainly, because, essentially, our country's interests were, and still are, represented by the people we elected to do so and these people carried on the negotiations, meetings and official talks that led us to where our country is today and also because, the effects of the entire integration process have been felt by every Romanian citizen. Reasons for this come from the fact that laws have been changed in order to assimilate the European acquis, consequently new rights and obligations have been created and also some already existent have been modified.

In order to pursue the article's objective, we come back on the initial premises that Romania's EU membership stood on.

We remind you that the first European community was created in 1951, when France, Germany, Belgium, Luxembourg, Italy and the Netherlands signed the treaty that established the European Coal and Steel Community, followed by two other European communities in 1957, when the same states signed the enforcing treaties of the European Economic Community and European Atomic Energy Community. Currently, the European Union is the biggest and most important single market in the world and also a very important actor on the political, social, economical and cultural international scene.

In order to approach this massive and exclusive family, interested countries had to have not only the willing and political ambition to join it, but also they had to adopt a series of standards which entitled them to an eventual candidacy. At the beginning, these standards aimed only the technical and economical domains, but in order to fulfill a proper coordination and to comply with the principles of good practice, much more domains were included as mandatory for reaching standard levels[3].

One interesting fact is that Romania was the first country from Central and East Europe to establish official relations with the European Community, starting with the communism period and to acknowledge it as a single subject of international law. These started around 1970's, when negotiations were initialized in order to sign a series of agreements regarding agro-food products, after that in order to implement a common customs regime and also to undo Romanian products in the EEC space. In this way, in 1974 Romania became the first East European country to be included in the EEC`s Generalized System of Preferences (GSP), allowing for easier access of Romanian agricultural products to the EEC market and, in 1980, the only country from the Soviet bloc to sign a comprehensive trade agreement with the EEC[4]. After 1987, the relation between our country and the EEC started to deteriorate due to Romania's unpredictable ruler, culminating with the Council and the European Commission suspending talks with Romania, because its authorities were accused of human rights violation.

After the fall of communism, new diplomatic relations are established between Romania and the European Community. The following period marks a new beginning for both our country and the European family, starting with the adoption of the Maastricht Treaty (1992), which introduced the term of "European Union" and created this new and unique entity that functioned on three pillars: 1. *The European Communities* pillar; 2. *The Common Foreign and Security Policy* pillar and 3. *Police and Judicial Co-operation in Criminal Matters* pillar.

In 1991, the European Commission offers Romania a special guest status along the European Community and also includes it into the PHARE[5] assistance programme.

In 1993, the *Europe Agreement establishing an association between the European Economic Communities and their Member States, of the one part, and Romania, of the other part* is signed. The main objective of this agreement was to prepare Romania for the integration, focusing on the economical relations and institutionalized political dialogue. Some of the premises that determined both parties to interact were based on one hand on the traditional links existing between the Community, its Member States and Romania and the common values that they shared, the wish to strengthen these links and to establish close and lasting relations, based on reciprocity and, on the other hand, the importance of establishing and enhancing in Europe a system of stability based on cooperation, with the Community as one of the cornerstones, willing to set up instruments of cooperation and economic,

[2] Ionel Chera, introduction to *Understanding the European Union. A concise introduction*, by John McCormick. Bucharest: CODECS, 2006.

[3] Luciana Ghica, *România şi Uniunea Europeană* (Bucharest, Meronia, 2006), p. 18.

[4] Dimitris Papadimitriou and David Phinnemore, *Romania and The European Union: From Marginalization to Membership?*(Taylor and Francis e-Library, 2008).

[5] Poland and Hungary Assistance for the Restructuring of the Economy - initially described as the international efforts to provide economic support to the emerging Polish and Hungarian democracies - is the EU's main financial instrument for accession of the Central and Eastern European countries.It was launched as a specific EC programme, initiated by Council Regulation No. 3906/89. Its funding is used to channel technical, economic and infrastructural expertise and assistance to recipient states. The aim is to help these countries achieve market economies based on free enterprise and private initiative.

technical and financial assistance on a global and multiannual basis[6].

On 22th June 1995, Romania proceeded to the official application to join the European Union, depositing also its National Pre-Accession Strategy and a declaration signed by the President of the Republic, the Senate and the Chamber of Deputies and the Prime Minister and the leaders of all the political parties represented in Parliament, which expressed Romania's political will to pursue the consolidation and development of the rule of law, political pluralism, the separation of powers, free elections, respect for human rights and the establishment of a market economy compatible with the principles governing the European Union.

The general previewed advantages and disadvantages of joining the European Union foreshadowed were:

1. advantages:

- the growth of the living standard by accessing the single market, which meant new legislation in this area with all the ensuing consequences, new investment opportunities, free movement of goods, services and capitals and so on;
- the adoption of high standards in the social politics domain, which meant underlining the importance of respecting fundamental rights, equality between the EU citizens, non-discrimination, protecting the environment and other;
- gaining the benefits of being an EU citizen, such as free movement of persons, equal access to job opportunities all around the member states, equality in rights and representation in the EU institutions;
- obtaining financial and institutional support in the agriculture domain, as a priority, but also in other important domains, and other.

2. disadvantages:

- even though, economical growth was foreshadowed, the internal administration needed a reform in order to comply with the high standards of the EU legislation, so Romania had to be up to this;
- the lack of administrative capacity and projects on European funds management could have significantly slowed the rhythm of growing the living standard
- another fact that could have affected the process of smooth integration was the lack of professional staff and expertise in pursuing and conducting the stages to reaching the required standards;
- regarding the agriculture sector, farms could have trouble in adapting to the veterinary norms, dictated by the European acquis;
- once a member of the EU (and also not forgetting the membership of NATO), Romania's geostrategic policy suffers some changes by becoming a border-state of this organization.
- In 1997, the European Council, at European Commission's request, issued an official opinion on Romania's adhesion application. The final conclusions were presented as follows:
- the current improvement in Romania, following the arrival in power of a new government, indicates that Romania is on its way to satisfy the political criteria;
- Romania has made considerable progress in the creation of a market economy, but it would still face serious difficulties to cope with competitive pressure and market forces within the Union in the medium term;
- despite the progress that has been made, Romania has neither transposed nor taken on the essential elements of the acquis, particularly as regards the internal market. It is therefore uncertain whether Romania will be in a position to assume the obligations of membership in the medium term. In addition, considerable efforts will be needed in the areas of environment, transport, employment and social affairs, justice and home affairs as well as agriculture. More generally, substantial administrative reform will be indispensable if Romania is to have the structures to apply and enforce the acquis effectively.

In the light of these considerations, the Commission considers that negotiations for accession to the European Union should be opened with Romania as soon as it has made sufficient progress in satisfying the conditions of membership defined by the European Council in Copenhagen.

The reinforced pre-accession strategy will help Romania to prepare itself better to meet the obligations of membership, and to take action to improve the shortcomings identified in the Opinions"[7].

The criteria established at the Copenhagen European Council mentioned above aimed those candidate countries of Central and Eastern Europe who wished to become members of the Union and meant meeting the following conditions:

- stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
- the existence of a functioning market economy, as well as the ability to cope with competitive pressures and market forces within the Union;
- the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.

After two reports presented in 1998 and 1999 by the European Commission on Romania's progress in meeting the necessary conditions in order to become a member of the EU, the European Council from 1999 decided to convene bilateral intergovernmental conferences in February 2000 to begin negotiations with Romania, Slovakia, Latvia, Lithuania, Bulgaria

[6] "EUROPE AGREEMENT establishing an association between the European Economic Communities and their Member States, of the one part, and Romania, of the other part", http://wits.worldbank.org/GPTAD/PDF/archive/EC-Romania.pdf.

[7] "Agenda 2000 - Commission Opinion on Romania's Application for Membership of the European Union", http://www.esiweb.org/pdf/romania_EC-Romania%20opinion-1997.pdf.

and Malta on the conditions for their entry into the Union and the ensuing Treaty adjustments[8].

As we can observe, negotiations implied a serious changing mechanism that involved a variety of actors and factors which would play an important role in reforming all of Romania's administration policies, institutions and legislation. As we were saying at the beginning of this paper and as we can now deduct, everyone was involved directly or indirectly involved in this process.

Hereinafter, we will resume the main rights and obligations assumed by Romania during the integration process. These rights and obligations are in force to this day, suffering the specific modifications that were applied through the adoption of the following treaties: Treaty of Amsterdam (signed in 1997, came into force in 1999); Treaty of Nice (signed in 2001, came into force in 2003) and last, but not least, Treaty of Lisbon (signed in 2007, came into force in 2009). Even though Romania officially joined the EU in 2007, the amendments made by each treaty produced effects also on our side.

According to art. 26 from the Treaty on the Functioning of the European Union:

"1.The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.

2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.

3. The Council, on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned. "

- Free movement of goods

The European legislation talks about conformity assessments bodies and accreditation, standardization and market surveillance bodies. In order to develop a functioning market in accordance with the EU standards, Romania had to implement a new mechanism that required, among others, a clear delimitation between the attributions of the organisms mentioned above, a well prepared staff, a procedure improvement and last, but not least, an efficient control system.

The 2005 Comprehensive Monitoring Report on Romania concluded as stated: "Romania is generally meeting the requirements for membership in the field of new approach sectoral legislation and in the non-harmonised area and is expected to be able to apply this acquis from accession. Attention should be paid to ensuring that legislative alignment is completed in the near future and that administrative preparations continue. In the nonharmonised area Romania should continue to remove barriers to trade and implement the mutual recognition principle in its legislation. Increased efforts are needed as regards horizontal and procedural measures and old approach sectoral legislation. In order to complete accession preparations, Romania must considerably upgrade its administrative capacities in the field of accreditation. Enhanced efforts are still needed to complete transposition of the old approach acquis and to revise marketing authorisations for pharmaceuticals. Particular attention must be paid to completing the alignment and implementation of legislation in the area of foodstuffs. Additional efforts are required to strengthen the administrative capacity of all institutions involved in food safety issues. Public procurement continues to be an area of serious concern. While legislative alignment needs to be completed, substantial shortcomings remain in the implementation and enforcement of legislation. Administrative capacities at all levels need to be urgently 33 strengthened; coordination improved and staff continuity, recruitment and training ensured. Unless legislation is fully aligned, coherent and implemented correctly, there is a serious risk that Romania would not have a functioning public procurement system in place in time."

- Free movement of people

The basic idea of the free movement of people principle is the elimination of discrimination regarding the conditions to enter a member state, study, travel, work, employment and remuneration.

Currently, the main rights and obligations under *the Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States* are:

- For stays of under three months: the only requirement for Union citizens is that they possess a valid identity document or passport. The host Member State may require the persons concerned to register their presence in the country.
- For stays of over three months: EU citizens and their family members — if not working — must have sufficient resources and sickness insurance to ensure that they do not become a burden on the social services of the host Member State during their stay. Union citizens do not need residence permits, although Member States may require them to register with the authorities. Family members of Union citizens who are not nationals of a Member State must apply for a residence permit, valid for the duration of their stay or a five-year period.
- Right of permanent residence: Union citizens acquire this right after a five-year period of uninterrupted legal residence, provided that an expulsion decision has not been enforced against them. This right is no longer subject to any conditions. The same rule applies to family

[8] "Helsinki European Council 10 and 11 December 1999 Presidency Conclusions", http://www.europarl.europa.eu/summits/hel1_en.htm.

members who are not nationals of a Member State and who have lived with a Union citizen for five years. The right of permanent residence is lost only in the event of more than two successive years' absence from the host Member State.

- Restrictions on the right of entry and the right of residence: Union citizens or members of their family may be expelled from the host Member State on grounds of public policy, public security or public health. Guarantees are provided to ensure that such decisions are not taken on economic grounds, comply with the proportionality principle and are based on personal conduct, among others[9].

These rights and obligations apply to Romanian citizens to the present, but making a short retrospective we observe the adapting process through the eyes of 2005 Comprehensive Monitoring Report on Romania, which said: "Romania is generally meeting the commitments and requirements arising from the accession negotiations in the areas of mutual recognition of professional qualifications, free movement of workers and coordination of social security systems, and is expected to be in a position to implement this acquis from accession. However, the administrative capacity still needs to be further developed. In the area of free movement of workers, Romania needs to ensure that its legislation fully complies with the case law of the Court of Justice regarding access to public sector posts in Romania. Preparations also need to be completed for the introduction of the European Health Insurance Card as from accession." We signal a particular case regarding the possibility of a Member State to apply restrictions over the labor market. In 2007, Ireland decided to impose some restrictions on free movement for the citizens of Bulgaria and Romania, who were the subject to the employment permit requirements which applied before they joined the EU. The Irish Government decided to end restrictions on Bulgarians and Romanians accessing the Irish labor market with effect from 1 January 2012[10].

- Free movement of services

This principle translates the need to ensure that the right of establishment and the freedom to provide services anywhere in the EU is not hampered by national legislation. In order to achieve this objective, Romania`s first aims were to harmonize the authorization conditions and the prudential rules, the control in the origin country, granting a single license and the mutual recognition of national supervision standards. In this sector, the pre-accession process was limited to the following conclusion mentioned in the 2005 Comprehensive Monitoring Report on Romania: "Romania is generally meeting the requirements for membership in terms of transposition of the acquis in the area of banking, investment services and securities markets and information-society regulations. Subject to steady progress being maintained both in completing the transposition, implementation of the legislation and administrative capacity, Romania should have functioning systems in place by accession. Particular attention should be paid to the strengthening of the Insurance Supervisory Commission. Increased efforts are needed to meet the commitments and requirements for accession in the areas of the right of establishment and the freedom to provide non-financial services and the protection of personal data. Work must be accelerated to complete the alignment in those areas, as well as to eliminate legal and administrative restrictions to establishment and freedom to provide services. Significant efforts are needed to ensure that the newly established Authority for Personal Data Processing becomes fully operational and is effectively implementing the data protection acquis (see Chapter 24 – Justice and home affairs). As regards the insurance sector, weak enforcement of rules on third party liability on motor insurance remains problematic. Increased efforts to enforce motor insurance legislation are now needed in order to ensure that Romania will be ready in this area by the time of accession."

- Free movement of capital

This principle was an effect of the Maastricht Treaty signed in 1992, as a precondition before adopting the single currency. Romania's commitment towards the implementation of this principle aimed to liberalize the capital movements in a gradual matter until its official accession to the EU. This implied changes in our legislation regarding the terminology on capital operations, accounting report, the organization of card payment, the right to establishment and freedom to provide services, investment services, regulated markets and others. The conclusion expressed in the same 2005 report mentioned above: "Romania is generally meeting the commitments and requirements arising from the accession negotiations in the field of capital movements and payments and is expected to be in a position to implement the acquis as from accession. It is also meeting the commitments and requirements arising from the accession negotiations in the field of payment systems. Increased efforts are needed in the area of money laundering, where alignment to the Financial Action Task Force standards has still to be completed and enforcement needs substantial improvement."

- Agriculture

Generally speaking, until this day, accession negotiations in the agricultural chapter focus on the procedures for future direct payments, support to rural development or on the need for transitional measures facilitating integration into the EU, taking into account the specific circumstances of the agricultural sector in the candidate countries in the process. The agricultural and rural development chapter includes a large number

[9] "Free movement of persons", http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_2.1.3.html.

[10] "Freedom of movement in the EU", http://www.citizensinformation.ie/en/moving_country/moving_abroad/freedom_of_movement_within_the_eu/freedom_of_movement_in_the_eu.html.

of binding rules, many of which are regulations that are directly applicable. The proper application of these rules and their effective enforcement by an efficient public administration is essential for the functioning of the Common Agriculture Policy[11]. Starting with 1992, until 2007, CAP[12] has been reformed in order to achieve the main purpose of permitting the communautaire agriculture to be more competitive and to positively contribute to the local, national and community efforts of landscaping and protecting the environment.

So, Romania benefited of several funds of the CAP for rural development and direct payments. The main programme before accession was SAPARD (Special Accesssion Programme for Agriculture and Rural Development) and after becoming a EU member, SAPARD became DRDP (National Rural Development Programme).

The conclusions brought by the 2005 Comprehensive Monitoring Report on Romania were: "Romania is generally meeting the commitments and requirements arising from the accession negotiations, among the horizontal issues as regards the Farm Accountancy Data Network, organic farming and state aid, rural development; in the veterinary field, common measures; and as regards phytosanitary issues. Subject to good progress being maintained in these areas, Romania should be in a position to implement this acquis from accession. Increased efforts are needed in the areas of quality policy, trade mechanisms, and all of the relevant common market organisations (CMO); in the veterinary field as regards animal welfare, zootechnics, animal nutrition and trade in live animals and animal products. Unless efforts are accelerated in these areas, there is a risk that functioning systems will not be in place at accession. Serious concerns exist in relation to Romania's preparations to set up its Paying Agencies and to implement the Integrated Administration and Control System (IACS). Serious concerns exist also in relation to the identification and registration of animals and the establishment of functioning border inspection posts in the field of veterinary control system in the internal market. Furthermore in the veterinary area, similar serious concerns remain regarding TSE and animal by-products (concerning the collection system of cadavers, the absence of rendering plants), animal disease control measures (for Classical Swine Fever) and veterinary public health (the upgrading of agri-food establishments). Unless immediate action is taken, Romania will not be in a position to implement the acquis in these areas by the date of accession."

We will resume our presentation at only four of the 31 chapter structures[13] that where undergone during the negotiations for Romania's accession to the European Union.

An important component of the integration process regards the harmonization of Romania's internal legislation to the EU legislation. Art. 70 from the Europe Agreement establishing an association between the European Economic Communities and their Member States, of the one part, and Romania, of the other part stipulated that "The approximation of laws shall extend to the following areas in particular: customs law, company law, banking law, company accounts and taxes, intellectual property, protection of

[11] "Accession negotiations", https://ec.europa.eu/agriculture/enlargement/negotiations_en.
[12] Common Agriculture Policy.
[13] 1. Free movement of goods.
2 Free movement of persons.
3 Free movement of services.
4 Free movement of capital.
5 Company legislation.
6 Competition policies.
7 Agriculture.
8 Fishery.
9 Transportation policies.
10 Taxation.
11 Economic and monetary union.
12 Statistics.
13 Social policies and employment.
14 Energy.
15 Industrial policies.
16 Small and medium enterprises.
17 Science and research.
18 Education, professional training and youth.
19 Telecommunication and information technology.
20 Culture and audiovisual policies.
21. Regional policies and coordination of structural instruments
22. Environmental protection
23. Consumer and health protection
24. Justice and internal affairs
25. Customs union
26. External affairs
27. Common external and security policies
28. Financial control
29. Financial and budgetary dispositions
30. Institutions
31. Other

workers at the workplace, social security, financial services, rules on competition, protection of health and life of humans, animals and plants, consumer protection, indirect taxation, technical rules and standards, nuclear law and regulation, transport and the environment."

In order to pursue this purpose, an essential element for the approximation of Romanian laws to the EU norms and standards was the Position Paper. This document had the role to present the existing situation regarding the transposition into the national law, on one hand and to present, in a succinct way, how Romania will transpose the main normative EU acts in the future. The institutions responsible for the correct and efficient implementation were also mentioned in the Position Paper. Another important instrument was the National Programme for accession to the European Union which included the strategic plan of how the accession process will be carried out[14].

Conclusions

Taking into consideration all the facts and information presented in the section above, we can observe that after a period of struggling, Romania's future changed in order to be a part of the big Europe family created starting with 1951. One of many the reasons that determined our country to become a member of the European Union was to obtain several advantages that were offered to all of the member states, including the highly developed countries. A space of security, freedom and justice was promised and considerable efforts were made in order to achieve these objectives. The European Commission final report before accessions, stated: "There has been some progress in the areas of judicial reform and the fight against corruption, money-laundering and organized crime, but further tangible results are needed. This report identifies those issues which require further work. It draws attention to provisions in the acquis and the Accession Treaty which are designed to safeguard the proper functioning of EU policies and institutions following accession. In line with the findings of this report, the Commission, after consulting the Member States, will set up a mechanism for cooperation and verification of progress in the areas of judicial reform and the fight against corruption, money-laundering and organized crime. For this purpose, benchmarks have been established which refer to the particular circumstances of each country. The Commission has adopted the necessary legal provisions to ensure the proper management of EU agricultural funds. The report underlines that the existing rules contain the necessary guarantees for the proper management of EU structural funds, and other programmes.(…) Overall, Bulgaria and Romania have made far-reaching efforts to adapt their legislation and administration to the laws and rules of the European Union. This has largely brought them into line with prevailing standards and practices within the European Union. Sustained support from the European Union will be available for addressing the remaining issues. Sufficient guarantees exist in the acquis and the Accession Treaty to ensure the proper functioning of EU policies and institutions. As a result of the progress made, Bulgaria and Romania will be in a position to take on the rights and obligations of EU membership on 1 January 2007. The Commission looks forward to welcoming Bulgaria and Romania as fully-fledged members of the European Union on this date"[15].

What can we say about Romania's outcome after 10 years of EU membership? We have the same rights and obligations as all the other members regarding the free movement of good, persons, services and capital, agriculture policy and other regulated domains by the European Union legislation, any discrimination between European citizens being banned. Romania made great progress in the macroeconomic adjustment and carrying out convergence criteria including in terms of preparation for accession to the euro area. Approaching the standards dictated by the European Union rules and regulations, but also by its principles, Romania placed itself on a new course, reaching out for better living conditions and highly compliance of the fundamental human rights and also for continuing the practice of the rule of law in a democratic state.

This paper aims to realize a balanced report on Romania's pre and post accession general status and it is expected to fulfill a short, but succinct mission in observing the role that the European Union played for our country.

We recommend further research on this subject, mainly because it is a very complex and vast domain and the effects of being an EU member are perpetual and can be approached from different points of view. In 2017, Romania started a new government mandate and even though the popular vote has been clear, people, Romanian citizens, but also from all around the Europe, felt the need to express their public concern about respecting the rule of law in all matters and at all levels, from the simple individual to the president of the country. In this current context, a thorough analyze of how is in Romania the Cooperation and Verification Mechanism for on judicial reform and corruption applied is necessary and recommended.

As a final statement regarding the European Union's current context, in which Romania plays its part as a member state, we will quote Antonio Tajani, the President of the European Union Parliament: "I feel like a sailor who is working hard to survive the tempest, and I'm convinced that we will ride out of the storm, and reach safe harbor"[16].

[14] Augustin Fuerea, *Manualul Uniunii Europene* (Bucuresti: Universul Juridic, 2011), 202.

[15] "Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania", https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2006/sept/report_bg_ro_2006_en.pdf.

[16] http://www.euronews.com/2017/03/20/antonio-tajani-there-is-only-one-strategy-responding-to-the-people.

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THE GAMER GENERATION – FUTURE DRONE PILOTS

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Abstract

Drones or unmanned piloted vehicles represent the pinnacle of ranged weapon technology that ensure a fast strike, low cost and with almost no boots on the ground. This type of new technology also brings a new requirement for governments that use these devices, a requirement that dated air force training cannot offer, but a mobile phone or controller can offer it wholesome. The idea of downplaying war to sound very hip and cool and fun for the younger crowd has been around since the 1970's, when the Vietnam war recruiters were using the idea that war was a good investment for children and teens, because it offered them a future-proof job and access to entertaining tools, but kept out the negative aspects of participating in an armed conflict. Now we see a resurgence in the way military recruiters use such trends to draw in the crowd.

In this regard, the situation of using children and teens, or more precisely ones who have video-games as a time investing hobby, has been considered by the regulated armed forces for some time now, but due to international treaties that govern child protection this has been deemed impossible to accomplish. Should child protection treaties be revised or not, and if they should, could drones be the entry point for taking part in armed conflicts or other armed situations?

Keywords: *drones, soldiers, videogames, treaties, conventions.*

1. Introduction

This paper will focus on answering issues regarding the usage of children as potential drone pilots and how international law tries to fight a known issue in governemnts around the world. Furthermore, the paper will focus on how international law subjects dealt with child recruitment and how modern military practices outpace the law of nations. To effectively define the focuses, this paper will outline current legal instruments and practices of states, even if said states did ratify some or all legal instruments, they still do not uphold them and furthermore, disobey them entirely because internal legal instruments allow them do so.

While other authors have indeed offered their point of view on child recruitment in regular armed forces, this paper took inspiration from Tonje Hessen Schei's work entitled "*Drone"*, a war documentary with human rights focuses, and tries to outline more legal instruments that are already existent in the struggle to prevent armed forces recruiting children as drone pilots and military hackers.

2. Keeping children off the battlefield and the efficiency of treaties that enforce such an action.

2.1. The definition of children under the Convention on the Rights of the Child (1989) and its Optional Protocol.

As per article 1 of the aforementioned *Convention*, a child is considered anyone who is below the age of 18 years old, unless national law state otherwise[1]. This is also further enforced by the Optional Protocol, where it expressly forbids incorporating persons bellow the age of 18 as direct participants[2]. Such a prohibition has been circumvented by non-state actors in armed conflicts mainly because it was a psychological weapon and because children were easy to draft and motivate to participate.

Under the *Geneva Conventions (1949)* and the *Additional Protocols*, according to article 77 paragraph 2 of *Additional Protocol I*, parties should refrain from using persons bellow the age of 15 as direct participants, but for those that are between the age of 15 and 18, the older ones will have priority in taking up direct combatant roles[3]. This is tied to the constant activity of the United Nations and the Security Council who has adopted ever since 1999 a regular debate on "*Children in armed conflict*"[4] and as such has periodic reports published on

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[1] Convention on the Rights of the Child, UNGA, 2.09.1990.

[2] Optional Protocol to the Convention on the Rights of the Child, A/Res/54/263 25.05.2000, UNGA.

[3] Additional Protocol I of 1977 of the Geneva Conventions of 1949.

[4] UNSC Res. 1261, 25 August 1999, text can be consulted at the following address: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CAC%20SRES%201261.pdf. Accessed 09.01.2017.

implementing a strategy to help war stricken communities and to protect children of all ages from the horrors of war.

While this debate launched without aiming the action at a specific non-state actor or government, it did however outline the fact that this issue will be handled by the UN Security Council as it sees fit. The most recent report of the U.N.S.C.[5] and the Human Rights Watch, entitled „*Extreme Measures: abuses against children detained as national security threats*"[6] is considered a tip of the iceberg type of situation where children have been detained on an extensive scale because they have been considered a real threat to national security in Nigeria and Syria. This may be true in the conventional way of fighting in an armed conflict, meaning with on the ground and in the trenches, but what if they were fighting from a location, far away from said battlefield, and connected from a computer or with a joystick?

These types of situations have to draw out the fact that persons bellow the age of 18 have become more active in how new generations of armed conflicts have been waged in this century. This is further pointed out in the UNSC report[7] where it's stated that a lot of states that have been confronted with the issue of terrorism and child soldiers have adapted their national legislation to allow the detention and questioning of participants bellow the age of 18 as potential terrorists, all the meanwhile allowing them to be treated as other adults, meaning they get beaten up, tortured or killed in prisons.

This raises a lot of questions on how a person bellow the age of 18 would be treated if he or she was a drone pilot that was detained on the battlefield. Would they get better treatment or even should they be treated in other ways as a regular adult soldier? The UNSC resolution requires states to comply with child protection laws, but so far, states such as Israel have failed to comply and offer proper child demilitarization or even basic child protection laws and have gone ahead and prosecuted the alleged terrorists as full spectrum warriors.

Other situations that are blatantly disregarded are those regarding children being already targets of drone strikes[8]. Such a situation was called even in 2015 a barbaric practice by tagging children as *„fun-sized terrorists*". To try an add a more awareness even among drone pilots, the Foundation for Fundamental Rights asked an artist in Pakistan to make a giant picture of a child and place it in a heavy bombed region[9], but sadly this did not ease the situation as attacks continued regardless of the ongoing campaign.

However, even if children are not yet recruited directly in the military, signs that things are changing in how the military considers who should be part of it. Recently the Swiss Army has decided that it should change its military recruiting algorithms by incorporating overweight people in their service[10]. This is coming at a time when cyber security and robotics threatening to become major areas in regular military situations. This is in line to how the U.S.A. has decided to create new military algorithms even from 2016[11] when former Secretary of Defense Ashton Carter stated that the military standards are due for a reform and that overweight people, pot smokers and single parents should be allowed in the military in different roles. Seeing as how these categories are usually people who are very versed in using computers and joysticks they make the perfect targets for future drone pilots and military hackers.

2.2. Why videogames are the entry point for convincing children to become part of the military.

First of all, what are videogames? Videogames, as the *Webster Dictionary*[12] puts it, is "*an electronic game played by means of images on a video screen and often emphasizing fast action*".

This means that playing games that have a heavy military theme could create a false sense of reality on how warfare is being handled in real life and could impact a child's expectations[13]. The U.S.A. Army tried to recruit children by offering them a contract stipulating that once they reach a certain age they have to enroll in either a military school or directly in the military, but this practice was seen as prohibited since it forced the child into military service at a later stage in life.

Human rights activist and documentary maker Tonje Hessen Schei[14] stated that confirmed reports from locations where gamers usually gather are frequently visited by army recruiters who bring a drone mission simulator and allow participants of the event, who are aged 10 or older, to partake in a mission to take out different military targets and terrorists in hoping that they would be entertained and join the military. The activist goes furthermore and claims that game designers are actually creating

[5] UNGA, A/70/836 – S/2016/360, 20.04.2016.
[6] HRW, 28.07.2016, available on their website, at the following address: https://www.hrw.org/report/2016/07/28/extreme-measures/abuses-against-children-detained-national-security-threats.
[7] See supra note 4, pages 5 and following.
[8] Murtaza Hussain, Former drone operators say they were „horrified" by cruelty of assassination program, The Intercept, 19.11.2015.
[9] Notabugsplat.com blog, April 2014.
[10] TheLocal.ch, Swiss military service: „Fat doesn't mean unfit to serve" says commission, 23.01.2017.
[11] Douglas Ernst, Pentagon may ease recruiting rules for obese people, pot smokers and single parents, Washington Times, 2.11.2016.
[12] Webster definition accessible at: https://www.merriam-webster.com/dictionary/video%20game.
[13] Knight Ridder Tribune News Service: "Army Game to Draft Virtual Soldiers," 23.05.2002, pg. 1 and following.
[14] Maker of the renowned documentary *Drone.*

videogames with the formats the military suggests them to as to create a better interface for future pilots or military personal.

Furthermore, Professor Philip Alston stated in 2010[15] that the *„PlayStation mentality"* is a key factor in how drone pilots are being trained and factor why killing has become a more viable option rather than capturing and also why collateral damage is no longer an issue.

3. Could child protection treaties be modified for the new generation of military personnel?

3.1. Why video games are the new tools for recruiting military personnel.

Video games are currently considered a spectrum of the entertainment sector that outgrew other conventional mainstream entertainment sectors by a large margin. The military have a longstanding reputation of partaking in the development of games or influencing some studios to develop certain interfaces[16].

Such an example is the popular game *America's Army,* a game that debuted in 2002 on the personal computer and PlayStation 2 and now expands to 5 games in the series with the latest in 2015. The game debuted at an annual gaming convention known as E3 and in 2002, the US Army used this momentum to release a video game that was both a recruiting tool and also a training simulator for people interested in a military career[17], but what the game also teaches is that international law and with a high regard, international humanitarian law, is something very subjective.

In this regard, the game teaches people that attacking hospitals or using new weapons is perfectly legal if the enemy is present there. The issue with such situations is that a lot of the player base is comprised of children who are very easily influenced and as such can be molded in developing a desire to join a military branch later on in life.

However, this trend has been in a tug-of-war situation, as the International Committee of the Red Cross has stepped up their presence in this sector as trying to teach young gamers about the risks of war and that justice exists for those who abuse their positions[1819]. This created the chance for players to create content and use the created content to learn about war crimes and the protected emblems of the Red Cross, while also learning that killing should not be the focus of the armed conflict, but rather obtaining an advantage.

Sadly, the ongoing trend in the U.S.A. set a precedent for other states like Norway or Sweden and it will further outline how military recruiters will transform small and harmless robotics events into giant recruiting events for future military researchers and pilots[20]. This is the case where human rights activists from Child Soldiers International have argued that during a 2013 event in Ohio, high-school students were exposed to a heavy military themed event in which they were being briefed about the benefits of drones and also they were exposed to military trainers who were teaching them how to build drones and rockets and how to use them in the field.

3.2. Are treaties still relevant?

To answer this as bluntly as possible, yes they are relevant. The current child protection treaties forbid armies to recruit children bellow the age of 18 for active combat roles[21]. This was outlined in conferences held under a political-level initiative of U.N. member states to form a working group that strives towards the disarmament and reintegration of children taking part in armed conflicts and to further the U.N. General Assembly Resolution from 1996[22] which created the *Special Representative for Children and Armed Conflict*. From this stage, the UN Security Council cataloged the recruiting of children bellow the age of 18 to take part in direct armed conflict as a *threat to peace*[23] and going even further as to incorporating it in the Rome Statute of 1998, through which the International Criminal Court was created, to make child recruiting a *war crime*.

The Security Council also considered that struggle against the usage and recruiting of children to be a high issue that will always be in the attention of the UNSC and the Secretary-General of the U.N[24] and starting with 2014 the UNSC started a campaign entitled *Children. Not Soldiers* to end military recruiters from going to schools to influence children into joining the military[25].

Unfortunately, as the *Drone* documentary proves, governments did not follow-through with the UNSC resolution to reduce military recruiter presence in schools and even went further as to request that the

[15] Philip Alston and Hina Shamsi, 'A Killer above the law', The Guardian, 2.08.2010.
[16] Tom Breakwell, Documenting the next generation of drone pilots, Vice, 6.10.2014.
[17] Michael B. Reagan, US Military recruits children: America's Army videogame violates international law, CommonDreams.org, 26.08.2008.
[18] Amanda Kooser, Red Cross: penalize war crimes in video games, Cnet, 4.10.2013.
[19] ICRC, New video game contest promotes respect for health-care personnel and facilities, 17.10.2014.
[20] Wearenotyoursoldiers.org, Why is the U.S. military pushing K-12 students to build drones in dayton?, 22.07.2014.
[21] Paris Principles and Commitments – guidelines on children associated with armed forces or armed groups, February 2007.
[22] UNGA A/RES/51/77.
[23] UNSC Resolution 1314.
[24] UNSC Resolution 1379.
[25] UNSC Resolution 2143.

Playstation generation be moved from the bedroom/living room to the frontlines against terrorism[26]. The former drone deputy commander in the RAF considers that current pilots suffer from fatigue and stress and as such a younger generation needs to take the lead in the fight against terrorism, since most of them are acquainted with the drone interface and controls from over playing console and personal computer games during their teenage years.

This is further noticeable in the USA where the Supreme Court in 2006[27] ruled that military recruiters will be allowed on school premise only if other groups that promote career orientation are allowed and will not receive extra benefits. This comes at a time when schools were trying to fight the Pentagon's presence on school grounds which sometimes meant that if a school would not allow recruiters to partake in their mission or discriminate regarding sexual orientation, then that school would lose funding. But after 2006, universities and law schools are not allowed to ban military recruiters for this reason, because federal law requires equal access for the military. This issue has been seen in Scotland as well when in 2007[28] teacher unions tried to push out the military out but failed to gather the require momentum to ban the recruiting of minors in schools.

While child protection treaties remain steadfast, governments are trying to find a loophole so that they can recruit potential soldiers into their fold, even if international campaigns and internal opposition is met. This was done by allowing legal interpretations of personal information protection laws to be in favor of national defense interests. For example, in the USA, in 1982 Congress voted on allowing the Department of Defense to establish a data-base of every person who is aged 17 and up as a potential recruit for the military, and also to store that information for up to 3 years[29]. Later on, in the early 2000s, Congress enacted a more forcible language towards schools and universities in the way of forcing them to accept the presence of a military recruiter on school grounds while failure to comply was met with harsh political backlash. Later on, Congress amended the legal documents as to allow parents to decide whether or not their child should be added to the Department of Defense watch list.

In Europe, the United Kingdom is the only government that allows the recruitment of teens in the army, as long as they are at least 16 years old[3031]. This means that they will not see active combat until the age of 18 but until then they will have a supportive role in the regular army. This has been seen as a paradox to the normal European practice, where the minimum age of enlisting is 18 for any role in the regular army.

In this regard it is worrying that children are allowed to join the military branch in Europe, this aspect being noted in the *Concluding observations on the fifth period report of the United Kingdom of Great Britain and Northern Ireland* conducted by the UN[32] and the *Open letter to the Ministry of Defence*[33] *from May 2016* where both UK Parliament members alongside NGOs, teacher and parent unions and the UN request that the UK stop accepting enlisting requests from children that are between the age of 15 and 18 as it contradicts the Convention on the Rights of the Child. Unfortunately, the requests fell on deaf ears since the UK has one of the biggest military presence in the world and is also a permanent Security Council member, meaning that the UK and the USA can legally get teenagers to join the army and also shape them as future military hackers or drone pilots.

4. Conclusions

While most states around the world race to acquire drone technology and the means to build it, the privilegded states such as Israel, U.S.A. and the U.K. have developed enough tech that they require more manpower to use it and maintain it. This means that state will try to find potential manpower in the private sector or try to supplement its lack of manpower by preparing younger generations to take up the role of legal combatants.

This paper has a dual role, first being that to spread awareness of the ongoing practice of recruiting or promoting military carreers to teens or younger audiences and second, to try and outline the constant work that the U.N. has achieved in the struggle to prohibit children from taking part in armed conflicts, yet the political will of certain states comes as counterproductive to the work of the entire U.N. system.

While it is true that the U.N. has certain areas in which it cannot intervene as much as it should, the peer preasure it can create could later on force states to adopt a certain conduit that is moral and on par with democratic states. Other than the U.N., only NGOs and other working groups can deter the ongoing child recruitment mechanisms and stop exposing them to military opportunists.

[26] Patrick Wintour, RAF urged to recruit video game players to operate Reaper drones, TheGuardian, 9.12.2016.
[27] Rumsfeld v. Forum for Academic and Institutional Rights, Inc. 547 US 47 (2006) – USA Supreme Court.
[28] BBC, Teachers vote for army school ban, 8.06.2007.
[29] David F. Burrelli, Jody Feder, Military recruitment on high school and college campuses: A policy and legal analysis, Congressional Research Service, 22.09.2009.
[30] There are 16 more other states in the world that have the same regime, but sadly most of them are considered to be autocracies or rogue states.
[31] As seen on the UK Army website: http://www.army.mod.uk/join/How-to-join.aspx.
[32] UN CRC/C/GBR/CO/5 – 12.08.2016.
[33] Member of the UK Parliament – Penny Mordaunt, 23.05.2016: https://www.child-soldiers.org/news/open-letter-to-the-ministry-of-defence.

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JUSTICE AT THE CROSSROADS: BETWEEN THE MAINTENANCE OF THE COOPERATION AND VERIFICATION MECHANISM AND ITS RAISINGS

Florin STOICA*

Abstract

Although it is a highly debated topic, Report of the Cooperation and Verification Mechanism for the judiciary (CVM) is a taboo subject, stirring both political forces and judicial institutions in Romania. Even though progress over time are notable we have to analyze how useful is this instrument for judicial independence and our system has achieved the necessary maturity. Romanian judicial reform can continue or not with the Cooperation and Verification Mechanism, is the biggest topic of debate.

Keywords: *Report, Judicial institution, Political forces, Reform, organization, progress*

1. Introduction

During the ten years since the establishment of the Cooperation and Verification Mechanism (CVM) of justice, Romania has made notable progress in reforming the judiciary and fighting corruption, which allowed a better, even acid alignment with European legislation, policies and programs.

In its most recent report of the European Commission, submitted to CVM for Romania on January 27, 2017, the results of the work of authorities is mentioned again, referring to both the executive system and also to the legislative and judiciary systems. Although compared with previous years', report identified progress in various areas, the judiciary and fight against corruption remain a problem for Romania, that would give rise to rather justified or not so justified major movements of civil society.

The last report[1] published can be considered as a positive one, as noted also by the Romanian authorities. Although this would broadly be the third positive report, all of these might have a common point, which would be that lawmakers are being criticized especially when it comes to protecting a colleague's legal problem. Several problems persist, but have reduced acuity, compared to the debut of this monitoring. The report highlights internal affairs issues from multiple points of view.

Under this mechanism, the European Commission has committed to assist Romania to remedy the shortcomings in the judiciary system, and to periodically check progress compared to the four benchmarks set for judiciary reform and the fight against corruption. For CVM to accomplish the purpose of establishing or monitoring the progress level of Justice and Home Affairs, European Commission prepares annual reports, which analyze developments and make recommendations to improve the four chapters.

The Commission also pointed out that CVM continue to play an important role in Romania, being a driver of reforms and encouraging to maintain the consistency of results. But also, internal voices continue to question whether the level of growth and progress could continue without this instrument of coercion to be started.

In the Maturity of the Romanian society, the reorganized institutions could not continue its journey without CVM analyzing their activity. Thus, in our study we will go through the last report and through the noted progress so that we make a comparative analysis of the reform in justice dating back to the first established reports to present times. Also, this study comes to enlighten the dispute between the supporters and the contesters of these reports.

2. Content

Even though Romania became a full member of the European Union, with effect from 1 January 2007, at the same time, the European Commission established, the monitoring of the judiciary system and Home Affairs Chapter. The justification for this monitoring would be that at that time in Romania there could be identified certain shortcomings in the area of justice reform and in the fight against corruption. The reasoning WHY was that, these deficiencies could hinder the effective application of legi lation, policies and programmes of the European Community. Such a Mechanism is set up for cooperation and verification by decision No.2006/928/EC of 13 December 2006.

Reference objectives have been established under the same legislation, both for Romania and Bulgaria[2]. These are being tracked by the European Commission and after its fulfilment this would lead to the removal of the monitoring process.

4 reference targets were instituted for Romania: the strengthening of the capacity and the liability of the Superior Council of Magistracy , by ensuring greater

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[1] http://europa.eu/.

[2] Decision no. 2006/928 / EC of December 13, 2006.

transparency and enhanced efficiency of Justice (1); the establishment of an integrity agency with responsibilities relating to the verifying of wealth, potential incompatibilities and conflicts of interest, leading to the application of dissuasive sanctions (2); removal of highlevel corruption (3); Elimination of corruption at the level of local administrations (4). The Commission shall produce annual reports through which it examines, monitors and makes recommendations for the four goals.

The first report was issued in June, 6 months after the completion of the procedures for integration emphasizing that: "Romania has amplified its efforts, at the highest levels, in the fight against corruption. Even if these efforts are recognized, there is still a lot left to be done. The progress realized in this short period of time from the begining of the cooperation and verification mechanism is still insufficient[3]". Thus, starting with the first reports, experts stressed on the need of stronger institutions for figthing against corruption and the deeply rooted problems of the system.

The experts recommended a clearer legislation in the field of anticorruption and respect of the separation of powers, leaving aside the political implications in the judiciary. Therefore, the first report's conclusion was that "overall, Romania has made some progress in the reform of the judiciary", but "the progress made in the field of treatment of high-level corruption is still insufficient[4]."

Second report of the European Commission, published in 2008, examines the first year of accession, and concludes that Romania has continued to make efforts to remedy deficiencies but these are pretty insignificant especially in key areas, such as in the fight against high-level corruption, compelling results have not yet been made. The Genereal Directorate against Corruption started to have positive results, but still weak in relation to the seriousness of the problems.

Within this report, the concern that lawmakers change the law in favour of the defendats was noted for the first time. Thus, we do so by reference to the law which provided the changes in investigation and prosecution of criminal trials. This bill of law which stipulated, inter alia, the limitation of prosecution to 6 months, the authorization of the search, registration or interception of communications only by previously informing the suspect, and fraud with prejudice of up to 9 million euro would have been considered a minor offence, with a maximum penalty of five years in prison. In conclusion this report points out the danger which Romania would be subject to and the effects that these changes would have in relation to foreign partners, especially in the case of joint investigations, with the Member States, the fight against terrorism and the prosecution of cross-border crime[5]".

The 2009 report represents the moment that CVM gave the solution of accelerating the process of criminal trials.

By the time of the 2009 report, one of the greatest problems was the length of the criminal trials, many of them culminating after the prescription has passed, and the main cause was the discontinuation of the criminal process led by exceptions of unconstitutionality. So until the resolution of the Constitutional Court, the trial would stagnate, and the frequency of these exceptions was quite high. It became an excess of a procedural nature, and European experts recommended the legislature to amend the law of the functioning of the Constitutional Court, in order to eliminate these situations. But not only these excesses were the cause of the delay in the criminal procedure, thus, the experts also identified excesses of a procedural nature which involved invoking the exception of illegality.

The recommendations in this case involved the limitations of such situations by modifying the law[6].

The first totally negative report was from 2010[7]. However, the only positive outcome was the work of DNA.

Although there were no huge performances, DNA held the best record of the supervised institutions. The performance of this institution consists of a growing number of high-level corruption cases, arraingments and the number of court final judgments.

In what concerned the rest of the established targets, the European Commission stated massive deficiencies. Experts stressed on the lack of political commitment in supporting the reform process and the lack of cooperation between the parties in the judiciary system.

The report published in 2011, can be briefly described as a negative one, especially from the point of view of confiscating the proceeds of crime. Thus, experts stressed on the fact that "the effectiveness of the fight against corruption is affected by the existence of serious problems in the system of recovery of the proceeds of crime. In Romania, assets obtained illegally are seized to a very small extent, mainly because of the limited possibilities for confiscation as provided by law, judicial restrictive practices and lack of proactive behaviour of the criminal investigation body[8]". In the same report there were also outlined notable pozitive results about the efficiency of court proceedings.

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[3] Final Report 27.6.2007 COM (2007) 378 from the Commission to the European Parliament and the Council on progress on accompanying measures in Romania after accession page 7.

[4] Ibidem 4 page 6.

[5] Progress report Romania July 2008 [COM(2008)494],Technical update Romania July 2008 [SEC(2008)2349] pag5.

[6] Progress report Romania July 2009 [COM(2009)401], pag 3.

[7] Progress report Romania July 2010 [COM(2010)401], Technical update Romania July 2010 [SEC(2010)949], pag 11.

[8] Progress report Romania July 2011 [COM(2011)460], pag 7.

Maybe the toughest report yet, was the report published in the year 2012, which highlit the acute political crisis in Romania that affected the rule of law. In this report, Romania is criticized in extremely tough terms. Thus, the Commission emphasized: "... Challenging the judicial decisions on a political level, undermining the Constitutional Court, overturning established procedures and removing the key mechanisms by which the powers of the State controle other subsequent powers, question the Government's commitment to respect the rule of law and independence of the judicial system[9] ".

This report mentions for the first time the press and its role in shaping public opinion, but also high pressures laid against judicial institutions.

The conclusions of this report note that "in some important areas, the changes occurred primarily as a result of external pressure. The fact that it takes an external pressure raises questions about the sustainability and irreversible state of the reform, emphasised in the context of recent events[10]".

The report also criticises the opposition from political actors to give the consent for DNA to commence the criminal proceedings of politicians[11].

The report given in 2013 is also a report of media harassment campaigns and pressure on justice. Such political chaos generated in 2012, have prompted the issuance of a report after 6 months, not after one year as it used to be. This report is characterized by hardness, in terms of critisism brought to political people and the media, which could be accused of partisanship or even manipulation. The work of the National Council of the Audiovisual sector has been the subject of analysis and criticism. European experts have delivered this report on the basis of numerous complaints from the people affected by such slippage.

European experts note the media pressures on the justice system and looked concerned by the effectiveness of the surveillance activity carried out by the National Audiovisual Council. Among the recommendations issued by the European experts was the need to review existing rules in order to ensure that press freedom is accompanied by adequate protection of institutions and fundamental rights of persons, and to provide effective remedies.

Also of great concern was the report from 2014, by which events from 2013 were analyzed. European experts had in mind two important subjects: the one where the Government, at that time, suddenly changed people with others in key positions from DNA without any transparent procedure for selecting and the episode dubbed "Black Tuesday".

Thus in the context of the report, the experts note: "on the basis of the CVM reports published so far it can be seen that progress was not easily obtained, and something obtained in an area may be restricted or denied by the setbacks in another area. In December 2013, Parliament's actions have demonstrated that the principles and objectives of the reform continue to be put to the test, for those principles to be reiterated, the intervention of the Constitutional Court was necessary[12]".

One of the actions that led to this harsh analysis was the problem of temporary appointments of Deputy at DNA, which were revoked, and the appointments made by the Minister of justice were lacking in transparency. The report examined procedures including those proposed in the second wave of appointments and linked DNA's decisions with the critisism invoked by the politicians.

Experts have made a broad analysis of the events of December 2013, known as "Black Tuesday", when there changes brought to the penal code by the Parliament without a debate or public consultation. The purpose of these changes was clear, namely removing MP's from the scope of the legislation applicable to the offences of corruption, as taking bribes, trafficking influence and abuse of Office. In other words the activity of the institutions fighting against corruption were elluded.

After the many negative reports in the year 2014, the first positive report was published. Obviously, it contains exceptions, namely those relating to Parliament's decisions.

The year of 2014 culminated with the entry into force of the New Codes[13] (criminal law and criminal procedure), and the European Commission welcomed the manner by which the jurisdictional system "adopted" rapidly the two institutions namely the judge of preliminary room and judge of rights and freedoms. This represent the success of major institutions: Ministry of Justice, the High Court of Cassation and justice (HCCJ), CSM, the Public Ministry and the National Institute of Magistracy (NIM).

However, these positive results, as the Commission stated, have been overshadowed by Parliament, through the rejection of requests from DNA to investigate and arrest various members of the Parliament. European experts noted the answer of the Parliament as arbitrary and without any objective criteria.

The Commission noted positively the rejection of the draft law on amnesty that would have protected from lawsuits or investigations, the corrupt politicians, but also drew attention to the danger that this situation would lead.

The best report on Romania is the one published in January 2016. It is considered to be most appreciative report addressing justice in Romania. The character of the work is appreciative of the structures in

[9] Progress report Romania July 2012 [COM(2012)410], pag 6.
[10] Ibidem 11, pag 8.
[11] Progress report Romania 2013 [COM(2013)47], pag 3.
[12] Progress report Romania 2014 [COM(2014)37], pag 5.
[13] Progress report Romania 2015 [COM(2015)35], pag 3.

the field of judiciary which is regarded as "a sign that the underlying trend regarding the independence of the judiciary is positive and that any person who commits an offence is not situated above the law"[14].

As in my previous article[15], the European Commission has noted both positive and negative results, but it has thus been made reference to the fact that in 2015 there were more and more critical voices against the Magistrates "expressed by politicians and in the media, and the lack of respect for judicial decisions ", these have included high-ranking officials. In 2015 one-third of the applications made by DNA to waiver immunity of some MPs in order to allow the initiation of investigations or enforcement measures of preventive detention, were dispelled by the Parliament.

So if in the Commission's MCV Reports on 2014, 2015 and 2016 we could highlight a trend and a positive balance sheet that indicates significant progress and increasingly irreversible nature of reforms implemented in the framework of CVM, in the year 2017 report notes that a number of key elements cannot be considered as being fulfilled. This positive trend was reconfirmed also in 2016, by analyzing the institutions of the judiciary which are in interdependence with the political changes. Therefore, during the 10-year follow-up, if you should compare the institutions and the judiciary since its debut in 2007, this year, we find an impressive evolution, even if in different periods the progress has been hindered, the reference objectives appear to be achieved.

2.2. The Analysis of the 4 goals of CVM report, achieved through the prism of the last report.

As mentioned above, even if they are amazing improvements in the 10-year follow-up, the European experts identified a number of key issues, whose evolution has been quite slow, and that according to the previous reports remained unresolved. Thus, the present report cannot conclude that the reference objectives are, at this stage, to be fulfilled in a satisfactory manner. The number of referrals is very limited, which is why their fulfillment will result in closure of the provisional reference individual goals and, subsequently, the CVM.

Thus, these key recommendations refer to the concentration of responsibilities and accountability required by the Romanian authorities and internal guarantees which are necessary to ensure the irreversible character of the results. Irreversibility will be supported through the development of mechanisms of reporting and accountability after the completion of the CVM.

European experts have the oppinion that the objectives can be met through monitoring CVM recommendations in the report and after picking up this tool, through the development of other procedures. However the speed of the process will depend on how quickly Romania will be able to accomplish them irreversibly and to avoid negative developments that put into question the progress that has been already made. Thus, even the small influence on low deficiencies can lead not only to progress of the mechanism but also to its transforming into a simple monitoring of the results. Though, to go beyond this step Romania must act to implement the recommendations contained in the final report.

As the Council repeatedly note[16], CVM can be removed when all four reference targets that apply to Romania can be considered as fulfilled in a satisfactory manner. The reference objectives pursued are those defined at the time of accession and those that cover essential aspects for the operation of a Member State-the independence and effectiveness of the judiciary, the integrity and the fight against corruption.

Although the reference objectives are independent, there are also important interconnections, which have an impact on their fulfilment. Benchmarking involves the analysis of structural conditions (such as laws, institutions and resources), of the results and their balance sheet with the possibility to consider that the advances are irreversible.

2.2.1. The judicial process

As the prime objective of reference we can identify as being the judiciary. This goal was meant from the beginnging, to be an independent system, impartial and efficient, based on strengthening the consistency of the judicial process, as well as improving transparency and accountability. Thus, experts note substantial institutional and normative progress. The Superior Council of Magistracy (SCM) has established itself as a manager of the judiciary and has demonstrated its ability to fulfil its constitutional role, particularly in regard to defending the independence of the judiciary, an essential role.

So during the year 2016, public perception of judicial independence and confidence in the judicial system has gained credibility[17]. Just as in other reports it was found there were shadows cast from this trend: attacks from politicians and the media, and directed against the magistrates and judicial institutions. In 2016 the attacks against the National Anticorruption Directorate were quite virulent.

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[14] Progress report Romania 2016 [COM(2016)41], pag 7.

[15] Florin Stoica, Phd Candidate „The evolution of Romanian Judicial System seen through the last monitoring report" în Proceedings-ul Conferinței Internaționale Challenges of the Knowledge Society-CKS 2016, 10th Edition, May 20th -21st, e-book, "Nicolae Titulescu" University Publishing House, Bucuresti, ISSN 259-927, ISSN-L 2068-779, pag.497-502.

[16] Conclusions of the Council of Ministers, October 17, 2006 (13339/06); Commission Decision establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in certain areas of judicial reform and the fight against corruption, December 13, 2006 [C (2006) 6569 final].

[17] Scoreboard EU justice in 2016 COM (2016) 199 final, graphs 48, 44 and 46. The survey in April 2016 showed a 60% confidence very high and high DNA. http://www.inscop.ro/wp-content/uploads/2016/04/INSCOP-raport-martie-2016-INCREDERE-INSTITUTII.pdf.

Even if we note the performance of the system, European, experts identified some negative aspects such as balancing the workload of different Courts and sections within the same Court, such as the method of finding solutions regarding the discrepancies between the workload of the big courts and of the smaller ones, and the distribution of tasks between judges and clerks. Legislation in this area has not progressed in 2016, and simple management actions could not provide a solution to solve these problems.

A major breakthrough in this chapter may be established by the fact that at present all the tools are available for monitoring the functioning of the courts and of the human resources situation and the fact that there is a comprehensive strategy for the development of the judicial system by 2015-2020.

Regarding the appointment of magistrates, especially for the highest roles, the year 2016 was a key one. Although the appointments made did not register issues of professionalism or integrity,the process used did not allow the introduction of clear procedures, that are open and transparent to select all candidates, to strengthen in a fixed and permanent system[18].

With regard to reforming the administration of the judiciary, the SCM(CSM) is responsible for professional and disciplinary punishment of deviations of the magistrates, and the Commission notes that the decision-making chain seems to have become more predictable and consistent.

Another point in the analysis is the one relating to legislative reform, so Romania has adopted and implemented the new civil code and the new penal code, and the related codes of procedure,in order to modernize the material right and improve the effectiveness and consistency of the judicial process. These major reforms may be considered to be almost completed. However, the completion of these reforms, as foreseen in the report's recommendations on 2016, has shown a degree of difficulty, and presents a number of deficiencies. On the civil side, the civil code and the code of civil procedure, the provisions of which have necessitated new infrastructure have been deferred successively, suggesting deficiencies at the level of planning.

For the criminal side, respectively for the criminal code and the criminal procedure code, the inward processing procedure by decisions of the Constitutional Court has proved difficult, and developed a surprising approach from the Parliament. The Constitutional Court through its decisions has imposed a number of changes to both the penal code and the code of criminal procedure by the Government, but unoperated changes by the end of the year 2016. The proposals put on the table seemed that weaken the anticorruption struggle, even though they were not adopted.

The role of the Constitutional Court continued to be important and to maintain the independence of the judiciary and through its decisions, sought to provide solutions to problems linked to the balance of powers and respect for fundamental rights which could not be resolved solely by the judiciary. Of the 12 decisions in 2016, most were common criminal provisions that have been taken to comply with the European Convention on human rights.

At the time of accession a major problem constituted in the absence of recurrence of such judgments, MCV's 2016 report found signs of shifting cultural paradigm in terms of consistency within the judicial system. The Commission has adopted successive recommendations in 2014, 2015 and 2016 on the subject, which was recognised as a structural deficiency also by the ECHR[19]. Such a trend observed during the year 2016, is setting up the new National Agency of managing Preserved Property.

As a conclusion concerning the objective number 1, Romania recorded substantial progress with respect to the objective reference no. 1, but nevertheless insufficient to be able to consider this task completed. More such efforts are needed to demonstrate a positive balance in certain areas, such as respect for the independence of the judiciary in Romania's public life, completing the reform of the criminal code and civil code, and ensuring efficiency in the execution of judgments by all those concerned.

2.2.2. The integrity and the National Agency for Integrity

The second goal of reference set up by the mechanism of verification and cooperation, refers to the establishment of an integrity agency with responsibilities in the field of verification of assets, incompatibilities and potential conflicts of interest, and with the power to adopt binding decisions which may lead to the application of dissuasive sanctions. Romania currently has a comprehensive legal framework in the field of integrity for public officials, and the National Agency for integrity is recognized as an independent institution which implements those rules. The upcoming changes regarding ANI, include a new tool, the system PREVENT ex ante checks of public procurement, whose legislation was completed in 2016. That legislation will have to include all conflicts of interest as defined by the new law.

As an overview, it can be said clearly that Romania has made progress in terms of reference objective No. 2 and it can be considered that the National Integrity Agency is an institution essential to the system. This was demonstrated by the fact that in 2016 it has been entrusted with the development of the system PREVENT, a system that will deal with ex ante

[18] Technical Report, Section 2.2.

[19] Săcăleanu (joined cases) 73970/01: Failure to perform or delay by the administration or by the legal person under the responsibility of the state to the judgments of national courts. In December 2016, the Romanian authorities submitted to the Council of Europe Action Plan. https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806d8adb.

checks on conflicts of interests in the public procurement, whose functioning will have to be demonstrated in 2017. Also, the Agency has a key role in the national Anticorruption Strategy 2016-2020 in preventing corruption.

2.2.3. Combating corruption at high level

The objective reference number 3 refers to the objectivity and professionalism with which the case of accusations of high-level corruption are being treated.

The Commission considers that the phenomenon of corruption is a deeply rooted problem in society, with consequences for both the system and the economy. This issue is identified as a major problem in Romania both in polls[20] and in Euro barometer concerning CVM[21].

CVM reports along monitoring have remarked a positive character, the steady growth in terms of investigation and prosecution in cases of high-level corruption, and delivery of judgment in such cases with a clear acceleration after 2011. The Commission noted the solidity with which institutions involved in investigating and prosecuting cases of corruption at high levels and in the delivery of the judgment in such cases. Thus the completion of such cases have led to these positive results.

National Anticorruption Directorate's activity is broad and involves investigating a large number of cases and thus submitting each year to sue hundreds of people accused of corruption in the medium and high level. The activity is then transferred to the High Court of Cassation and justice and the courts of appeal, who judge final convictions in a huge number of corruption cases at high and middle level,. Later on, a positive activity is recorded in the purpose of confiscation of the goods to recover the damage caused by the offences of corruption. The Balance sheet of activity is steady and 2016 and proves their professionalism and independence. However, the repetition of some similar offences demonstrates that corruption prevention measures have not been effective.

During the monitoring, the Commission stressed on the link between the effectiveness of anticorruption activity and reaction of media and the political class. In 2016, the political class continued to bring public criticism towards some magistrates and to the justice system in general.

Another recurring problem noted by the report of CVM is the absence systematic approach which could explain denials to lift parliamentary immunity to allow investigations or preventative measures. As in the case of the other targets although they were recognised by the Commission for substantial progress, the third objective reference cannot be removed.

2.2.4. Combating corruption at all levels

The fourth benchmark considered in our analysis is considering additional measures to prevent and fight corruption, in particular within the local administration.

Although aperent harmless corruption on a small or medium level, is also on the table analysis of European experts. This type of corruption is a real flaw in the public system, because it can have consequences for the economic and social development of Romania. Such an area where the emergence of this phenomenon is particularly destructive for investments, is procurement. Another area where corruption has serious consequences is health. The solutions identified in this case are prevention and proactive approach of the government to block opportunities for corruption.

Commission recommends accelerating progress in asset recovery, which will be certified by the National new agency to administer seized property (ANABI), which began operating in January 2017.

Experts welcome the habbit of prioritizing the prosecution of corruption at lower level that became part of the prosecution activity and remains a priority for them. Also recommended, are additional measures to remedy this problem. In order to simplify this procedure the national anti-corruption strategy was developed, which is the central tool for preventing corruption in the public administration at national and local level.

Although previous anti-corruption strategies have generated slow progress, the Government adopted a new anti-corruption strategy 2016-2020 in August 2016, seeking, in particular, specific measures to address identified deficiencies. However what characterizes this strategy is the possibility that it will implement the measures effectively in all sectors, especially at the local level, where many observers see the risk of corruption as particularly high.

Although anticorruption measures, were introduced by successive executives and there have been made intensive efforts, noted by experts of the European Commission towards achieving the fourth benchmark, even this objective can not be regarded as fulfilled. Impediments consist of the implementation of preventive policies defined recently.

2.2.5. Main recommendations

European experts believe that the reform should continue following same process, and internal safeguards must be further strengthened in order to ensure the irreversibility necessary for meeting the benchmarks satisfactorily.

The Commission makes recommendations on appointments, thus it shapes the implementation of a clear, objective and independent system of appointing senior prosecutors, based on clear and transparent criteria, with appeal to support the Venice Commission.

[20] Flash Eurobarometer 428: Business and corruption, http://ec.europa.eu/ COMMFrontOffice/PublicOpinion/index.cfm /Survey/getSurveyDetail/instruments/FLASH/surveyKy/2084 available.

[21] *Flash Eurobarometer 445: "Cooperation and Verification Mechanism for Bulgaria and Romania", published on January 25, 2017.*

As a persistent problem throughout the 10 years of monitoring reffering to respect for the judges and compliance to judges and the judicial process, the Commission's recommendation for a code of conduct for parliamentarians to provide clear provisions on mutual respect between institutions and to specify clear that parliamentarians and parliamentary process must respect the independence of the judiciary. Such a Code of Conduct similar could be adopted for ministers.

Recommendations on judicial reform at the end of the present phaze of reforming the penal code and establishing an action plan to complete the remaining provisions of the civil code, involving all the actors leading the judiciary. At the same time, experts recommend to further improve the transparency and predictability of the legislative process. Thus, the decision-making process, the Government and Parliament should ensure full transparency and take due account of consultations with the relevant authorities. Consultations will be conducted also with other interested parties in related legislative activity codes, anticorruption laws, laws on integrity (incompatibilities, conflicts of interest, illicit wealth), the laws of justice (on the organization of justice). Institutional transparency for the year 2016 is given as an example of good practice[22].

Regarding the issues of consistency of judgments, the Commission recommends the further use of appeals in the interests of the law and the preliminary questions.

As shown in the reference number 1 objective, observance and enforcement of judgments is part and parcel of judicial efficiency[23]. The Commission's recommendations relating to the implementation of an appropriate action plan to remedy the dispute over the execution of judgments and the application by the Government of the case law generated by the courts, as well as the establishment of an internal mechanism for monitoring aimed at fulfilling this plan. Experts stress the importance of the implementation of the plan as well as the development of the role of judicial institutions.

European experts also stress on the importance of the implementation of the PREVENT system, and on the introduction of a practice of drawing up reports of ex-ante verification for checks carried out by the National Agency for integrity and National Agency for public procurement.

For benchmarks 3 and 4, on Fighting corruption, commission issued recommendations on the adoption of objective criteria for taking decisions and reasons for these decisions in order to waive the immunity of parliamentarians, to ensure that immunity is not used to avoid investigation and criminal prosecution offenses of corruption.

In developing such measures the executive will ask for help from the Venice Commission and GRECO[24]. It also recommends the establishment of a reporting mechanism decision on immunity. It is also recommended that the implementation of the National Anticorruption Strategy, remains within the deadlines set by the Government in August 2016, but also making the of the National Agency of Seized Goods fully operational.

2.2.6. Criticism of Annual CVM Report

Reffering to the last report, there is a lot of criticism coming from socio-professional categories directly involved in the judiciary. Thus, Magistrates Association in Romania noticed that the system's evolution is analyzed only in terms of fighting corruption, the involved few institutions are the only ones which have such an activity assigned. Similarly, when referring progress in fighting high-level corruption, report covers only the DNA and Î.C.C.J. (High Court of Justice) (In that order!), With a focus on "independence or effectiveness of DNA", forgetting the role of appeal courts and other courts. The report could also be criticized that "excessive workload of the courts", which continues to 'strike the consistency of judgments "and" additional obstacles related to more general aspects of the legislative process "are not so comprehensive so that ther shape a clear picture of the realities of the judiciary or deepen the problems of this system[25]. The Association criticizes the lack of realism about the role of SCM, which is, as emphasized in the report, disconnected from the profession. One of the arguments is the lack of references to protests of the magistrates. The Magistrates Association press release indicates infrastructure problems that prevent real efficiency of the judicial system. But also the lack of transparency in data collection for processing the monitoring reports. In other words, magistrates do not dispute the evolution of the Romanian judicial system but they deny only the embellished results.

In the light of developments in the system, presented above, but also taking account of the critical positions of professionals in the field, we could ask ourselves if this tool has been useful, if it is still useful and whether developments in the Romanian judicial system would also be recorded without a coercive tool. The alignment of policies, legislation and programmes of the European Community would have been possible without the establishment of a mechanism for cooperation and verification of the internal affairs and justice. Those problems that were monitored could have put at risk the economic development, but a package of measures and a series of internal institutions could successfully replace the terror of this instrument.

[22] Progress report Romania 2017 [COM(2017)44], pag 9.

[23] Guidelines on Article 6 of the European Convention on Human Rights - Right to a fair trial (civil size) http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf.

[24] Group of States against Corruption (GRECO) was established in 1999 by the Council of Europe to monitor compliance with the organization's anti-corruption standards.

[25] Press release of the Association of Magistrates of Romania no. 10 / 01.28.2017

However, the notable results obtained and the remaining of small issues to be rectified, might justify a lifting of this monitoring. Also, the latest report underlines this. The evolution of the Romanian judicial system is consistent with national and international legislation, and it follows its course, benefiting from technical and logistical means of the present times.

4. Conclusions

Latest reports of CVM Commission, namely in the years 2014, 2015 and 2016 are characterized by a tendency to positivity as indicated by the notable progress achieved by reforms implemented under the CVM. The result of successive monitoring, acquires irreversibility through active involvement of judicial institutions. Although during the 10 years of developments in the CVM there were periods when the reform had reduced speed, Romania recorded major progress towards meeting the benchmarks contained in the CVM.

Amid these major advances, a number of key issues identified in previous reports remain unresolved and this is the reason that we can not conclude that the benchmarks are, at this stage, carried out in a satisfactory manner, in order to remove this instrument. The latest report can identify a small number of key recommendations to reach provisional closure of individual benchmarks and subsequently MCV process. Most of the key recommendations relate to ensuring the irreversibility of the results, which is reached by imposing responsibility and accountability imposed by the Romanian authorities. This will be supported also by further development of the reporting mechanisms and the mechanisms to ensure accountability after closing CVM. So meeting these key recommendations will result in lifting after the next monitoring this instrument for monitoring and verification, but the speed at which the tasks will be carried through will depend on making these results permanent. Besides that, the negative developments should be avoided in order not to be left questioning the progress. However, the report for 2017 will have to contain entries reported by magistrates, in order to ensure transparency and objectivity.

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CONFLICT OF INTEREST IN ADMINISTRATIVE LAW

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Abstract

We are currently witnessing, on the one hand, new forms of relationships between public and private sector, such as public-private partnership agreements, concession agreements, etc. and on the other hand, the expectations of citizens towards public authorities are increasingly higher in what concerns the lawfulness and transparency of their activities in terms of protecting citizen's interest.

Therefore, in this study, we aim to analyze how the conflict of interest is regulated within the area of the administrative law and to present the new conception of the lawmaker in what concerns this topic, taking into account the European tendencies.

Keywords: *conflict of interest, public procurement, integrity warning, the National Integrity Agency, SEAP (Electronic System for Public Procurement)*

1. Introduction

In administrative law, public interest takes precedence over particular interest and the subjects of the administrative relationships[1] are in a position of legal inequality. The law should be constantly changing, adjusted to the economic realities and should protect the citizen. Legislative inconsistency weakens citizen's confidence in public authorities.

The conflict of interest, as provided by the legislation in force has a double regulation, oscillating between criminal law and administrative law. This study mainly aims to present the status of the legislation on the conflict of interest. Since the law is meant to reconcile the aspirations of the justice with the demands of the society, the presence of the judge in the area of the law is absolutely required[2].

According to Decision no. 390 of July 3rd, 2014[3] of the Constitutional Court, a legal concept can have a content and autonomous meaning, different from one law to another, provided that the law using the respective term defines it. Therefore, in our opinion, this is a potential explanation of the fact that the concept of conflict of interest from the criminal law is different from the concept of conflict of interest from the administrative law.

As recently stated in a paper, the doctrine and the judicial practice[4] played an important role[5] in the activity of the European Communities and of the European Union itself. In connection with the aforementioned, this study mainly aims to present the status of the legislation on the conflict of interest and then to add the point of view of the doctrine and the case law on this topic.

2. Content

2.1. The concept of conflict of interest in the criminal law

The offense of conflict of interest was provided by Criminal Code of 1969 by Law no. 278/2006 for the amendment and supplementation of the Criminal Code[6] (...) in art. 253¹ Criminal Code and currently[7] it is provided by art. 301 of the Criminal Code[8] in force.

Art. 301 of the Criminal Code defines in para.(1) the conflict of interest as being „the conduct of the public officials who, while carrying out their professional duties, committed an act or participated in making a decision that resulted, directly or indirectly, in a material gain for themselves, their spouses, for a relative including second level relatives, or for another person with whom they were in trading or labor relationships for the past 5 years or

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[1] For other details on the administrative law relationships, see M.C.Cliza, *Drept administrativ Partea I*, Prouniversitaria Publishing House, Bucharest, 2010, p.53, stefanelena@univnt.ro.

[2] Elena Anghel, *The reconfiguration of the judge`s role in the romano-germanic law system*, in LESIJ.JS XX – 1/2013, Pro Universitaria Publishing House, Bucharest, 2013, pp. 65-72.

[3] Decision no. 390 /2014 of the Constitutional Court, published in the Official Journal no. 532/2014.

[4] In what concerns the practice of the European Union Courts, see Roxana-Mariana Popescu, Influenţa jurisprudenţei Curţii de Justiţie de la Luxemburg asupra dreptului Uniunii Europene – case study: the concept of „charge having equivalent effect to customs duties, Revista de Drept Public, no.4/2013, Universul Juridic, București Publishing House, indexed SSRD, pag. 73-81 and Roxana-Mariana Popescu, Features of the unwritten sources of European Union law, Lex et Scientia, International Journal, no.2/2013, Pro Universitaria Publishing House, pg. 100-108.

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[8] Law no.286/2009 on the Criminal Code, published in the Official Journal no. 510 /2009.

from whom they had or have benefits of any nature and shall be punishable by no less than 1 year and no more than 5 years of imprisonment and the ban from exercising the right to hold a public office".

In this context, we reiterate a fact which has already been stated in a paper, according to which, the principle of lawfulness in the activity of the justice concerns two important aspects: the lawfulness of the courts and the lawfulness of criminal offenses and penalties[9]. The mandatory nature of the rule of law is ensured, if required, by the coercive force of the state[10].

The Constitutional Court, by means of Decision no. 603/2015[11] admitted the motion to dismiss on grounds of lack of constitutionality and noted that expression "trading relationships" of art. 301 para.(1) is not constitutional. On this occasion, the Court established that the constitutional standard on the protection of individual freedom requires its limitation to be performed within a normative framework which, on the one hand, establishes explicitly the cases of limitation of this constitutional value, and, on the other hand, provides clearly, precisely and predictably these cases[12].

Given this, the Court notes that the lack of clarity, precision and predictability of expression "trading relationships" of the criticized text makes unclear and unpredictable the conditions of individual freedom restriction, a fundamental right provided by art. 23 of the Constitution.

Furthermore, the discretion of the lawmaker when questioning art. 23 of the Constitution, undergoes a strict control of the Constitutional Court, being therefore a limited one[13]. Taking into account the definition given to the public official for the purpose of the Criminal Code, the public official provided by law no. 188/1999 is always identified with the active subject of the offense of conflict of interest, the concept of public official for the purpose of criminal law being more comprehensive[14], according to Decision no. 603/2015 of the Constitutional Court, previously cited.

2.2. The concept of conflict of interest in the administrative law

In the administrative law, the regulation of the conflict of interest is performed from a different perspective. At the European level, the Organization for Economic Cooperation and Development issued in 2013 the Guidelines for Managing of Conflict of Interest in the Public Service[15]. It is interesting that the guidelines distinguish between three concepts: actual conflict of interest, apparent conflict of interest, potential conflict de of interest.

Therefore, a *conflict of interest* involves a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of the official duties and responsibilities. This definition, according to the Guidelines, has the same meaning as the *actual conflict of interest*, the Guidelines note that a conflict of interest situation can thus be current or it may be found to have existed at some time in the past.

An *apparent* conflict of interest can be said to exist when it *appears* that a public official's private interests could improperly influence the performance of the duties *but this is not in fact the case.*

A *potential* conflict arises where a public official has private interests which are such that a conflict of interest would arise if the public official were to become involved in relevant (conflicting) official responsibilities in the future.

Furthermore, we also mention Recommendation no. 10 (2000) of the Committee of Ministers to Member States on Codes of conduct for public officials which refers in art. 10 to the conflict of interest and takes into account only public officials[16].

Paragraph (1) of art. 10 of the Recommendation provides the following: "Conflict of interest arises from a situation in which the public official has a private interest which is such as to influence or appear to influence the impartial and objective nature of his or her official duties", and paragraph (2): „The public official's private interest includes any advantages to himself or herself, to his or her family, parents, friends or persons or organizations with whom he or she has or has had business or political relations. It includes also any liability, whether financial or civil, relating thereto."

From this point of view, we consider that it would be interesting to analyze the evolution of the conflict of interest by comparing the legislations with strong legal tradition in Europe, as we are aware of the fact that nowadays most legislative changes are transplanted from other legal systems[17].

At national level, the conflict of interest was regulated in terms of administrative law by Law no.

[9] Mihai Bădescu, *Drept constituţional şi instituţii politice*, second edition revised and supplemented, V.I.S.Print, Bucharest, 2002, p. 449.
[10] Roxana Mariana Popescu, *Introducere în dreptul Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2011, p.12.
[11] Decision no. 603/2015 of the Constitutional Court of Romania, published in the Official Journal no. 854/2015.
[12] For a detailed analysis of the values expressed by means of the law principles, see Elena Anghel, *Values and valorization*, in LESIJ XXII, no. 2/2015, pag. 103-113.
[13] Decision no. 317/2016 of the Constitutional Court of Romania, published in the Official Journal no.566/2016.
[14] Decision no. 603/2015, of the Constitutional Court of Romania, published in the Official Journal no. 854 /2015.
[15] https://www.oecd.org/gov/ethics/2957377.pdf., accessed on February 10th, 2017.
[16] Recommendation no. 10 (2000) of the Committee of Ministers to Member States of the Council of Europe on the codes of conduct for public officials, adopted by the Committee of Ministers on May 11th, 2000, during the 106th session, published on: http://cna.md/public/files/legislatie/rec_2000_10_cod_conduita_funct_public.pdf, accessed on February 10th, 2017.
[17] Laura-Cristiana Spătaru-Negură, *Exporting Law or the Use of Legal Transplants*, în proceedings-ul CKS-eBook 2012, Pro Universitaria Publishing House, Bucharest, 2012, p. 814.

161/2003 on certain measures to ensure transparency in the exercise of publicly appointed offices, public functions and in business environment, to prevent and sanction corruption[18]. Title IV of this law is expressly entitled: "Conflict of interest and incompatibilities regime in the exercise of publicly appointed offices and public functions".

Law no. 161/2003 on certain measures to ensure transparency in the exercise of publicly appointed offices, public functions and in business environment, to prevent and sanction corruption defines the conflict of interest in art. 70 as follows: "the conflict of interest means the situation where a person exercising a publicly appointed office or a public function has a financial interest or an interest which can influence the objective fulfillment of the duties incumbent on him or her according to the Constitution or to other normative acts". At the same time, as shown on another occasion, the framework law provides expressly the situations involving conflict of interest for public officials in art. 79[19].

The conflict of interest for presidents and vice-presidents of the county councils or local and county councilors is provided by Law no. 215/2001 on public administration in art. 47 and for mayors, deputy mayors, general mayor, deputy mayors of Bucharest the legislation provides that they are not entitled to issue an administrative act or to conclude a legal act, or to issue an order, in the exercise of the function, which produces a material benefit for themselves, spouses or first level relatives. In case of a conflict of interest, if they are related to the conflict of interest situation, all legal or administrative acts concluded directly or indirectly by intermediaries, under the violation of the legal provisions on the conflict of interest shall be deemed void[20].

The public authority which is competent to check the conflicts of interest was especially established by Law no. 144/2007 on the establishment, organization and functioning of the National Integrity Agency[21]. The action for the annulment of the legal or administrative acts concluded under the violation of the legal provisions on the conflict of interest can be taken by the Agency even if the person in question no longer holds the respective function[22].

On a regular basis, reports are published on the official web page[23] of the National Integrity Agency, on the status of the procedure relating to incompatibilities, conflicts of interest, confiscation of assets, legal liability proceedings, and in this respect court decisions, etc. are published, as well as statements of assets and interests. It is interesting that the National Integrity Agency publishes on the web page the cases of potential conflicts of interest, for example in case of local elected officials specifying the following: criminal and administrative conflict of interest.

2.3. The conflict of interest in the field of public procurement, according to the latest legislative amendments

Throughout 2016 a package of laws was adopted on public procurement and concession. Law no. 100/2016 on the concession of works and services[24] provides expressly the *conflict of interest* in Chapter III - called: *Rules for participation in the award procedure*, art. 42-46. The conflict of interest is defined in art. 43 as follows: "any situation where the members of the staff of the contracting entity who are involved in the performance of the award procedure or who can influence the result thereof have, directly or indirectly, a financial or economic interest or other personal interest which could be construed as an element which compromises their impartiality or independence in the award procedure".

Five situations likely to generate conflict of interest are detailed in this law. Furthermore, an interdiction is provided for 12 month term as of the conclusion of the agreement for the winning tenderer the contracting entity concluded the concession agreement with, namely the tenderer shall not be entitled to conclude any other agreements on service provision, directly or indirectly, for the performance of the concession agreement, with natural persons or legal entities which were involved in the process of control/evaluation of participation requests / tender offers submitted within an award procedure or employees/former employees of the contracting entities the contractual relations of whom ceased after the award of the concession agreement. The penalty for the breach of this prohibition is the rescission or de jure termination of the concession agreement, according to art. 45 of the law. Legal liability enables lawfulness, as the simple confirmation of sanction measures would not be effective if the application thereof did not pursue the restoration of the rights established by law[25].

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[18] Law no. 161/2003 on certain measures to ensure transparency in the exercise of publicly appointed offices, public functions and in business environment, to prevent and sanction corruption, published in the Official Journal no. 279/2003.

[19] Elena Ștefan, *Practica judiciară privind incompatibilitățile publice*, Revista de Drept Public no. 1/2015, p.77-78.

[20] Cristian Clipa, Drept administrativ. *Teoria funcției publice. (I) Raportul juridic de serviciu- noțiune, natură, părți, obiect și conținut*, Hamangiu Publishing House, Bucharest, 2011, p. 352.

[21] Law no. 144/2007 on the establishment, organization and functioning of the National Integrity Agency, published in the Official Journal no. 359/2007, apud Elena Ștefan, *op.cit.*, p.78.

[22] Cristian Clipa, *op.cit.*, p. p. 352.

[23] https://www.integritate.eu/Home.aspx., accessed on February 10th, 2017.

[24] Law no. 100/2016 on the concession of works and services, published in the Official Journal no. 392/2016.

[25] Elena Anghel, *The responsibility principle*, în Proceedings of the Challenges of the Knowledge Society Conference (CKS) no. 5/2015, p. 364-370.

2.3.1. The procedure in case a potential conflict of interest is identified.

The contracting entity shall be bound to provide in the concession documents the name of the persons holding decision making functions within the contracting authority.

If the contracting entity founds a situation which is likely to cause conflict of interest, it shall perform the required procedures in order to establish if the respective situation represents a conflict of interest situation and shall describe to the candidate /tenderer who finds himself in the respective situation, the reasons which, in the opinion of the contracting entity, are likely to cause a conflict of interest.

Furthermore, the contracting entity shall be bound to submit a point a view to the candidate/ tenderer.

The measures ordered by the contracting entity, when establishing the existence of a conflict of interest, for the removal of the circumstances causing the respective conflict of interest are the following:

- The replacement of the persons in charge with the evaluation / control of the tender offers / participation requests, when their impartiality is affected and when possible;
- The rejection of the tenderer / candidate who has relations with decision-making function persons within the contracting entity.

2.3.2. The integrity warning

Law no. 184/2016 establishing a mechanism for preventing conflicts of interest regarding the award of the public procurement agreements[26] is a recent normative act in connection with the subject analyzed by us. The content of the law provides that it shall become effective within 6 month as of the publishing in the Official Journal of Romania and shall be exclusively applicable to the procedures for the award of public procurement agreements initiated after the enforcement of the law.

Law no. 184/2016 establishes the *ex ante* check mechanism in terms of the situations which can generate conflict of interest within the procedures initiated by the electronic public procurement system, so that they are removed without the respective procedures being affected. A *Prevention System* – an integrated computer system for the prevention and identification of potential conflict of interest is established within the National Integrity Agency. The system operates based on the data recorded in the integrity forms registered with SEAP at the time of the performance of the procedures for the award of public procurement agreements and processed by the integrity inspectors, according to the law.

The law introduces a new concept, respectively: *the integrity warning*. Art. 7 of the law details the meaning of the integrity warning. More precisely, in the event the integrity inspectors within N.I.A., following the performed checks, detect the prerequisites of a potential conflict of interest, they shall be bound to deliver the integrity warning issued by the *Prevention System*, within no more than 3 business days as of the receipt of the filled in form, Section II.

The lack of an integrity warning or the lack of measures ordered by the head of the contracting authority, as a consequence of the integrity warning, shall not preclude the performance of identification, evaluation and investigation procedures or the civil, disciplinary, administrative, contraventional or criminal liability of the persons who violated the legal provisions.

Upon the receipt of the integrity warning, the head of the contracting authority shall be bound to take all the necessary measures to overcome the conflict of interest. Such measures might consist in: replacing the member of the evaluation committee, excluding the tenderers / candidates / associated tenderers /subcontractors / third parties who find themselves in a potential conflict of interest, according to specific regulation.

The failure to take measures following the receipt of an integrity warning or the failure to fill in the integrity form triggers ex officio the conflict of interest evaluation procedure, following the completion of the award procedure, exclusively with the persons who are subject to the provisions of Law no. 176/2010. The National Integrity Agency shall check if the measures required for the removal of the conflict of interest situation were implemented, according to its specific duties.

3. Conclusions

As the title of this study is called, we hereby analyzed the specific legislation of the conflict of interest in order to identify the modality it is regulated. The conflict of interest, on the one hand, is provided as an offense, and on the other hand, is provided by the administrative law. Currently, we note that the legislation is not unified yet, despite the new package of laws and this thing shall be reflected by the litigations to be submitted before the courts of law and in what concerns the mechanism of ex ante prevention of the conflict of interest in the public procurement procedure, we will see how effective it is after this legislation enters into force.

[26] Law no. 184/2016 establishing a mechanism for preventing conflicts of interest regarding the award of the public procurement agreements, published in the Official Journal no. 831/2016.

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- Laura-Cristiana Spătaru-Negură, *Exporting Law or the Use of Legal Transplants*, în proceedings-ul CKS-eBook 2012, Pro Universitaria Publishing House, Bucharest, 2012;
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- Law no. 161/2003 on certain measures to ensure transparency in the exercise of publicly appointed offices, public functions and in business environment, to prevent and sanction corruption, published in Official Journal no.279/2003;
- Law no. 144/2007 on the establishment, organization and functioning of the National Integrity Agency, published in Official Journal no.359/2007;
- Law no. 100/2016 on the concession of works and services, published in Official Journal no.392/2016;
- Law no. 184/2016 establishing a mechanism for preventing conflicts of interest regarding the award of the public procurement agreements, published in the Official Journal no.831/2016;
- Law no. 278/2006 for the amendment and supplementation of the Criminal Code, as well as for the amendment and supplementation of other laws, published in the Official Journal no. 601/2006;
- Law no. 286/2009 on the Criminal Code, published in the Official Journal no. 510/2009;
- Decision no. 603/2015 of the Constitutional Court, published in the Official Journal no.854/2015;
- Decision no. 317/2016 of the Constitutional Court, published in the Official Journal no.566 /2016;
- Decision no. 603/2015 of the Constitutional Court, published in the Official Journal no.854/2015;
- Decision no. 390 / 2014 of the Constitutional Court, published in the Official Journal no. 532 /2014;
- Recommendation no. 10 (2000) of the Committee of Ministers to Member States on Codes of conduct for public officials, adopted by the Committee of Ministers on May 11th, 2000, during the 106th session, published on: http://cna.md/public/files/legislatie/rec_2000_10_cod_conduita_funct_public.pdf., accessed on February 10th, 2017;
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PUBLIC PROCUREMENT IN THE LIGHT OF THE NEW LEGISLATIVE CHANGES

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Abstract

The package of laws on public procurement and concessions of Romania which entered into force in May 2016 came with many new elements. Therefore, in this study, we aim to present the new conception of the lawmaker towards this subject. Not least, we will analyze the role of the National Council for Solving Complaints in the procedure for the award of public procurement agreements and other elements in what concerns the complaints in the field of public procurement.

Keywords: *National Council for Solving Complaints, public procurement, remedies, law, aggrieved party.*

1. Introduction

In May 2016 a new package of laws on public procurement and concessions was published in the Official Journal of Romania, as follows: Law no. 98/2016 on public procurement[1]; Law no. 99/2016 on sectorial procurement[2]; Law no. 100/2016 on the concessions of works and services[3]; Law no. 101/2016 on remedies and appeals concerning the award of public procurement agreements, sectorial agreements and of works concession agreements and service concession agreements, and for the organization and functioning of the National Council for Solving Complaints[4].

Following the adoption of this package of laws in the field of public procurement, Government Emergency Ordinance no. 34/2006 on the award of public procurement agreements, public works concession agreements and service concession agreements was repealed[5]. Currently, there is not a case law established based on these legislative changes yet. In the current historical context in which the humanity escalates a new stage of civilization, thus embracing the „unity in diversity", the role of the general principles of law, a legal expression of the fundamental relations of the society, is amplified[6].

On another occasion we showed that, at European level, currently, there are tendencies of unification of the legislation in this field, three Directives being adopted, the Member States having to amend the legislation so that to ensure their implementation at national level[7]:

- Directive 2014/23/EU on the award of concession contracts[8];
- Directive 2014/24/EU on public procurement[9];
- Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors[10].

The primacy of the European Union law[11] requires to the national courts, in particular, to guarantee to the litigants the rights which arise from its directives, when the national law precludes the fulfillment thereof[12]. As we have recently shown, the European Union law embraces the theory of monism, namely the existence of a single legal order comprising the international law and the domestic law in an unitary system[13]. Every state has enacted its law according to own socio-political requirements, traditions and values proclaimed by it[14]. Therefore, no state has a legislation

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[1] Law no. 98/2016 on public procurement, published in the Official Journal no. 390/2016.

[2] Law no. 99/2016 on sectorial procurement, published in the Official Journal no. 391/2016.

[3] Law no. 100/2016 on the concession of works and services, published in the Official Journal no. 392/2016.

[4] Law no. 101/2016 on remedies and appeals concerning the award of public procurement agreements, sectoral agreements and of works concession agreements and service concession agreements, and for the organization and functioning of the National Council for Solving Complaints, published in the Official Journal no. 393/2016.

[5] Government Emergency Ordinance no. 34/2006 on the award of public procurement agreements, public works concession agreements and service concession agreements, published in the Official Journal no. 418/2006- (currently *repealed*).

[6] Elena Anghel, *The importance of principles in the present context of law recodifying*, in proceeding CKS e-Book 2015, p. 753-762

[7] Elena Emilia Ștefan, *Drept administrativ Partea a II-a.Curs*, Universul Juridic Publishing House, Bucharest, 2016, p.63.

[8] Available online at: http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A32014L0023, accessed on February 1st, 2016.

[9] Available online at: http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex%3A32014L0024, accessed on February 1st, 2016.

[10] Available online at: http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A32014L0025, accessed on February 1st, 2016.

[11] In what concerns the primacy of EU law see Roxana-Mariana Popescu, Specificul aplicării prioritare a dreptului comunitar european în dreptul intern, în raport cu aplicarea prioritară a dreptului internaţional, Revista Română de Drept Comunitar, no. 3/2005, pag. 11-21.

[12] Dumitru-Daniel Șerban*, Achiziţiile publice. Jurisprudenţa Curţii Europene de Justiţie*, Hamangiu Publishing House, Bucharest, 2011, p. 4. The failure to comply with the EU legal regulations results in the initiation of the infringement procedure in this respect, see Roxana-Mariana Popescu, *General aspects of the infringement procedure*, Lex et Scientia, International Journal, no.2/2010, Pro Universitaria Publishing House, pag. 59-67.

[13] Laura Cristiana Spătaru Negură, *Dreptul Uniunii Europene- o nouă tipologie juridică*, Hamangiu Publishing House, Bucharest, 2016, p.190.

[14] See Elena Anghel, *Constant aspects of law*, in proceedings CKS-eBook 2011, Pro Universitaria Publishing House, Bucharest, 2011, p. 594.

that is valid for all times[15], the national lawmaker being always focused on social life and on discovering the needs of the society, thus proceeding with the amendment of the legislative framework.

In this context, we mention that, in what concerns national law, Law no. 554/2004 introduces as a ground for revision, in art. 21 para.(2): the ruling of final and irrevocable judgments by violating the principle of precedence of Community law (...)[16]. As the doctrine showed, the new ground for revision (...) was designed as a domestic remedy, in case of final and irrevocable judgments, pronounced by means of the violation of the principle of precedence of the European Union law, regulated by art. 148 para. (2) of the Constitution of Romania, for the purpose of fulfilling the general obligation incumbent on the Member States under art. 10 of the Treaty[17] establishing the European Community[18].

2. Content

2.1. Public procurement concept

A number of vulnerabilities of the public procurement system of Romania, both legislative and practical, was found in a project[19], and we hereby list selectively a few of them: incomplete and unstable legislation marked by ambiguity, non-transparent ministry orders, the lack of sanctions for public authorities, limited practice regarding appeals due to high costs and lack of confidence in the effectiveness of the appeals. In the last two decades, the case law of the Court of Justice and the European Union Tribunal in the field of public procurement proved to be extremely rich, more than 200 specific cases being registered on the dockets of the two courts[20].

In what concerns public procurement and concessions, we must provide the following: the concessions of goods are still subject to Government Emergency Ordinance no. 54/2006 on the regime of the agreements of public property goods concession and the concessions of services[21], works, sectoral procurement are subject to the package of laws of 2016. A summary of the new package of laws has been recently published on A.N.A.P.[22] (the National Agency for Public Procurement) official site. A.N.A.P. was established by Government Emergency Ordinance no. 13/2015[23].

The concept of public procurement is defined by art.3 para.(1) of Law no. 98/2016 on classic public procurement, as follows: "the procurement of works, products or services under a public procurement agreement by one or more contracting authorities from economic operators designated by them, regardless if the works, products or services are intended for the fulfillment of a public interest".

According to art. 7 of the law, the contracting authority shall be entitled to purchase directly products or services if the estimated value of the procurement, VAT excluded, is less than RON 132,519, respectively works, if the estimated value of the procurement, VAT excluded, is less than RON 441,730.

Throughout the application of the award procedure, the contracting entity shall be bound to take all the measures in order to prevent and to identify conflict of interest situations, in order to avoid distortion of competition and to ensure equal treatment for all economic operators.

Law no. 98/2016 on public procurement regulates the following procedures for the award of public procurement agreement: open tendering, restricted tendering, competitive negotiation, competitive dialogue, partnership for innovation, negotiation without prior publication, design contest, simplified procedure, procedure applicable in case of social services and other specific services: *open tendering*; *restricted tendering*; *competitive negotiation; competitive dialogue*; *Partnership for innovation*; *Negotiation without prior publication; Design contest*. Furthermore, the law also refers to the *procedure applicable in case of social services and other specific services* as well as to the *simplified procedure* which is initiated by publishing a simplified contract notice in SEAP, accompanied by the relating award documentation.

The new elements are, among others, the right of the contracting authority to resort to the award of public procurement agreement in case of division into lots, provided that this information is included in the procurement documents; the awarding criteria, in order to establish the most advantageous offer, are the

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[15] Laura-Cristiana Spătaru-Negură, *Old and New Legal Typologies*, in proceedings CKS-eBook 2014, Pro Universitaria Publishing House, Bucharest, 2014, p. 354.

[16] Law no. 554/2004 of the contentious administrative, published in the Official Journal no. 1154/2004 (latest amendment by Law no. 138/2014 for the amendment and supplementation of Law no. 134/2010 on the Code of civil procedure, as well as for the amendment and supplementation of related normative acts, published in the Official Journal no.753/2014).

[17] In what concerns the Treaty on European Union, see Roxana-Mariana Popescu, *Introducere în dreptul Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2011, p. 62-63.

[18] Gabriela Bogasiu, *Law of the contentious administrative*, edition III, revised and supplemented, Universul Juridic Publishing House, Bucharest, 2015, p.545.

[19] https://www.transparency.org.ro/proiecte/proiecte_incheiate/2010/proiect_3/Riscuri%20de%20coruptie%20in%20achizitii%20publice.pdf

[20] Dumitru- Daniel Șerban*, Achizițiile publice. Jurisprudența Curții Europene de Justiție*, Hamangiu Publishing House, Bucharest, 2011, p. 1

[21] For further details on the concession of public property goods, see Marta Claudia Cliza, *Drept administrativ, Partea a II-a*, ProUniversitaria Publishing House, Bucharest, 2011, p.208

[22] http://anap.gov.ro/web/wp-content/uploads/2016/01/0-Informatii-principale-pachet-legi-modificat.pdf, accessed on January 31st 2017.

[23] Government Emergency Ordinance no. 13/2015 on the establishment, organization and functioning of the National Agency for Public Procurement, published in the Official Journal no. 362/2015.

following: lowest price, lowest cost, best value for money, best value for cost.

The concept of ESPD was introduced – the European Single Procurement Document which refers to the fact that the updated declaration on own risk, as preliminary evidence, instead of certificates issued by public authorities or third parties certifies that the economic operator meets the following conditions:

a) He/she is not in any of the exclusion situations (...)
b) He/she fulfills the capacity criteria, as requested by the contracting authority
c) If the case may be, he/she fulfills the selection criteria established by the contracting authority, according to the provisions of this law.

In what concerns sectoral procurement, Law no. 99/2016 defines it as follows: "the procurement of works, products or services under a sectoral agreement, by one or more contracting authorities from economic operators designated by them, provided that the purchased works, products or services are intended for the performance of one of the relevant activities: gas and thermal energy, electric power, water, transport services, ports and airports, postal services, extraction of oil and natural gas – exploration and extraction of coal or other solid fuels".

2.2. National Council for Solving Complaints

Law no. 101/2016 on remedies and appeals concerning the award of public procurement agreements, sectoral agreements and of works concession agreements and service concession agreements, and for the organization and functioning of the National Council for Solving Complaints, regulates matters related to the membership of the Council, status of the personnel of the Council, complaints settlement procedure, the remedy against the decisions of the Council etc.

The National Council for Solving Complaints is an independent body with administrative – jurisdictional activity and legal personality and operates according to Law no. 101/2016. The Council has a web page which can be accessed[24] and where we can find information such as: activity reports, complaints submission form, decisions etc.

The National Council for Solving Complaints has 36 members, selected by competition and appointed by the decision of the Prime Minister. The members of the Council are special status public official called: *counselors for solving complaints in the field of public procurement.*

The new law introduces the obligation of the aggrieved party to deliver a prior notification, before the submission of the complaint. Under the penalty of rejection the complaint as inadmissible, which can be claimed ex officio, before resorting to the N.C.S.C. or to the court of law, the party which deems itself aggrieved shall be bound to notify the contracting authority on the request of remedy in full or in part of the alleged violation of the legislation on public procurement or concessions within 10 days or 5 days.

2.3. The aggrieved party concept

Further on, we will clarify the concept of aggrieved party, according to the new legislation in the filed of public procurement

Therefore, the concept of aggrieved party under this law is defined as follows: "Any person who considers himself/herself aggrieved in his/her right or legitimate interest by an act of a contracting authority or by the failure to solve a request within the legal deadline can claim the annulment of the act, the obligation of the contracting authority to issue an act or to adopt remedy measures, the recognition of the claimed right or legitimate interest, by administrative jurisdictional or judiciary means, according to the provisions of this law".

On the other hand, art. 52 para.1) of the Constitution establishes the fundamental right of any person aggrieved in his/her legitimate rights or interests by a public authority, by means of an administrative act or by the failure of a public authority to solve his/her request within the legal deadline, shall be entitled to the acknowledgement of his/her claimed right or legitimate interest, the annulment of the act and settlement of the damage, a right which represents the guarantee for citizens' protection against public authorities abuses and for free access to justice[25].

Free access to justice is established by art. 21 of the Constitution and consists in that every person is entitled to bring cases before the law for the defense of his/her legitimate rights, freedoms and interests[26].

Law no. 101/2016 on remedies and appeals concerning the award of public procurement agreements, sectoral agreements and of works concession agreements and service concession agreements, and for the organization and functioning of the National Council for Solving Complaints defines in art. 3 para.(1) letter f) the meaning of aggrieved party: "any economic operator who fulfill the following conditions:

- has or had an interest in connection with the award procedure;
- suffered, suffers or is likely to suffer damage as consequence of an act of the contracting authority, likely to cause legal effects or, as a consequence of the failure to solve within the legal deadline a request on the award procedure". Therefore, the concept of aggrieved party has a broader meaning in the sense of the new package of laws on public procurement compared to art. 52 of the Constitution.

[24] http://www.cnsc.ro/, accessed on January 31st 2017.
[25] Decision no.168/2011 of the Constitutional Court, published in the Official Journal no. 261/2011.
[26] Mihai Bădescu, *Drept constituţional şi instituţii politice*, second edition revised and supplemented, V.I.S.Print, Bucharest, 2002, p.237.

2.4. The law applicable to litigations in the field of public procurement

Hereinafter, we will analyze if the provisions of Law no. 554/2004 of the contentious administrative or of Law no. 101/2016 on remedies and appeals concerning the award of public procurement agreements (...) are applicable in what concerns litigations which occur in public procurement procedure.

In the field of public procurement, as a remedy measure, by way of derogation from art. 1 para.(6) of Law no. 554/2004, the contracting authority can revoke / cancel own acts or the entire award procedure following the receipt of a notification the authority finds substantiated[27].

In what concerns the means chosen for complaints, Law no. 101/2016 establishes the alternative jurisdiction, the aggrieved party being allowed to choose the administrative-jurisdictional means, respectively by resorting to the N.C.S.C. or the judiciary means, by resorting to the tribunal, the division of the contentious administrative and fiscal. In this case it is easy to note that this is an alternative jurisdiction.

The difference between the two options of the aggrieved person is that, in case of the judiciary complaint, the applicant shall be bound to pay a stamp duty, unlike the other option, where no fee has to be paid. According to the Constitution, art. 21 par.(4), administrative special jurisdiction is optional and free of charge, excluding the administrative appeals28. No constitutional provision prohibits the legal establishment of a prior administrative procedure, without jurisdictional nature, such as graceful or hierarchical administrative appeal procedure[29].

Given that Law no. 101/2016 is a law dedicated to complaints and appeals in the field of public procurement, the possibility of aggrieved parties to resort to court actions brought against the acts of the contracting authorities in this field is removed under Law no. 554/2004, this special law of remedies derogates from[30].

The fulfillment of the law depends on whether it is accepted and assumed as a value and a rule by the members of the society. In this regard, the understanding of the fulfillment of the law is an act of assessment and search of the justice and of the other acknowledged values [31].

3. Conclusions

As the title of this study is called, we hereby analyzed a large bibliographic material in order to identify the new legislative elements of the public procurement field. If before 2016 there was a single normative act, respectively a Government Ordinance, nowadays, we have a package of laws applicable to public procurement procedures and concessions.

Although the public procurement legislation was harmonized with the European legislation, according to an official announcement, in 2016, a large number of fraud cases were found in this field[32]. Therefore, the Romanian Police declared that, in 2016, by means of the Directorate for Investigation of Economic Crimes, after checking the lawfulness of the conclusion and performance of public procurement agreements, they filed 946 criminal cases. The damage caused to the state budget, according to the respective announcement, by illegal performance of public procurement agreements, amounted to more than 5 billion RON, and for the recovery of such amount precautionary measures were ordered amounting to 1.7 billion RON.

Not least, a great competition[33] is noted between the economic operators participating in public procurement procedure.

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TEN YEARS AFTER ROMANIA'S ACCESSION TO THE EUROPEAN UNION: COSTS, BENEFITS AND PERSPECTIVES

Dan VĂTĂMAN[*]

Abstract

This year we celebrate ten years since Romania became full-fledged Member of the European Union, a decade in which our country have seen a remarkable evolution marked by huge transformations and irreversible processes of reform which led to the modernization of the society and economic development. Despite these undeniable achievements which had a positive impact on the quality of life of Romanian citizens, a great number of people are disappointed because still facing poverty and economic underdevelopment, aspect that makes them to express disapproval of the fact that Romania is a Member State of European Union. In the light of this paradox, the aim of this study is to put in antithesis the advantages and disadvantages of the Romania's accession to the European Union, all this in relation to the current international context and the challenges facing the European Union.

Keywords: *European integration process; tenth anniversary of Romania's accession to the European Union; reform measures; costs and benefits; prosperity and development.*

1. Introduction

On January 1st 2017 we celebrated 10 years since Romania became full-fledged Member of the European Union and also on 25th March 2017 we celebrated the 60th anniversary of the signing of the Treaties of Rome, one of the most remarkable historical moments of the European integration process. These two anniversaries represent real moments of joy for the Romanian people, the overwhelming majority of people being convinced that Romania's accession to the European Union was beneficial for our country which have seen a remarkable evolution marked by huge transformations and irreversible processes of reform which led to the modernization of the society and economic development[1].

Despite these undeniable achievements which had a positive impact on the quality of life of Romanian citizens, a great number of people are disappointed because still facing poverty and economic underdevelopment, aspect that makes them to express disapproval of the fact that Romania is a Member State of European Union.

In the light of this paradox, the aim of the present study is to put in antithesis the advantages and disadvantages of the Romania's accession to the European Union, this approach being made by reporting to the assumed obligations and related rights of our country as shown in Treaty of Accession and Act concerning conditions of Accession as well as the Treaties on which the European Union is founded.

In the context of growing Euroscepticism and Populism in Romania and not only (this trend is fueled by populist politicians across Europe) it is important to remind people that in this period of ten years remarkable developments have taken place, especially in the field of judiciary reform and fight against corruption, two key issues for Romanian society.

For this purpose, the objectives of this study are to highlight the substantial progress already achieved in the areas of judicial reform and the fight against corruption, achievements highlighted by the Cooperation and Verification Mechanism (CVM) reports where are underlined "a positive trend and a track record pointing to strong progress and growing irreversibility of the reforms in Romania"[2]. On the other hand, it must be put in question the outstanding key issues whose fulfillment would lead to the provisional closing of individual benchmarks, and then the conclusion of the CVM process. Not least, it is necessary to highlight also the Romanian citizens' perception about advantages and disadvantages of the Romania's accession to the European Union.

Although the specialized literature comprises several studies on this topic, I am convinced that a new study is necessary in the context of expressed concerns, both at the European level and especially at the national level, caused by Romanian Government attempt to change and amend law No. 286/2009 regarding the criminal code and the law No. 135/2010 regarding the criminal procedure code.

2. General aspects concerning the establishment and evolution of the Cooperation and Verification Mechanism (CVM)

Given that the European Union is founded on the rule of law, a principle common to all Member States,

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[1] These aspects arise from *Flash Eurobarometer 445: The Cooperation and Verification Mechanism for Bulgaria and Romania - third wave*, January 2017 - https://data.europa.eu/euodp/en/data/dataset/S2128_445_ENG.

[2] Progress report Romania 2017 - https://ec.europa.eu/info/files/progress-report-romania-2017-com-2017-44_en.

in order to accession Romania has had to fulfill a number of conditions, including the existence of an impartial, independent and effective judicial and administrative system properly equipped to fight corruption.

Whilst noting the considerable efforts to complete Romania's preparations for membership, the European Commission has identified a series of remaining issues, in particular in the accountability and efficiency of the judicial system and law enforcement bodies. Consequently, pursuant to the provisions of the Treaties on which the European Union is founded and having regard to the Act concerning the conditions of accession of Romania (in particular Articles 37 and 38 thereof), the European Commission has adopted a decision to set up the Cooperation and Verification Mechanism (CVM)[3].

According to this decision, Romania shall report each year to the European Commission on the progress made in addressing each of the four benchmarks provided for, respectively:

- Ensure a more transparent, and efficient judicial process notably by enhancing the capacity and accountability of the Superior Council of Magistracy;
- Establish an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interest, and for issuing mandatory decisions on the basis of which dissuasive sanctions can be taken;
- Building on progress already made, continue to conduct professional, non-partisan investigations into allegations of high-level corruption;
- Take further measures to prevent and fight against corruption, in particular within the local government[4].

Thus, the CMV was set up to address shortcomings in judicial reform and the fight against corruption, the Romanian authorities were responsible for proving that the judicial system works and that investigations in corruption cases leading to arrests and, depending on the court's judgment, convictions and confiscation of goods. Over the years, the European Commission has presented a series of evaluation reports on the progress made by Romania, these reports being the result of a careful process of analysis by the Commission, drawing on close cooperation with Romanian institutions, as well as the input of civil society and other stakeholders, including other Member States[5].

3. Romania' progress in the fields of judicial reform and fight against corruption as shown in the CMV reports

Judicial reform and the fight against corruption have been key issues for Romanian society over the last 10 years. Therefore, the CVM has made a major contribution to a transformative process in Romania, playing an important role as driver for reform, as well as a tool to track progress.

In its overall assessment of Romania's progress, the Commission has highlighted that the 10 years' perspective of developments under the CVM shows that, despite some periods when reform lost momentum and was questioned, Romania has made major progress towards the CVM benchmarks[6].

The European Commission has pointed a positive trend and a track record pointing to strong progress and growing irreversibility of the reforms. At the same time, a number of key issues already identified in earlier reports have remained outstanding for which reason the Commission made a number of recommendations and invited Romania to take action to fulfil them in an irreversible way, and also to avoid in the future the negative steps which call into question the progress made so far.

In the area of judicial reform the CVM goals was focused on establishing an independent, impartial, and efficient system, strengthening the consistency of the judicial process, and improving transparency and accountability. Thus, in this domain has been registered a substantial legislative and institutional progress, among achievements can be mentioned: adoption and implementation of new Civil and Criminal Codes with a view to modernizing the substantive law and improving the efficiency and consistency of the judicial process; strengthening the role of the Superior Council of the Magistracy which has established itself as manager of the judicial system; rigour of entry procedures into the magistracy, supported by obligatory training by the National Institute of Magistracy.

Despite these positive developments and strong public perception of judicial independence and trust in the judiciary, there are still a number of unresolved issues and, more than that, the reform is facing with political and media attacks on magistrates and judicial institutions, especially against the National Anti-corruption Directorate. Also, it must be mentioned the fact that only in 2016 the Constitutional Court adopted 12 decisions which annulling some provisions of the new Criminal Code and Code of Criminal Procedures and the Parliament or Government did not meet the legal term to align the codes with Constitutional Court

[3] Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (2006/928/CE) - OJ L 354, 14.12.2006, p. 56–57.

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[5] For details see Vataman Dan, *European Union: Specialized Practical Guide*, Bucharest, "Pro Universitaria" Publishing House, 2015, pp. 139-145.

[6] Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism COM(2017) 44 final - http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52017DC0044.

decisions. Moreover, the situation became even worse on 31 January 2017 when the Government adopted an emergency ordinance (Ordinance 13/2017) proposing amendments to the Criminal Code and Code of Criminal Procedures. The government's intended measure to modify provisions on the corruption crimes of abuse of office and conflict of interest had resulted in the largest street rallies since the fall of communism in 1989, where hundreds of thousands of Romanians were demonstrated every evening asking for the government to resign.

With reference to the second benchmark concerning the integrity framework and the National Integrity Agency, as shown in the Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism, Romania has made substantial progress and currently has a comprehensive framework for integrity for public officials, and the National Integrity Agency has established itself as an independent institution to implement these rules[7]. However, the legal framework for integrity, the set of laws defining the situations of conflicts of interests and incompatibilities for civil servants and elected or appointed officials, has been regularly re-opened in Parliament. It has not yet been possible to put in place a clear, consolidated legal framework as the bedrock for sustainability and some decisions by Parliament have still appeared to question or delay the implementation of final court decisions confirming the Agency's reports[8].

With regard to the third benchmark namely tackling high-level corruption, the European Commission acknowledges that the achievements of Romania in this area have rightly attracted widespread recognition and substantial progress has been made. In this regard, the Commission reports reveal a steadily growing track record in terms of investigating, prosecuting and deciding upon high-level corruption cases, with a clear acceleration in the last years. Unfortunately, the repetition of similar offences suggests that corruption prevention has not been effective, reason for that the Commission has appreciated that only maintaining both the pace and the consistent direction of reform would allow this benchmark to be closed quickly.

In terms of the tackling corruption at all levels, according to the last European Commission report, medium and low-level corruption is widely perceived to be a problem in Romania, with consequences for Romania's economic and social development. The Commission pointed that progress was slow and the application of prevention measures ineffective, with insufficient political will from the top of the institutions to implement corruption prevention measures. Also welcomed the adoption by the government of a new anti-corruption strategy for 2016–2020 in August 2016, notably seeking to target the identified weaknesses with specific measures. Thus, the Commission concluded that though some progress has been made there are however important remaining shortcomings which need to be addressed in the future and the reform needs to continue on the same path[9].

4. Romanian citizens' perception about advantages and disadvantages of the Romania's accession to the European Union

In order to join to the European Union, any country must meet the conditions for membership (conditions known as the "Copenhagen criteria") which include a free-market economy, a stable democracy and the rule of law, and the acceptance of all EU legislation.

Before Romania's accession to the European Union the European Commission has identified remaining issues in particular in the accountability and efficiency of the judicial system and law enforcement bodies, where further efforts were needed to ensure the capacity of our country to implement and apply the measures adopted to establish the internal market and the area of freedom, security and justice. Therefore, according to the assumed obligations stated in Treaty of Accession and Act concerning conditions of Accession, Romania was forced to adopt reform measures which inevitably led to the modernization of the society and economic development[10]. In addition, the efforts of the Romanian authorities had positive effects on the image of the country at international level and, at the same time, on the lives of Romanian citizens.

Although these developments had a positive impact on the quality of life of Romanian citizens, a great number of people are disappointed because still facing poverty and economic underdevelopment, aspect that makes them to express disapproval of the fact that Romania is a Member State of European Union.

According to Standard Eurobarometer 85 released in spring 2016, the Romanians asked about life in the European Union showed that the most important issues facing Romania at the moment are unemployment, immigration, economic situation, terrorism or health and social security. For this reason 78% of subjects responded that the current situation in national economy is "total bad" and 55% of them showed that tend to not trust in European Union and, perhaps most worrying, 38% of Romanians responded that they do not feel European citizens[11].

As well, according to Standard Eurobarometer 86 released in November 2016, economic situation, health

[7] COM(2017) 44 final, p.6.
[8] Ibid p. 7.
[9] Ibid p. 8.
[10] Vataman Dan, *History of the European Union*, Bucharest, "Pro Universitaria" Publishing House, 2011, p. 121.
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and social security and unemployment remain by far the most important issues facing Romania, according to respondents. As shown in Eurobarometer report, the European Union now has a positive image for a 50% of Romanians what is seen as a "significant increase" following the decrease seen between autumn 2015 and spring 2016[12]. This result could be a cause for optimism or pessimism depending on how each individual responds to the following question: "Is the glass half empty or half full?"

Despite this negative perception of Romanians about life in European Union, a change has occurred in relation with situation regarding corruption and judicial shortcomings. In accordance with Flash Eurobarometer 445, more Romanians thought that the situation regarding corruption and judicial shortcomings had improved and things would get better in the next few years. Thus, a significant majority agreed that the action of the European Union through the Cooperation and Verification Mechanism (CVM) has had a very positive impact on tackling shortcomings in the judicial system and corruption. We see that, despite concerted actions of populist politicians and some interest groups which demanded that CVM to be stopped immediately, a large majority of Romanians agree that the European Union has a legitimate role to play in tackling corruption and shortcomings in the judicial system and, furthermore, this action should continue until convergence with other EU Member States' standards has been reached[13].

5. Conclusions

As I pointed out above, Romania's accession to the European Union on 1 January 2007 represents a milestone in our history. From that moment Romania has known a remarkable evolution marked by huge transformations and irreversible processes of reform which led to the modernization of the society and also economic development. As a result of Romania's accession to the European Union the Romanian citizens has achieved not only the right to move and reside freely within the territory of the EU countries but also the right to be treated like any other EU citizens with equal access to all fundamental rights as enshrined in the EU Charter of Fundamental Rights.

The paradox is that although it is obvious that Romania was making significant progress, fact also recognized by European officials, continue to be one of the poorest countries in the European Union. Therefore, a large part of Romanians are confronted currently with poverty which not subside although Romania has continued to produce economic growth. Under these circumstances we might ask: Why the transition in Romania was accompanied by an explosive increase in poverty? Does poverty have connection with Corruption? The answer is certainly "YES", because corruption and poverty go hand-in-hand, existing a direct correlation between them.

Unfortunately this scourge is threatening the lives of too many people and for this reason, not just in my opinion, is necessary that the fight against corruption to continue, because this is only way to get out of this vicious circle.

As we have seen, Romania is currently making a true anti-corruption revolution, spearhead being the National Anticorruption Directorate. The fight against this scourge is supported by most Romanians which do not hesitate to penalize any measure which they deem an alarming retreat in the country's fight against corruption. This fact has been conclusively demonstrated this year when hundreds of thousands of Romanians expressed their revolt and dissatisfaction within some large mass protests against the Government's attempt to adopt an emergency ordinance on collective pardon and also the controversial emergency ordinance no. 13 /2017 which attempted a major change in the criminal public policy of the Romanian state.

In essence the message conveyed by people asking Romanian legislative authorities to create laws for the people and not against them (or even worse in interest of politicians) and also have urged the public authorities and officials to abide by the law and respect democracy.

Looking back at the 10 years that have passed since Romania's accession to the European Union and taking into account the problems that still face our country is definitely clear that only option our country is continuation the reforms and concrete steps to address corruption at all levels. This is the only way we can convince our European partners that Romania is a reliable partner which demonstrate seriousness and responsibility.

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CONSIDERATIONS ON THE CALCULATION OF DAMAGES IN INTELLECTUAL PROPERTY INFRINGEMENT CASES. RIGHT HOLDER'S LOSS AND UNFAIR PROFITS OF THE INFRINGER. CUMULATION

Paul-George BUTA*

Abstract

This short article deals with a specific problem of interpretation of Romanian law on the enforcement of IP rights, namely the possibility of having the court set damages to the right holder by taking into account both the right holder's loss and the infringer's unfair profits. The two criteria for the assessment of damages are specifically provided for by law and are also expressly provided for by the EU IP Rights Enforcement Directive which was implemented in Romania. While the possibility of referring to either of the two remains uncontested, the possibility of cumulating the two has been denied in some decisions of the Romanian High Court. In order to do so the High Court has interpreted Romanian law so as to comply with the provisions of the EU Directive read by taking into account one of the recitals to the directive which seems to only allow for the criteria to be used alternatively and not cumulatively.

The article examines this interpretation and concludes that the curt ought not to have referred to the text of the EU Directive and that, even if it would do so, could not base its interpretation on the recital, as it did and should have come to the conclusion that the cumulation of the two criteria is possible. In order to do so the article examines the implementation of the Directive in Romanian law, the limitations that the CJEU has imposed on the interpretation of EU acts, the history of the enacting of the EU provisions at issue and the context of the provisions within the directive.

Keywords: *Enforcement Directive, damages, cumulation, right holder's loss, unfair profits, infringement of intellectual property rights, calculation of damages, implementation, transposition, EU law.*

1. Introduction

1.1. Prologue

The issue of damages, although traditionally "an afterthought", nowadays rises more and more to the forefront of the debate on IP law as the remedies are recognized to be "the big motivators" in IP litigation[1].

This is even more the case in IP litigation than in other civil litigation since there are special rules that govern the calculation of damages in IP infringement cases which supersede the civil law provisions generally applicable in tort cases.

These provisions have developed in Romanian law in time, together with efforts to harmonize Romanian law with international and EU law which Romania needed to transpose in order to comply with international obligations.

Since these provisions originate in a limited number of sources and since this same limited number of sources has led the development of provisions on IP damages in significant number of states, one is to expect a high level of homogeneity in the court practice of these states.

As this article will show, there are still numerous points of divergence on at least the issue here discussed and this divergence can be traced back to a possible equivocal reading of the relevant piece of EU law.

Nevertheless, the present article will propose a reading of the provision in question and a solution to the problem of cumulating right holder's loss and infringer's profits under Romanian law.

1.2. The provisions at issue

The main provision concerned is article 14 of the Romanian Government's Emergency Ordinance no. 100 of 14 July 2005[2] (hereinafter "GEO 100/2005"), which reads: "

On application of the injured party the competent court shall order the infringer who, with intent, has engaged in an infringing activity, to pay the right holder damages appropriate to the actual prejudice suffered by him as a result of the infringement.

1. When the court sets the damages it shall take into account:
   a) all appropriate aspects, such as the negative economic consequences, especially loss of benefit by the injured party, the unfair benefits accrued to the infringer of the protected industrial property right and, where appropriate, elements, other than economic factors, such as the moral prejudice caused to the right holder; or
   b) as an alternative, where appropriate, it will set the damages as a lump sum on the basis of elements such as at least the amount of royalties or the value of rights which would

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[1] "Fordham 25 (Report 5): IP Remedies", IPKat, accessed 21 April 2017, http://ipkitten.blogspot.ro/2017/04/fordham-25-5-ip-remedies.html.

[2] *Monitorul Oficial*, nr. 643/20.07.2005.

have been due, if the infringer of the protected industrial property right would have requested authorisation to use the intellectual property right in question.

2. When the infringer of the protected industrial property right has, with intent, engaged in an infringing activity the competent court may order the covering of benefits or the payment of damages, susceptible of being pre-established".

Article 13 of the IP Enforcement Directive reads:"

1. Member States shall ensure that the competent judicial authorities, on application of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the right holder damages appropriate to the actual prejudice suffered by him as a result of the infringement.

   When the judicial authorities set the damages:

   a) they shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the right holder by the infringement;
   b) as an alternative to (a), they may, in appropriate cases, set the damages as a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question.

2. Where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity, Member States may lay down that the judicial authorities may order the recovery of profits or the payment of damages, which may be pre-established".

2. Content

2.1. A different approach in implementation

The preamble to GEO 100/2005 and article 21 thereof clearly indicate that the purpose of enacting this instrument was the transposition of Directive 2004/48/CE of 29 April 2004 on the enforcement of intellectual property rights[3] (hereinafter "the IP Enforcement Directive"). However, the differences in the implementation of the directive and the subsequent legislative developments in Romania seem to have diverged, at least to some extent, from this narrow purpose as will be seen below.

First of all, GEO 100/2005 clearly indicates that its scope is limited to "industrial property rights". Article 1 of the act states that "(1) The present Government Emergency Ordinance provides for measures, procedures and reparation of damages meant to insure that industrial property rights are respected. (2) For the purposes of this Government Emergency Ordinance, the expression *industrial property rights* includes all industrial property rights provided for by national or EC law or by the international treaties and conventions in this field, to which Romania is a party". This was confirmed by the authors having analyzed the text of GEO 100/2005[4] who pointed at the clear distinction made by the Paris Convention for the Protection of Industrial Property of 20 March 1883 and the Convention for the creation of the World Intellectual Property Organization signed in Stockholm on 14 July 1967, Romania being a party to both these conventions and therefore bound by the distinctions there made.

This clearly goes against the purpose of the IP Enforcement Directive which has sought, as its title clearly indicates, that the measures provided therein apply to all intellectual property rights, including industrial property rights, copyright and related rights. For instance, ever since the first European Commission proposal, article 1 clearly indicated that the Directive was to apply to "intellectual property rights" [5]. Moreover, the text of the proposal clearly indicates that it was meant to deal with both industrial property rights and copyright and related rights, for example by listing the substantive law of intellectual property to include, among others, trademarks, designs, patents, copyright and related rights, by including within the measures in the acquis communautaire with regard to the enforcement of intellectual property rights references to both industrial property rights and copyright and related rights, by specifically referencing provisions concerning copyright in recitals 15, 18 and 26 and in articles 2 par. (2), 6 and 21 par. (1) as well as in the Annex containing a "List of provisions of Community and European law relating to the protection of intellectual property". The fact that the IP Enforcement Directive concerned all intellectual property rights (and not just industrial property rights) was also acknowledged in the Romanian literature[6].

Even though the second paragraph was amended by means of Law no. 280/2005 for the approval of Government Emergency Ordinance no 100/2005 on the enforcement of industrial property rights[7], par. (2) of article 1 was changed as follows: "For the purposes of

[3] *OJ*, L 157, 30.04.2004.

[4] Bucura Ionescu, "Ordonanţa de urgenţă nr. 100/2005 privind asigurarea respectării drepturilor de proprietate industrială. Nou instrument juridic de combatere a fenomenului de contrafacere în România," *Revista Română de Dreptul Proprietății Intelectuale* 4 (2005): 73-74.

[5] European Commission, "Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights," COM/2003/0046 final.

[6] Octavia Spineanu-Matei, "Apărarea drepturilor de proprietate intelectuală. Compatibilitatea legislației românești cu Directiva 2004/48/EC a Parlamentului European și a Consiliului din 29 aprilie 2004," *Revista Română de Dreptul Proprietății Intelectuale 2* (2005): 47-51.

[7] *Monitorul Oficial*, nr. 897/7.10.2005.

this Government Emergency Ordinance~~,~~ the expression *industrial property rights* includes all industrial property rights provided for by national or EC law or by the international treaties and conventions in this field~~,~~ to which Romania is a party" (strikethrough added). While deletion of the last comma is a sensible amendment, deletion of the first comma is not and much less so the apparent enlargement of the scope of the provision to encompass "all rights provided for by" law, thus not only industrial or intellectual property rights but any rights, of any nature, provided by national, EC or international law. Such enlargement would defeat the purpose of indicating in the – still unamended – par. (1) of the same article, the scope as being limited to industrial property rights, now enlarged by par. (2) to encompass virtually any right provided by law.

The IP Enforcement Directive was also transposed in Romanian law in what concerns copyright, but was done so by means of a separate act, Government Emergency Ordinance no. 123 of 1 September 2005, concerning the modification and amendment of Law no. 8/1996 on copyright and related rights[8], which clearly indicated, both in the Government's Statement of Motives and in article 79, that the prime reason for its adoption was the need to implement this particular EU Directive.

Choosing to separately implement the IP Enforcement Directive in respect of industrial property rights on the one hand and copyright and related rights on the other is not only a divergence in form but also in substance since, in what damages are concerned, these were added by point 62 of Government Emergency Ordinance no. 123/2005 to par. (2) of article 139 in Law no. 8/1996 with the following wording: "In setting damages the court takes into account: a) either criteria such as the negative economic consequences, especially loss of benefit by the injured party, the unfair benefits accrued to the infringer and, where appropriate, other elements than economic factors, such as the moral prejudice caused to the right holder; b) or damages set at the triple of sums that would have been legally due for the type of use corresponding to the infringing acts, where the criteria under a) could not be applied".

While the complete disappearance of par. (3) can be attributed to the original faulty transposition of the Directive text, letter b) of article 139 par. (2) of Law no. 8/1996 is no mere transposition but the creation of a new regime, whereby in situations where the criteria under letter a) can't be applied (which is stricter than an alternative, where appropriate, as used in GEO 100/2005), the infringer shall be obliged to three times the "sums that would have been legally due" (different than "a lump sum on the basis of elements such as at least the amount of royalties or the value of rights which would have been due" had proper authorization been sought).

The above serves to indicate that the Romanian legislator has diverged in the implementation of the IP Enforcement Directive from a pure transposition of the directive's provisions and has enacted a regime for the enforcement of IP rights with some particularities.

2.2. The problem of cumulation in the calculation of damages

The problem in the practice of the Romanian courts stems from the reading of article 14 par. (2) of GEO 100/2005 and article 139 par. (2) of Law no. 8/1996.

The High Court has indicated, in three decisions[9], that, in setting the damages, the court may not order damages having regard to both the right holder's loss and the infringer's unfair benefits. The court has indicated that the provisions in national law are "not clear and unequivocal, given the exemplifying character of the hypotheses, which arises from the use of the word "especially"". In order to interpret the national provisions the court has looked at the provisions of recital 26 of the preamble to the IP Enforcement Directive (transposed by the national provisions) which reads "With a view to compensating for the prejudice suffered as a result of an infringement committed by an infringer who engaged in an activity in the knowledge, or with reasonable grounds for knowing, that it would give rise to such an infringement, the amount of damages awarded to the right holder should take account of all appropriate aspects, such as loss of earnings incurred by the right holder, *or* unfair profits made by the infringer and, where appropriate, any moral prejudice caused to the right holder" (emphasis added).

For the court, the use of the conjunction "or" in the enumeration in recital 26 indicates that the EU legislator has meant for the two criteria (even if given as examples) to be alternative and not cumulative.

Moreover the court has indicated that the right holder, as plaintiff, has the choice of which criteria to claim under (either of the two being susceptible of cumulation with moral damages), such choice pertaining to the litigation strategy envisaged by the right holder and by the anticipation of the evidentiary burden presupposed by any of the hypotheses and by the volume of the infringement.

Therefore the position of the Romanian High Court is that the right holder can only claim damages under one of the two criteria provided for in the national law: either as loss of his own benefit or as unfair benefits accrued to the infringer, but not both. In order to arrive at this conclusion the High Court has based its assessment solely on the provisions of recital 26 of the preamble to the IP Enforcement Directive.

[8] *Monitorul Oficial*, nr. 843/19.09.2005.

[9] ICCJ, s. I civ, Decision no. 531/14.02.2014, ICCJ, s. I civ., Decision no. 2072/27.06.2014 and ICCJ, s. I civ., Decision no. 1610/12.06.2015.

2.3. The limits of using the preamble of the Directive in order to interpret a provision of EU law

The first issue to be dealt with concerns determining the interpretative power than can be attributed to recital 26 of the preamble to the IP Enforcement Directive.

The CJEU has established that "the preamble to a Community act has no binding legal force and cannot be relied on either as a ground for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner clearly contrary to their wording (Case C-162/97 *Nilsson and Others* [1998] ECR I-7477, paragraph 54, and Case C-308/97 *Manfredi* [1998] ECR I-7685, paragraph 30)" [10].

It is therefore indisputable that recital 26 of the preamble to the IP Enforcement Directive on its own has no binding legal force and therefore can't be relied on in order to (i) derogate from the provisions or to (ii) interpret those provisions "in a manner clearly contrary to their wording".

Our argument is that the provisions in Romanian law are unequivocal and that a grammatical interpretation of the provisions clearly allows for both the loss to the right holder and the unfair benefits obtained by the infringer are to be taken into account by the court on setting the damages.

This is because article 14 par. (2) letter (a) of GEO 100/2005 states: "*all* appropriate aspects, *such as* the negative economic consequences, *especially* loss of benefit by the injured party, the unfair benefits accrued to the infringer of the protected industrial property right *and, where appropriate, elements, other than economic factors*", which would have one read that the court ought to take into account all aspects, among which (without being limited to) economic factors of which the court should especially look at the right holder's loss of benefit, the infringer's unfair benefits and, only where appropriate, factors other than the economic ones.

The same is true for article 139 par. (2) letter (a) of Law no. 8/1996 with the only difference that taking into account "all appropriate aspects" is not expressly mentioned.

Therefore the fact that there are two economic factors enumerated which the law requires courts to especially have in mind (without them being considered as alternatives being expressly provided for) indicates that the legislature's intent was for the courts to have both factors, especially, in mind, without excluding the possibility that other economic factors could be considered.

This appears all the more true when one looks at another difference between the Romanian legal provisions and those of the IP Enforcement Directive. Thus, article 13 par. (1) letter (a) of the IP Enforcement Directive makes no use of the word "especially", as do the Romanian provisions. These provisions are therefore even less likely to be considered equivocal than their EU counterparts. Use of the word especially before the enumeration of lost benefits and unfair benefits can therefore only mean either that lost benefits are to be considered "especially" while unfair benefits are to be still taken under consideration but not "especially" (meaning that cumulation of the two is still possible) or that the two elements enumerated are to be considered foremost, with others possibly taken under consideration as well, depending on the case. Given the fact that the law clearly requires the court to take into account "all appropriate aspects" and there can be no discernible reason for the loss of benefit to be preferred to unfair benefits, we tend to favor the latter interpretation.

Either way, to our mind, there can be no reading of the Romanian provisions that can be considered equivocal on the possibility of the court taking into consideration both the loss of benefit and the unfair benefits when setting the damages to be awarded to the right holder.

If we were to consider that the Romanian provisions were indeed unclear and therefore called for an interpretation and that in such interpretation of the provisions the court were to seek guidance in the IP Enforcement Directive and, furthermore, in so doing, that the court would look at recital 26 of the preamble the question that needs to be answered is whether an interpretation to the effect that cumulation is not allowed would be "clearly contrary to the wording" of article 13 par. (1) letter (a) of the IP Enforcement Directive.

In *Tyson Parketthandel*[11] the CJEU has indicated that in order to assess whether an interpretation of a provision in light of the preamble would be "clearly contrary to the wording" of that provision one should first verify whether there was an error in drafting the provision in question[12]. Then, one would need to see whether the provision, as read without the help of the preamble, "is consistent with the system established by" the EU act in question[13].

If the answer is in the negative to the first inquiry and in the affirmative to the second, the recital cannot be relied on to interpret the provision in question since such interpretation would be "in a manner clearly contrary to the wording of that provision" [14].

In our case the answer to the first inquiry is clearly in the negative since there is no point in the *travaux préparatoires* or the text of the IP Enforcement Directive as translated in the other languages that could

[10] CJEU, *Deutsches Milch-Kontor GmbH v. Hauptzollamt Hamburg-Jonas* (C-136/04), Decision of 24 November 2005, ECLI:EU:C:2005:716, par. 32.

[11] CJEU, *Hauptzollamt Bremen v. J. E. Tyson Parketthandel GmbH hanse j.,* (C-134/08), Decision of 2 April 2009, ECLI:EU:C:2009:229.

[12] Idem, par. 17.

[13] Idem, par. 18.

[14] Idem, par. 19.

lead one to consider that the drafting of article 13 par. (1) letter (a) could be considered an error.

In respect of the second inquiry, this would require that the reading of the provision as is (i.e. as permitting cumulation) be looked at having regard to the context and the objectives of the IP Enforcement Directive as a whole, in order to determine whether such reading is consistent with the system thus established.

The CJEU has done so in *Liffers*[15], holding that: "In that regard, according to the Court's settled case-law, for the purpose of interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part. […]

As regards, lastly, the objectives pursued by Directive 2004/48, it must first of all be pointed out that, according to recital 10 thereof, the objective of that directive is to ensure, inter alia, a high, equivalent and homogeneous level of intellectual property protection in the internal market.

Next, recital 17 of that directive indicates that the measures, procedures and remedies provided for therein should be determined in each case in such a manner as to take due account of the specific characteristics of that case.

Finally, recital 26 of the directive states, inter alia, that, with a view to compensating for the prejudice suffered as a result of an infringement committed by an infringer, the amount of damages awarded to the holder of the intellectual property right should take account of all appropriate aspects, including any moral prejudice caused to the right holder.

It thus follows from recitals 10, 17 and 26 of Directive 2004/48 that the objective of that directive is to attain a high level of protection of intellectual property rights that takes into account the specific aspects of each given case and is based on a method of calculating damages that addresses those specific aspects" (citations omitted).

Therefore, the system that the IP Enforcement Directive seeks to create is one that provides "a high level of protection of intellectual property rights that takes into account the specific aspects of each given case and is based on a method of calculating damages that addresses those specific aspects".

Moreover, in *OTK*[16] the CJEU has held that "It should be noted, first of all, that, as is apparent from recital 3, Directive 2004/48 seeks to ensure that the substantive law on intellectual property is applied effectively in the European Union. Thus, Article 3(2) of the directive requires the measures, procedures and remedies provided for by the Member States to be effective, proportionate and dissuasive.

Whilst recital 10 of Directive 2004/48 refers, in this context, to the objective of ensuring a high, equivalent and 'homogeneous' level of protection, of intellectual property in the internal market, the fact remains that, as is apparent from Article 2(1), the directive applies without prejudice to the means which are or may be provided for, in particular, in national legislation, in so far as those means may be more favourable for right holders. It is quite clear from recital 7 of the directive that the term 'means' that is used is general in nature, encompassing the calculation of damages.

Consequently, as the Court has already held, Directive 2004/48 lays down a minimum standard concerning the enforcement of intellectual property rights and does not prevent the Member States from laying down measures that are more protective" (citations omitted).

Thus, in both *Liffers* and *OTK*, the CJEU has made clear that the system envisaged by the IP Enforcement Directive is one ensuring a high, equivalent and homogenous level of protection of intellectual property rights, including from the point of view of calculation of damages, such system needing to be effective, proportionate *and dissuasive*, while not precluding application of any more favorable terms to the right holder.

Therefore, reading article 13 par. (1) letter (a) in a manner that would restrict the manner of calculation of damages that can be sought by the right holder appears to be contrary to the system that the IP Enforcement Directive seeks to impose.

This is all the more true when taking into account the fact that the equivocal reading of the provision seems to stem more from the different wording used in recital 26 than from the wording of the provision at issue itself.

2.4. A look at the enactment of the EU provision at issue

The EU Commission's "Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights"[17] provided, in article 17, that

1. Member States shall lay down that the judicial authorities shall order an infringer to pay the right holder adequate damages in reparation of the damage incurred by the latter as a result of his intellectual property right being infringed through the infringer having engaged in an activity in the knowledge, or with reasonable grounds for knowing, that it would give rise to such an infringement.

[15] CJEU, *Christian Liffers v. Producciones Mandarina SL, Mediaset España Comunicación SA, formerly Gestevisión Telecinco SA (C-99/15), Decision of 17 March 2016*, ECLI:EU:C:2016:173, par. 14, 21-24.

[16] CJEU, *Stowarzyszenie „Oławska Telewizja Kablowa" v. Stowarzyszenie Filmowców Polskich (C-367/15), Decision of 25 January 2017*, ECLI:EU:C:2017:36, par. 21-23.

[17] European Commission, "Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights", 30 January 2003, COM/2003/0046 final.

To this end, the competent authorities shall award, at the request of the prejudiced party:

a) either damages set at double the royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question;
b) or compensatory damages corresponding to the actual prejudice (including lost profits) suffered by the right holder as a result of the infringement.

In appropriate cases, Member States shall lay down that the prejudice suffered can also be deemed to include elements other than economic factors, such as the moral prejudice caused to the right holder by the infringement.

2. In the case provided for in paragraph 1, point (b), Member States may provide for the recovery, for the benefit of the right holder, *of all the profits made by the infringer which are attributable to that infringement and which are not taken into account when calculating the compensatory damages*.

For calculating the amount of the profits made by the infringer, the right holder is bound to provide evidence only with regard to the amount of the gross income achieved by the infringer, with the latter being bound to provide evidence of his deductible expenses and profits attributable to factors other than the protected object" (emphasis added).

Recital 24 of the preamble to the proposal was even more explicit: "With a view to compensating for the prejudice suffered as a result of an infringement committed by an infringer who has engaged in an activity in the knowledge, or with reasonable grounds for knowing, that it would give rise to such an infringement, the amount of damages awarded to the right holder should be set either at a fixed rate equal to double the royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question (the aim being to allow for compensation based on an objective criterion while taking account of the expenses incurred by the right holder, such as the costs of identification and research), or according to the actual prejudice (including loss of earnings) suffered by the right holder (compensatory damages), *to which must be added the profits made by the infringer, which are not taken into account in calculating the compensatory damages*. It must also be possible to take into account other elements, such as the moral prejudice caused to the right holder" (emphasis added).

This was also included in the EU Commission's explanatory memorandum: "Article 17 on damages supplements the provisions of Article 45 of the TRIPS Agreement. Paragraph 1 confirms the principle that the damages are intended to compensate for the prejudice suffered because of an infringement committed intentionally or by mistake. Paragraph 1 accordingly lays down that the prejudiced party is entitled either to fixed-rate damages equal to double the amount of the royalties or fees which would have been due if the infringer had requested authorisation (the aim being to provide for full compensation for the prejudice suffered, which is sometimes difficult for the right holder to determine. This provision does not constitute punitive damages; rather, it allows for compensation based on an objective criterion while taking account of the expense incurred by the right holder such as administrative expenses incurred in identifying the infringement and researching its origin) or to compensatory damages (corresponding to the losses suffered by the right holder, including loss of earnings). It is further laid down that elements other than economic factors may be taken into account in calculating the damages, such as the moral prejudice caused to the right holder by the infringement. Paragraph 2 provides that, in appropriate cases, *profits made by the infringer which are not taken into account in calculating the compensatory damages may be added*. The idea is to provide a deterrent against, for example, intentional infringements perpetrated on a commercial scale. For calculating the aforementioned profits, the right holder is bound to provide evidence only with regard to the amount of the gross income achieved by the infringer, with the latter being bound to provide evidence of his deductible expenses and profits attributable to factors alien to the infringement" (emphasis added).

This proposal was not significantly altered in the Draft European Parliament's Resolution on the proposal for a directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights (COM(2003) 46 – C5-0055/2003 – 2003/0024(COD)), amendment 38, which concerned article 17, solely inverting the order of the two existing sub-paragraphs of par. (1) and inserting the possibility of awarding pre-established damages, where available[18].

However, on 9 March 2004, when the proposal was put to a vote in the European Parliament, one EMP has stated that "In December, the Committee on Legal Affairs and the Internal Market voted for a text, which is not going to be approved today, but rather certain amendments are going to be approved which differ radically from what was voted for in that meeting of the committee" [19].

In fact, the consolidated text of the Council of the European Union of the Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights issued on 19 December

[18] EU Parliament, "Report of the Committee on Legal Affairs and the Internal Market on the proposal for a directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights", 5 December 2003, PE 332.524, A5-0468/2003.

[19] "Debates on Tuesday, 9 March 2004, Strassbourg", European Parliament, accessed 21 April 2017, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20040309+ITEM-003+DOC+XML+V0//EN&language=EN.

2003[20] (only two weeks after the Report of the European Parliament's Committee on Legal Affairs and the Internal Market) provided, in article 17, that "The damages shall be set by the judicial authorities: (a) either by taking into account all appropriate aspects, such as negative economic consequences, including lost profits, which the injured party has suffered, *as well as any unfair profits* made by the infringer" (emphasis added). The consolidated text also provided for the deletion of paragraph (2) as it existed in the Commission's proposal.

Therefore, even by taking into account developments in the Council, the view was that all profits unfairly made by the infringer were to be taken into account, together with negative economic consequences to the right holder (including lost profits) in the calculation of damages.

The UK's delegation to the Council's proposal of 26 January 2004[21], which offered a version more closely resembling the final wording of the provision, consolidated the two subparagraphs of par. (1), maintained the deletion of par. (2) and read "The damages, which shall be of a non-punitive nature, may take into account all appropriate aspects, such as the foreseeable negative economic consequences which the injured party has suffered, including lost profits and any royalties or fees which would have been due if the infringer had requested authorization to use the intellectual property right in question, or any unfair profits made by the infringer, and may include elements other than economic factors".

Interestingly enough, the justification indicated in the UK delegation's proposal was that "the level of damages must be determined by the judicial authorities of the Member States. The judicial authorities must retain discretion to take into account all the circumstances of the individual case in assessing damages". Therefore, even in this proposal, the objective was not to impose a limit on the possibility of cumulating criteria in the calculation of damages but rather to keep open to the courts all possibilities in using and combining these criteria when setting damages, all with the taking into account of the specific circumstances of each individual case.

The Council proposal for the amendment of the recitals on 3 February 2004[22] provided itself in recital 24 that "the amount of damages awarded to the right holder should be set up either as a lump sum […], or according to the actual prejudice (including loss of earnings) suffered by the right holder […], *to which must be added any unfair profits made by the infringer*" (emphasis added).

An important change has occurred in the 9 February 2004 Council proposal in preparation of agreement at the first reading[23], where recital 24 was amended to the wording of what is now recital 26 ("the amount of damages awarded to the right holder should take account of all appropriate aspects, such as loss of earnings incurred by the right holder, *or* unfair profits made by the infringer and, where appropriate, any moral prejudice caused to the right holder") but article 17 par. (1) provided that "When the judicial authorities set the damages, they shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, *as well as any unfair profits* made by the infringer and, in appropriate cases, […] elements other than economic factors, such as the moral prejudice caused to the right holder by the infringement" (emphasis added).

This is particularly relevant because it shows that the wording of the recital as amended was either thought to reflect or at least not affect the possibility of the unfair profits being taken into account together (by use of "as well as any unfair profits") with the negative economic consequences (including lost profits) to the right holder.

In the text agreed by the Permanent Representatives Committee on 16 February 2004[24] recital 24 was maintained as in the preparation and article 17 was amended to the current wording of article 13 in the IP Enforcement Directive.

The cumulation of these criteria in the setting of damages was envisaged all throughout the complicated EU legislative process and was provided for expressly, in plain words, even when the recital (now 26) was amended to its current form. In the absence of any express indication to the contrary, this seems like a strong indication that the proposed rewording in recital 24 (now 26) and, subsequently, article 17 (now 13) – such rewording for both the provisions having been finally approved in accordance with the text agreed by COREPER 1 in February[25] - has not altered this intention.

[20] Council of the European Union, "Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights - Consolidated/annotated text", 19 December 2003, ST 16289 2003 INIT.

[21] Council of the European Union, "Proposal for a directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights - Suggestions for drafting amendments to 16289/03", 26 January 2004, ST 5657 2004 INIT.

[22] Council of the European Union, "Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights - Consolidated text:Recitals", 3 February 2004, ST 5802 2004 ADD 1.

[23] Council of the European Union, "Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights - Preparation of agreement at the first reading", 9 February 2004, ST 6052 2004 INIT.

[24] Council of the European Union, "Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights - Text agreed by the Permanent Representatives Committee", 16 February 2004, ST 6376 2004 INIT.

[25] See Council of the European Union, "Proposal for a Directive of the European Parliament and of the Council on the measures and procedures to ensure the enforcement of intellectual property rights - Outcome of the European Parliament's first reading (Strasbourg, 8 to 11 March 2004)", 10 March 2004, ST 7012 2004 INIT.

2.5. The effect of the EU provision on the interpretation of the national provisions at issue

As has been shown above, there is strong evidence that article 13 par. (1) letter (a) in the IP Enforcement Directive should be read and/or interpreted as allowing the cumulation of the right holder's loss of benefit and the infringer's unfair profits as criteria for the setting of damages in IP infringement cases and this irrespective of the provisions of recital 26 of the preamble to the directive.

There is moreover a question as to whether the Romanian courts should, as the High Court has, base their interpretation of the relevant provisions of Romanian law solely on the interpretation of the IP Enforcement Directive, i.e. whether the Romanian courts ought to consider the boundaries set by (or derived from) the IP Enforcement Directive as definitive boundaries that may not have been exceeded by the Romanian legislator on the implementation of the directive.

As the CJEU has held in *OTK*[26], "as is apparent from Article 2(1), the directive applies *without prejudice to the means which are or may be provided for, in particular, in national legislation, in so far as those means may be more favourable for right holders*. It is quite clear from recital 7 of the directive that the term 'means' that is used is general in nature, encompassing the calculation of damages. Consequently, as the Court has already held, *Directive 2004/48 lays down a minimum standard concerning the enforcement of intellectual property rights and does not prevent the Member States from laying down measures that are more protective*" (emphasis added).

Therefore, even if the High Court's conclusion that the IP Enforcement Directive precluded the cumulation of the right holder's loss of benefit and the infringer's unfair profits as criteria for the setting of damages in IP infringement cases, in order to hold that the Romanian legal provisions did not allow such cumulation, it should have verified whether such provisions were not "more favorable for right holders" or "more protective" and thus exceeded the limits of the IP Enforcement Directive and, consequently, could not be narrowed down to fit that scope.

Since, as the CJEU has held in *OTK*, "It is quite clear from recital 7 of the directive that the term 'means' that is used is general in nature, encompassing the calculation of damages"[27], the possibility of using cumulatively the two criteria for the calculation of damages appears as "more favorable to right holders" than the lack of such a possibility, the narrowing down of such more favorable provisions to match that of the IP Enforcement Directive seems to run counter to the provisions and objectives of that very directive.

The conclusion that the High Court's analysis has not so taken into account the limits of the IP Enforcement Directive's scope is further enforced by the fact that the High Court has held that the IUP Enforcement Directive, having been transposed in national legislation, takes precedence in its application over the provisions of article 45 par. (1) of TRIPS[28]. In fact, recital 5 of the preamble to the IP Enforcement Directive states that "This Directive should not affect Member States' international obligations, including those under the TRIPS Agreement" and, article 2 par. (3) letter (b) provides that „This Directive shall not affect: [...] (b) Member States' international obligations and notably the TRIPS Agreement, including those relating to criminal procedures and penalties".

Therefore, even when considering the provisions of TRIPS, or other international legislation, the provisions of the IP Enforcement Directive (as implemented in national law) should not be taken to affect Member States' obligations under these international acts and, where overlaps exist, the conflict should be solved by reference to article 2 par. (1) of the directive (since this would be a conflict of internal legal provisions, all such acts being taken to be part of internal law), by application of the means more favourable to right holders.

Moreover, the interpreting of these provisions should not be narrowed down by application of other, general provisions of national law since, as the High Court has stated[29], these are provisions of special law, which apply with precedence over those of general law, following the principle *specialia generalibus derogant*. Therefore, as indficated by the High Court[30], traditional limits on the calculation of damages in tort do not apply where calculating damages for IP infringement, the latter being regulated with precedence by the legal provisions at issue.

3. Conclusions

Since, as shown above, the provisions of article 14 par. (2) letter (a) of GEO 100/2005 and article 139 par. (2) letter (a) of Law no. 8/1996 cannot be taken to bar cumulation of the right holder's loss of benefit and the infringer's unfair profits as criteria for the setting of damages in IP infringement cases, since not even by reference to article 13 par. (1) letter (a) of the IP Enforcement Directive cannot be read nor interpreted as imposing such ban and since such provisions might even exceed (if taken as more favorable to the right holders) the scope of the IP Enforcement Directive, such cumulation should be allowed.

More research is to be conducted in order to determine how such criteria are to be applied in

[26] CJEU, *Stowarzyszenie „Oławska Telewizja Kablowa" v. Stowarzyszenie Filmowców Polskich (C-367/15), Decision of 25 January 2017*, ECLI:EU:C:2017:36, par. 22-23.
[27] Idem, par. 22.
[28] ICCJ, s. I civ., Decision no. 2072/27.06.2014.
[29] Idem.
[30] Idem.

practice, the High Court indicating in one of its decisions[31] that, although the phrase "unfair benefits" is an independent concept, exceeding economic profits alone, the determination of such must take account of the part of the benefits that could be attributable to the infringer's licit activity and therefore not attributable to the infringement at issue.

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[31] Idem.

ARBITRABILITY OF DISPUTES RELATED TO INTELECTUAL PROPERTY RIGHTS

Ruxandra I. CHIRU[*]

Abstract

The present study is aimed for the intellectual property rights holders and specialists in intellectual property law, that are invited to use, promote and implement arbitration as a winning alternative means of solving disputes. The author presents the arbitration as the main method of alternative dispute resolution and analyses the conditions in which arbitration may be used for settling disputes related to intellectual property rights. In this respect, the paper largely presents the main conditions: the dispute has to be liable for settlement by means of arbitration, the parties have to conclude an arbitration agreement, the arbitration agreement has to be valid and effective and the dispute has to be included in the provisions of the arbitration agreement. The author also reviews the types of arbitration used by the World Intellectual Property Organization Centre for Arbitration and Mediation, the World Trade Organization, the Romanian Copyright Office and the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, presenting some ruling of arbitral tribunals concerning arbitrability issues.

Keywords: *arbitrability; arbitration; Court of International Commercial Arbitration (CICA); World Intellectual Property Organization (WIPO);World Trade Organization (WTO); ORDA arbitration procedure.*

General considerations regarding arbitrability

- The arbitration represents settlement of disputes activity administered by an alternative jurisdiction with private nature, separately regulated by Civil Procedure Code both the one in force, as well as the one adopted in 1865 by the means of the 4th Book intituled *"About Arbitration"*. Arbitration is an effective alternative to state justice, presenting many advantages for the parties to the judicial process, including:
- The flexibility of proceedings – the parties have the freedom to choose the applicable procedure rules (with the condition not to breach public order and imperative provisions of the law), the type of arbitration –ad-hoc or institutionalized, the arbitrators that are to settle the dispute, the organising institution, the place of arbitration etc.;
- Arbitrator specialisation – the parties have the possibility to choose individuals with professional specialisation in the field referred to judgement increasing the confidence and offering the guarantee upon the competence of the ones that are to settle the dispute;
- Confidentiality of arbitration – conducting the arbitral proceedings is performed in a closed circle with the exclusive participation of parties and their representatives which ensures the commercial secret and avoids negative publicity, having a very important role in order for the commercial relationship between parties to continue;
- The period for settlement of conflict is much shorter than in the case of a judicial trial – if the parties do not convene otherwise, the arbitral tribunal must settle the request for arbitration within 6 months from its establishment, respectively 12 months for international arbitration, under the sanction of arbitration caducity;
- Arbitral awards are final and binding for the parties, having the possibility to be enforced just as judicial judgements;
- Arbitral awards may be cancelled only by the action for annulment and only for the limiting reasons provided by Art.608 of Civil Procedure Code.

International commercial arbitration is the *"preferred method of dispute settlement that emanate from international commerce"*[1]. Besides the above mentioned advantages, the parties can be mistrustful in judicial practices, political systems and foreign economical structures[2], due to unawareness or too little knowledge upon national legislation from origin countries of contractual partners, choosing arbitration being the best solution. Another important advantage is New York Convention (1958)[3] on Recognition and Enforcement of Foreign Arbitral Awards to which Romania is signatory party among other 156 countries worldwide, facilitating recognition and approval of enforcement of arbitral awards rendered by international arbitration.

The term "arbitrability" represents a status, disputes' nature, being arbitrable, respectively meeting cumulative conditions: 1) the dispute may be settled by the means of arbitration; 2) the parties concluded an

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[1] J. D. M. Lew, *Applicable Law In International Commercial Arbitration*, 1978, *apud* Grantham, W., *The Arbitrability of International Intellectual Property Disputes*, in Berkeley Journal of International Law, Volume 14, Issue 1, 1996, p. 175.

[2] *Idem.*

[3] http://www.newyorkconvention.org.

arbitration agreement; 3) arbitration agreement is valid and operative; and 4) the dispute should fall in the field of the disputes part of the arbitral convention provisions. The aforementioned conditions shall be further assessed.

Disputes related to intellectual property rights that may be settled by arbitration proceedings

It is in the best interest of all specialists in intellectual property rights and owners of these rights to know in which cases they may turn to arbitration and as to where and when. That is, because the assets as intellectual property of successful enterprises around the world are increasing in number and more valuable and the disputes that have as object the breach of certain intellectual property rights are ever more, the stakes for these disputes are often huge.

According to the provisions contained in Art 2 (viii) within the Convention for Establishing World Intellectual Property Organisation, Stockholm, 1967[4], intellectual property includes the rights related to: *"literary, artistic and scientific works, performances of performing artists, phonograms and broadcastings, inventions in all fields of human endeavour, scientific discoveries, industrial designs, trademarks, service marks, and commercial names and designations, protection against unfair competition and all other rights resulting from intellectual activity in the industrial, scientific, literary and artistic fields".*

Pursuant to the provisions provided by international conventions, taken over also by Romanian law, sub-branches of intellectual property are: copyright, related rights and *sui-generis* rights of database producers on one hand and industrial property rights on the other hand, each of them having patrimonial and non-patrimonial (moral) content. The rights emanating from intellectual creations are closely related to authors' personality, because *"the author's personality is extended in work"*[5], and such special connection offers the author firstly the moral non-patrimonial rights, from which derives patrimonial rights, evaluable in money. Intellectual property rights have a very complex dual nature and the two components are separately regulated and protected. Exemplifying, there are moral rights of intellectual property: right to decide if and in what extent and when the work shall be published, right to request the acknowledgement as author of the work, right to ask for observing the integrity of work, right to withdraw the work. There are considered intellectual patrimonial rights: the right to authorise or forbid the reproduction of work, distribution, renting, leasing, broadcasting, creating derived work, the rights that emanate from a registration request for an industrial property object (patent, industrial design, utility model), exclusive right of use and to oppose any kind of use or detriment brought to work without right to do so, right of priority or exposure, as well as all rights settled by contract with third parties exploiting the objects of intellectual property.

The first condition for arbitrability – what kind of disputes and with regard to what type of intellectual property rights may be settled by arbitration – it must be assessed in close connection with national legal provisions, respectively if and which are the arbitrable disputes and if there are legal exceptions with regard to the settlement by arbitration of disputes with regard to the intellectual property rights.

„ The concept of arbitrability, properly so called, relates to public policy limitations upon arbitration as a method of settling disputes. Each state may decide, in accordance with its own economic and social policy, which matters may be settled by arbitration and which may not. In international cases, arbitrability involves the balancing of competing policy considerations. The legislators and courts in each country must balance the importance of reserving matters of public interest (such as human rights or criminal law issues) to the courts against the public interest in the encouragement of arbitration in commercial matters"[6].

In Romania, the types of disputes related to intellectual property that may be settled by arbitration are regulated by general law –the arbitration procedure[7] from the Civil Procedure Code – and special laws, specific to different types of property rights – copyrights, related rights and industrial property.

Pursuant to provisions of the New Civil Procedure Code all disputes upon which the law do not provide otherwise are arbitrable, except for the ones related to civil status, individuals capacity, inheritance disputes, family relationships and the rights upon which the parties cannot order (Art. 542 of Civil Procedure Code). The previous regulations limited the domain of disputes that may be settled by means of arbitration *"patrimonial disputes […], except for the ones related to rights upon which the law forbids to make an amicably settlement"* (Art. 340 from the previous Civil Procedure Code[8]). While within previous Civil Procedure Code patrimonial disputes were forming the only category of disputes liable to be settled by means of arbitration, being excluded from the domain of arbitrability un-transactional patrimonial disputes and non-patrimonial disputes, the new procedural regulation increased the variety of arbitrable disputes by eliminating the condition as regards the patrimonial nature – although the disputes expressly excluded from

[4] http://www.osim.ro/legis/brevet/stocholm967.htm.

[5] V. Roș, *Dreptul proprietății intelectuale, Vol. I, Dreptul de autor, drepturile conexe și drepturile sui-generis*, Publisher C.H. Beck, 2016, p.10.

[6] A. Redfern, M. Hunter, *International Commercial Arbitration 137* (2d.ed., 1991) *apud* Grantham, W., *The Arbitrability of International Intellectual Property Disputes*, in Berkeley Journal of International Law, Volume 14, Issue 1, 1996, p. 179.

[7] Book IV *„About arbitration"*, 2010 Civil Procedure Code – Law no. 134/2010 republished, Official Journal no. 247 of 10 April 2015.

[8] 1865 Civil Procedure Code.

the possibility of settlement by arbitration subsumes, in fact, all non-patrimonial rights[9], it remains the possibility of existence of non-patrimonial rights others than the ones related to civil status, individual capacity, inheritance debate or family relationships. It's about disputes related to interpretation of certain contractual clauses that are not valuable in cash, however they have most of the times pecuniary consequences upon parties, and also about disputes related to evacuation.

Art. 1112 with regard to disputes' arbitrability, dedicated to international arbitration process, falls however as the previous Civil Procedure Code within the segment of patrimonial arbitrable disputes: *"Any patrimonial case may be the object of arbitration if it is related to rights upon which the parties can freely order and the state law where the arbitration court seats do not reserves the exclusive jurisdiction to judicial courts".*

If patrimonial disputes related to intellectual property are arbitrable, as they are about rights upon which the parties can order, in case of non-patrimonial disputes we must assess the extent the parties may have such rights and if they can exert non-patrimonial rights[10].

Thus, as regards the industrial property rights, we may have disputes raised from exploitation contracts concluded by the owners of rights with third parties that can be settled by arbitration – although the laws regarding industrial property rights do not mention expressly the possibility of settlement by arbitration, it is understood, if not otherwise provided by an expressed legal exception, the existing option for arbitral procedure.

It remains however under question the possibility of the arbitral tribunal to order upon the validity of industrial property right[11], such possibility may be raised also in the defence.

General rule is that it is necessary to complete certain administrative formalities under the competence of State Office for Inventions and Trademarks (OSIM) in order to obtain the ownership of an industrial property right or, depending on the country where the request is formulated and the necessity of acknowledging the right abroad, by other similar bodies, national, Community, European or international. Such formalities are legally regulated and binding in order to acknowledge the right of industrial property upon an invention, industrial design, etc. and in order to benefit of the legal protection of that certain right, nationally – national legislations, Community – directives and European regulations, international – T.R.I.P.S. Agreement, Paris Convention for protection of industrial property etc. An exception to this rule is the case of commercial secrets and undisclosed information, for which there is not (yet) a formal procedure of acquisition or acknowledgement of the right upon them.

The view of the doctrine, which I do share, points out the issue of validity upon an industrial property title (patent, registration certificate) that cannot be settled by arbitration due to the fact that special laws grounding these titles are in exclusive jurisdiction of state court, furthermore, in Romania; there is only one, namely Bucharest Tribunal. This means that the validity of protection title is not arbitrable based on a direct provision of the law related to public order. Raising in defence of an exception upon validity of an industrial property right cannot be held and assessed by the arbitral tribunal (there is a similar issue raising in front of the arbitral tribunal forgery and use of forgery on documents submitted by the opposing party), the respondent having the right to challenge industrial property rights before courts of law. Also, such a registered request on the docket of the courts of law could determine suspending the settlement of arbitral dispute pursuant to Art.413 Para.1, point 1 of the Civil Procedure Code, until the final settlement of appeal. The solution of declining jurisdiction is not a valid one, contesting the validity of industrial property title in defence – and not by a counterclaim –not being a separate count of claim by which the arbitral tribunal could consider itself vested and, on the other hand, not capable of affecting the will of the parties, content of the statement of claim and jurisdiction upon settlement of the arbitral tribunal.

In another opinion[12], in case there shall be raised, in defence, issues that challenge the very right of intellectual property, the arbitral dispute cannot continue until the settlement of such problems by the court of law. It is not clear though who shall notify the court of law, considering that a possible decline may be targeting, as stated above, only counts of claim that the arbitral tribunal has been vested with.

It is worth mentioning that in Romanian law the exclusive jurisdiction related to the requests of annulment upon industrial property rights awarded by OSIM pertains to Bucharest Tribunal, the reason being the necessity of defending public prerogatives of State to award, acknowledge and protect industrial property rights[13]. Decisions within judicial judgements are, according to law, registered with OSIM. The exclusive jurisdiction of OSIM and courts of law is related to public order, observing the protection *erga omnes* of the rights emanating from the industrial property rights. Referral to jurisdiction of courts of law is imperative, arbitration being excluded (an arbitral award is binding only for the parties; it cannot obtain an *erga omnes* effect).

[9] Cozac, S., Arbitrabilitatea disputelor privind interpretarea clauzelor contractuale și a celor neevaluabile în bani, http://www.juridice.ro
[10] S. Florea, Arbitrabilitatea litigiilor în materia drepturilor de proprietate intelectuală, http://www.juridice.ro
[11] S. Florea, op.cit.
[12] I. Băcanu, Litigii arbitrabile, in Review "Dreptul" no. 2/2000, p. 39
[13] S. Florea, op.cit.

In this sense, Law no. 64/1991 on patents[14] provides within Art. 48-54 that the actions related to non-patrimonial personal rights of patents owners fall under the exclusive jurisdiction of law courts. Likewise, Law no. 84/1998 on trademarks and geographical indications[15] (Art. 45-49, 54, 60, 85) and Law no. 129/1992 on protection of designs and models[16] (Art. 25, 42).

In conclusion, the difference between arbitrable/non-arbitrable has as criteria *causa petendi*, meaning that when the legal grounds constitute the legal provisions related to the existence of intellectual property right, the dispute is not arbitrable, while the legal ground related to contractual responsibility, delictual responsibility, unjust enrichment or undue payments, the dispute is, basically, arbitrable[17]. Determination of arbitral jurisdictional extent is a matter of public order; nevertheless, considering its importance, the arbitrability is separately regulated by national and international legislations[18].

The disputes arising from infringement of rights which do not question the validity of protection title are arbitrable. Thus, it can be settled by arbitration – of course if the parties concluded an arbitral convention – disputes arising from assignment contracts, licence contracts, franchise contracts, infringement of holder or successor rights, disputes between assignor and the assignee or the ones between licensors and licensees to the extent disputes are related to rights the parties may provide.

The disputes emanated from raising industrial property rights with regard to the ones that do not impose completing formalities, as unregistered trademark, unregistered design, domain name, symbol, may be settled by arbitration, holders being able to order upon them unconditionally.

In the field of copyright and related rights, Law no. 8/1996[19] separates clearly the patrimonial rights listed within Art. 13 and 21, and moral rights (Art. 10). While disputes having as object patrimonial rights are in principle arbitrable – they may be subject for certain contracts concluded with pecuniary interest and the holders may order upon it – the law provides that moral rights "*cannot make the object of any waiver or alienation"*[20], they cannot be transactional, their holders cannot order upon them, thus, on first impression, disputes related to infringement cannot be settled by arbitration. However, I do not see why arbitration could not be vested with the settlement of certain requests finding infringement of moral rights and granting compensations, upon such matter parties being able to settle amicably anytime and in front of any jurisdiction.

Concluding an arbitration agreement

In which cases and on what intellectual property rights, the parties may conclude arbitration agreements? What are the forms of arbitration agreements?

The arbitration agreement is "the keystone of arbitration"[21], which is the manifestation of the will of the parties to settle the disputes between them by arbitration, excluding the disputes covered by agreement from jurisdiction of the courts.

The arbitral convention may be concluded either in the form of an arbitral clause included in the contract either as a compromise – a subsequent agreement which targets certain dispute, concluded even after the dispute is registered before a court (including arbitral courts).

The two forms of arbitration agreement are independent of each other, the inclusion of a arbitral clause in the parties' contract allowing them to submit directly to the competent arbitral institution or, in case of ad-hoc arbitration, to constitute directly the tribunal, without the necessity to conclude a compromise[22].

Both the arbitral clause and the compromise represent autonomous commitments and not parts of the contract[23]. The arbitral clause shall remain in effect and binding upon the parties even after termination of contract.

Written form is requested *ad validitatem*. Art. 548 Para 1 of the Civil Procedure Code is strict upon the form of arbitral convention stipulating that "*shall be concluded in writing under penalty of nullity*". Likewise, the New York Convention (1958) on Recognition and Enforcement of Foreign Arbitral Awards, a Convention which enjoys broad international appreciation and whose value is widely recognized[24], Art. II, provides that *"Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences"* that *"The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams"*[25].

[14] Law no. 64/1991 on patents, republished in the Official Journal no. 613 of 19 August 2014.
[15] Law no. 84/1998 on trademarks and geographical indications, republished in the Official Journal no. 337 of 8 May 2014.
[16] Law no. 129/1992 on protection of designs and models, republished in the Official Journal no. 242 of 4 April 2014.
[17] I. Băcanu, *op.cit*, p.39.
[18] *Idem.*, p. 24.
[19] Law no. 8/1996 on copyrights and related rights, published in the Official Journal no. 60 of 26 March 1996.
[20] Art. 11 Para. 1 of Law no. 8/1996.
[21] I. Băcanu, *op.cit.*, p. 23.
[22] V. Roș, *Arbitrajul comercial internațional*, Regia Autonomă "Monitorul oficial", 2000, p. 89.
[23] *Idem*, p.88.
[24] *Idem*, p. 97.
[25] *Apud* V. Roș, *op.cit.*, p.103.

Valid and operative arbitration agreement

Towards the nature of arbitration agreement, general provisions may apply on the validity of an agreement as provided by Civil Code, Art. 1179: the ability of the parties to contract; consent of the parties; specified and legal object; legal and moral cause.

According to special provisions contained in Book IV *About Arbitration* from the Civil Procedure Code, an arbitration agreement is invalid or ineffective in cases where the parties agree to settle by arbitration disputes concerning *"rights on which the parties cannot order"* (Art. 542 Para. 1 of the Civil Procedure Code).

It's about objective arbitrability, determined by the nature of the dispute – not any kind of dispute is liable to be settled by arbitration, however the doctrine[26] speaks equally about subjective arbitrability – capacity of legal persons of public law to conclude an arbitration agreement. The issue of State ability to conclude arbitration agreements has been widely discussed[27], based on Civil Procedure Code provisions, which provides that "*The State and public authorities have the ability to conclude arbitration agreements only if authorized by law or international conventions to which Romania is part*" (Art. 542 Para. 2), and *"If one party to the arbitration agreement is a State, a state-owned or state-controlled organization, the party may not invoke its own right to contest the arbitrability of a dispute or its capacity to be a party to the arbitration"* (Art. 1112 Para. 2, on international arbitral process), as well as the Geneva Convention of 1961[28] providing at Art. II(1) that *"capacity of legal persons of public law to resort to arbitration"*, the latter having *"the power to conclude valid arbitration agreements"* in international commercial disputes.

An arbitration convention having as object non-arbitrable disputes infringes public order and is, therefore, invalid in accordance with provisions of Art. 11 of Civil Code. However, if the arbitral tribunal crosses over this nullity and settles a dispute based on an illicit arbitration agreement, the arbitral award may be cancelled by a request for annulment[29] according to Art. 608 Para. 1 Letter a) of Civil Procedure Code *"the dispute was not liable for settlement by arbitration"* or letter h), *"the arbitral award infringes public order, morals or mandatory provisions of law".*

In international arbitration, New York Convention of 1958 provides that recognition and enforcement of foreign arbitral awards shall be refused if *"The subject matter of the difference is not capable of settlement by arbitration under the law of that country"* (Art. V(2)).

Classification of dispute in the domain of disputes included in arbitral agreement

Parties are free to decide what types of disputes shall be submitted for settlement to the arbitration court. Thus, arbitration clauses may refer to *"any dispute arising out of or in connection with the contract"* or *"disputes concerning performance of the contract",* in this case disputes concerning termination of contract falling under the jurisdiction of the state courts. If the parties conclude a compromise, the arbitral tribunal only has jurisdiction to settle the dispute forming the object of compromise, any other dispute being a matter under the jurisdiction of national courts.

In determining the arbitrability of a dispute, the arbitral tribunal must consider whether the parties have agreed to defer to arbitration the type of dispute that has been vested for settlement.

In next chapters, I will present the main institutions that organize arbitration proceedings to which natural and legal persons in Romania may turn to settle disputes concerning intellectual property rights.

Arbitration organised by the World Intellectual Property Organization (WIPO)

The World Intellectual Property Organization (WIPO) is the global forum for intellectual property services, policy, information and cooperation, established by the Convention establishing the World Intellectual Property Organization, Stockholm, 1967, and having as main objective *"to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization"* (Art. 3 of the Convention Establishing WIPO).

In 1994, it had been established the WIPO Arbitration and Mediation Center, with its headquarters in Geneva (Switzerland), having as purpose to promote resolution of intellectual property disputes by mediation and arbitration. Developed by leading experts in cross-border dispute settlement, the arbitration, mediation and expert determination procedures offered by the Center are widely recognized as particularly appropriate for technology, entertainment and other disputes involving intellectual property[30].

In intellectual property, arbitration shall be conducted on disputes arising from copyrights and related rights, trademarks, geographical indications,

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[26] Ph. Fouchard, E. Gaillard, B. Goldman, *Traite de l'arbitrage commercial international*, Ed. Litec, Paris, 1996, *apud* I. Băcanu, *op.cit., p.22.*

[27] For additional details, see for example B. Oglindă, *Despre validitatea și caracterul operant al clauzelor compromisorii încheiate de stat, autorități publice și alte persoane juridice de drept public, în contextul Noului Cod de procedură civilă și al legislației speciale aplicabile*, "Revista Transilvană de Științe Administrative" 1 (34)/2014, pp.81-97.

[28] European Convention on International Commercial Arbitration, Geneva, 21 April 1961, ratified in Romania through Decree no. 281/1963.

[29] I. Băcanu, *op.cit.*, p.24.

[30] http://www.wipo.int/amc/.

designs and models, patents, utility models, layout-designs of integrated circuits, anti-competitive practices etc.

WIPO Arbitration Rules[31] may be used for settling all types of arbitrable civil disputes, being however adapted for certain areas of intellectual property in order to suit the specificity of this complex field[32].

A special feature of the arbitral proceedings conducted under the WIPO Arbitration and Mediation Center is the choice of arbitrators by the Center as Appointing Authority, but only after consulting the parties, who are invited to submit proposals to be considered at the time of appointment[33].

Another feature worthy to be noticed is the expedited arbitration procedure, considered by WIPO experts to be necessary in certain areas, to counteract the disadvantages of standard arbitration that may sometimes extend over a long period of time. By this different set of rules, shortened time frames are established compared to standard rules, so the dispute should be declared closed within three month and the final award should be made within one month (as opposed to nine month and three month respectively under the WIPO Arbitration Rules).

Arbitration organized by the World Trade Organization[34]

The World Trade Organization was established on 1 January 1995, under the Marrakesh Agreement signed on 15 April 1994, replacing the General Agreement on Tariffs and Trade (GATT), having the main role of supervising a large number of treaties defining the "rules of trade" between nations.

Annex 1C to the Agreement Establishing the World Trade Organization is the Agreement of Trade Related Aspects of Intellectual Property Rights – T.R.I.P.S. This agreement provides for minimum standards for various regulations in the intellectual property field and represents one of the most important multilateral instruments regarding globalization of rules on intellectual property.

For all domains in relation to which it provides supervision, including intellectual property, the World Trade Organization provides services of dispute settlement between Member States on breach of any agreement or promise under WTO. According to the data available on the Organization's site[35], WTO has one of the most active international dispute settlement mechanisms in the world – over 500 disputes have been bought and over 350 ruling have been issued since WTO was established, representing *"the WTO's unique contribution to the stability of the global economy"*[36].

The general rules of dispute settlement are comprised in WTO Agreement for dispute settlement, called DSU – *Dispute Settlement Understanding*. These rules and special procedures are binding for all WTO members and their application is ensured by the sole dispute settlement body set up within the WTO General Council. Dispute resolution is achieved through specific methods, such as consulting, the panel of experts, conciliation, mediation and arbitration.

Art. 21.3 of the DSU provides for the possibility to initiate arbitration procedures whenever neither the parties nor the WTO were able to establish a "reasonable period of time" in which a Member State found to be in violation of its WTO obligations must comply with the ruling and recommendations of the WTO Dispute Settlement Body. Arbitrators are selected in accordance with the above mentioned rules either by the parties to the arbitration or by the General Director of WTO.

Arbitration organized by the Romanian Copyright Office (ORDA)

The arbitral tribunals established under the auspices of the Romanian Copyright Office settle disputes concerning copyright and related rights as defined by Law no.8/1996 on copyright and related rights.

The arbitral procedure is regulated by Art. 130 – 131^2 of Law no. 8/1996, Section III on "Functions of Collective Management Organizations". According to these provisions, collective management organizations in the field of copyrights and related rights shall develop methodologies for their fields, including economic rights payable that have to be negotiated with users for the payment of these rights (Art. 130 Para 1 letter b). These methodologies are negotiated within a commission established by the decision of the general director of the Romanian Copyright Office, constituted from one representative for each of the main collective management organizations operating for each category of rights and one representative for each of the main associative structures of users (Art. 131 Para. 2). Negotiations take place during 30 days at the most from the date of the establishment of the commission and the outcome of negotiations is recorded in a protocol filed with the Romanian Copyright Office and published in the Official Journal (Art. 131^2 Para. 1 and 2). Once published, methodologies are binding for all users in the field for which they were negotiated, as well as for

[31] WIPO Arbitration Rules, effective from 1 June 2014, http://www.wipo.int/amc/en/arbitration/rules/.

[32] C. Leaua, M. Maravela, *Consideraţii cu privire la servicii de soluţionare a litigiilor prin metode alternative în cadrul Organizaţiei Mondiale a Proprietăţii Intelectuale în domenii specifice*, in "Revista Română de Dreptul Proprietăţii Intelectuale" no. 3/2012, p. 78.

[33] *Idem*, p.85.

[34] All information related to dispute resolution and arbitration organized by the World Trade Organization come from the official site of WTO: http://www.wto.org.

[35] https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.

[36] https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm.

all manufacturers and importers of media and devices for which compensatory remuneration for private copy is due[37].

When entities forming a party that is going to participate in the negotiations could not agree upon a common point of view to be presented to the other party, or the two parties under negotiations could not agree upon a unique form of the methodology within the 30 days as provided by law, or the collective management organizations could not agree upon the conclusion of a protocol for the distribution of remunerations and for the establishment of the fee due to the sole collector, the Romanian Copyright Office may be required to initiate arbitration proceedings (Art. 131^2 Para. 3).

An important issue debated within the doctrine is the voluntary or mandatory nature of ORDA arbitration procedure. If at first glance, the expression *"may be required"* would show the optional nature of arbitral proceedings, which is otherwise a particular issue of the arbitration procedure as regulated by the Civil Procedure Code and sustained by some authors[38], at a closer scrutiny, the procedure regulated by Law no. 8/1996 is the only procedure that allows, in the absence of agreement between the parties, elaboration of methodologies for collection and distribution of economic rights due to copyright and related rights holders, without which the entire activity of collective management organizations would be blocked[39]. Thus, we are talking about a mandatory procedure.

The arbitral tribunal is established by drawing lots in front of the parties of five standing arbitrators and three substitute arbitrators that shall replace, in the order of the drawing of the lots, the unavailable standing arbitrators. Within 5 days of the appointment of arbitrators, ORDA convenes at its headquarters the appointed arbitrators and the parties, when the arbitral tribunal shall establish its fee by negotiating with the parties, which is equally shared by both parties in arbitration, the first date of arbitration, no later than five days, and the place of arbitration. The arbitral tribunal's final award, comprising the final form of the methodologies subject to arbitration, shall be filed with the Romanian Copyright Office within 30 days from the first date of arbitration, period of time that may be extended, reasoned, with maximum 15 days. The arbitral award may be appealed at the Bucharest Court of Appeal and the decision of the Court of Appeal shall be final and binding, being submitted to the Romanian Copyright Office and published in the Official Journal for enforceability (Art. 131^2 Para. 9).

Studying all these provisions of Law no. 8/1996, we see that ORDA arbitration does not cover basic principles of arbitration as established by the Civil Procedure Code and also by international regulations – the procedure is not a voluntary one, it is not based on the parties' consent, the arbitrators are not appointed by the parties, the arbitral award may not be subject to the action for annulment regulated by Art. 608 of the Civil Procedure Code. It is in fact a mandatory manner of solving a particular type of problems occurred in a precisely determined area, having a clearly regulated nature[40].

Arbitration procedures organized by the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania

The Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania[41] is the oldest arbitral institution in Romania, being established in 1953 for settling international commercial disputes.

Today, the Court of International Commercial Arbitration acts as a permanent arbitral institution near the Chamber of Commerce and Industry of Romania, reorganized in accordance with Law no. 335/2007 of the chambers of commerce in Romania[42], and settles domestic and international civil disputes in accordance with its own arbitral procedure rules, as well as the provisions of the Civil Procedure Code, having a very good reputation earned because of its Romanian and foreign specialists with high qualification registered on its List of arbitrators, as well as because of the high quality of the arbitral awards rendered under its auspices.

The Court of International Commercial Arbitration settles commercial disputes from all economic sectors – construction, financing, investment, insurance, public procurement, energy, intellectual property.

Studying the jurisprudence of the Court of International Commercial Arbitration, I identified several cases settled by arbitration, concerning intellectual property disputes on property rights that did not call into question the title of protection, in relation to which the arbitral courts retained their liability for settlement by means of arbitration.

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[37] S. Florea, *op.cit.*

[38] P. Popovici, *Arbitrajul constituit pe lângă Oficiul Român pentru Drepturile de Autor din România*, in "Revista Română de Dreptul Proprietății Intelectuale" no. 4/2010, p.10.

[39] S. Florea, *Considerații privind procedura desfășurată în fața tribunalului arbitral la Oficiului Român pentru Drepturile de Autor*, in 'Revista Română de Dreptul Proprietății Intelectuale' no. 4/2012, pp.144.

[40] For a detailed review of differences between arbitration regulated by Law no. 8/1996 and the one regulated by the Civil Procedure Code, see S. Florea, *Considerații privind procedura desfășurată în fața tribunalului arbitral la Oficiului Român pentru Drepturile de Autor*, in 'Revista Română de Dreptul Proprietății Intelectuale' no. 4/2012, pp.142-156.

[41] http://arbitration.ccir.ro.

[42] Law no. 335/2007 of the chambers of commerce in Romania, published in the Official Journal no. 836 of 6 December 2007.

Thus, in a dispute[43] concerning compensation for unlawful use of a patent on heating equipment for Diesel engines, the arbitral tribunal held its own jurisdiction under the arbitration agreement concluded by the parties, jurisdiction that was actually not disputed by the parties, administered evidences and settled the dispute by final award.

In another dispute[44] concerning the termination of a contract for the purchase of software – adaptation and implementation of a system of integrated management for insurance and reinsurance services, for supplier's culpable un-fulfilment of its contractual obligations, the arbitral tribunal held that *"the parties concluded a valid arbitration agreement"*, the jurisdiction of the arbitral court not being questioned nor challenged by them. In settling the dispute, the arbitral tribunal examined the applicability of the special provisions of Art.46 Para.3 of Law no. 8/1996 on copyright and related rights, according to which*: "The person ordering the work shall be entitled to terminate the contract if the work does not meet the established conditions: In case of contract denunciation, the amounts cashed by the author remain to the latter. In case he executed preparatory work for a work which was the subject of an order contract, the author is entitled to reimbursement of incurred expenses."* and found that, in this dispute, *"it is about the purchase of a computer program, subject to copyright in accordance with Art.7 letter a) of Law no. 8/1996, that had to be achieved, adapted, implemented and handed over to the beneficiary by the supplier"*, being about *"an order contract for future work being subject, among others, to the provisions of Law no.8/1996 on copyright and related rights".* For these reasons, it found the rightful termination of the contract, but rejected the claim for reimbursement of the advance, showing that an order providing for the refund of the amounts received as advances by the supplier *"would be contrary, in part, to some imperative legal provisions in place for the protection of authors of future works and which cannot be derogated from by the parties' will (Art. 5 Civil Code)"*.

In an arbitral award rendered in 2008[45], which concerned a dispute arising out of breach of contractual payment obligations from a advertising services contract, under which, *inter alia*, the claimant made an advertisement related to which infringement of copyrights was invoked by means of counterclaim, with the consequent interruption of broadcast, it was found that the arbitral tribunal has jurisdiction in accordance with the arbitration agreement concluded by the parties by means of an arbitration clause included in the contract. The jurisdiction was challenged by the claimant as regards the settlement of the counterclaim, as it concerned claims based on alleged violations of Law no. 8/1996 on copyright and related rights, showing that both the law and the arbitration clause except disputes on intellectual property from the jurisdiction of arbitration, and that the counterclaim *"is not arbitrable, is not liable to be settled by arbitration since it concerned copyrights arising out of an audiovisual work"*. The arbitral tribunal joined the exception on jurisdiction with the substance of the case and rejected it, including its liability to be solved by arbitration, arguing that the counterclaim referred to infringement of commercial obligations arising out of the contract and not to copyright infringement, since that was a claim based on ordinary law, not a dispute about intellectual property.

In another dispute[46] settled under the auspices of the Court of International Commercial Arbitration, which dealt with a breach of payment obligations arising out of a products and services delivery contract – delivery, installation, commissioning, maintenance and updating a software, and damages under the penalty clause of 50% of the contract value for beneficiary's breach of the confidentiality obligation provided by the contract, the arbitral tribunal retained its jurisdiction to settle the dispute in accordance with the arbitration agreement – the arbitration clause agreed between the parties in the contract, jurisdiction that was actually not disputed by the parties. With regard to the claim for damages, the claimant stated that the parties had determined that the intellectual property right on the software belongs to the claimant, the beneficiary having the obligation of confidentiality – databases, reports, price lists – assumed under the contract, being a commercial secret on which it recognised intellectual property rights in favour of the claimant. Both parties confirmed that the copyright for the main software program belonged to a company in Finland, with whom the claimant concluded a distribution contract for Romania, however the claimant invoked the copyright over some *"created and developed related software"*, without which the main software could not be used in Romania. The arbitral tribunal rejected the claim for damages, retaining that the intellectual property rights on the software belong to the company in Finland, that *"birth, content and extinction of copyright on an intellectual creation work are subject to the law of the State where it was acknowledged by the public for the first time"* (Art. 2.624 Civil Code), that *"copyright on computer programs is harmonised throughout European Union Member States by (EC) Directive no. 24 of 23 April 2009 on the legal protection of computer programs, and the Directive was implemented in*

[43] Arbitral Award no. 112 of 9 April 1986, case file no. 69/1984, arbitral tribunalcomposed of: Ion Băcanu – presiding arbitrator, Savelly Zilberstein and Yolanda Eminescu – co-arbitrators.

[44] Arbitral Award no. 27 of 22 February 2007, case file no. 68/2005, arbitral tribunal composed of: Marian Nicolae – presiding arbitrator, Cornelia Lefter and Viorel Roș - co-arbitrators.

[45] Arbitral Award no. 172 of 14 August 2008, case file no. 46/2008, arbitral tribunal composed of: Ion Băcanu – presiding arbitrator, Victor Babiuc and Victor Tănăsescu – co-arbitrators.

[46] Arbitral Award no. 58 of 6 May 2016, case file no. 132/2015, arbitral tribunal composed of: Viorel Roș – presiding arbitrator, Flavius Baias and Traian Briciu – co-arbitrators.

Finland, the country where the owner of the computer program right had its headquarters […], as well as in Romania, where it is claimed that the Claimant's own rights were born", that *„the assignment of the right to use a computer program does not imply transfer of the copyright on it"* (Art. 75 Para. 2 of Law no. 8/1996) and that the confidentiality clause is contrary to the provisions of the distribution contract concluded between the claimant and the owner of the copyright on the software, by which the right to use the program was transmitted only, the claimant not having the copyright owner's consent for making derivative works (Art. 8 of Law no. 8/1996).

I believe that settling disputes concerning intellectual property rights through arbitration has several advantages worthy of being considered by holders of those rights, as well as specialists in this field that is in constant change and development, of course, with strict observance of the limitations established by national laws and international conventions.

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LI-FI TECHNOLOGY AND THE NEW CONCEPT OF DATA TRANSFER SECURITY

Ramona DUMITRAȘCU *

Abstract

Li-Fi is a wireless technology that transmits high-speed data using visible light communication (VLC), it can achieve speeds of 224 gigabits per second in the lab. The potential Li-Fi technology can change a lot in virtual word considering it can provide transmission at 1 GB per second - that's 100 times faster than current average Wi-Fi speeds. By flickering the light from a single LED, Li-Fi technology can transmit far more data than a cellular tower, using Visible Light Communication (VLC) technology - a medium that uses visible light between 400 and 800 terahertz (THz). It works basically like an incredibly advanced form of Morse code - flicking an LED on and off at extreme speeds and can be used to write and transmit things in binary code. The benefit of Li-Fi over Wi-Fi, other than potentially much faster speeds, is that because light cannot pass through walls, it makes it a whole lot more secure.

Keywords: *internet, security, software, encryption*

1. Introduction

Demand for wireless data is increasing day by day which is escalating the congestion in radio spectrum. In present scenario the bandwidth capacity which is available is finite and not capable enough to sustain with the constantly increasing demand of wireless data. Wireless Fidelity dubbed as Wi-Fi has been in use from almost years to provide the internet services to all the required places right from home to humungous organizations. But it has limited bandwidth of about 54-100 megabits per second (Mbps). With High definition video & audios available for the viewers, it is becoming intricate to transfer them to the user flawlessly. The problem of speed & consistency even doubles when support is to be given to multiple devices because of splitting up of bandwidth between devices. The beauty of Wi-Fi is its easy and simple to set up network but threatening part is to provide security. To overcome technological boundaries of Wi-Fi, a new paradigm is in, which is Li-Fi[1].

Transfer of data from one place to another is one of the most important day-to-day activities. The current wireless networks that connect us to the internet are very slow when multiple devices are connected. As the number of devices that access the internet increases, the fixed bandwidth available makes it more and more difficult to enjoy high data transfer rates and connect to a secure network. But, radio waves are just a small part of the spectrum available for data transfer. A solution to this problem is by the use of Li-Fi. Li-Fi stands for ”Light- Fidelity”. Li-Fi is transmission of data through illumination by taking the fiber out of fiber optics by sending data through an LED light bulb that varies in intensity faster than the human eye can follow.

Li-Fi is the term some have used to label the fast and cheap wireless communication system, which is the optical version of Wi-Fi. Li-Fi uses visible light instead of Gigahertz radio waves for data transfer.

The idea of Li-Fi was introduced by a German physicist, Dr. Harald Hass, which he also referred to as data through illumination. The term Li-Fi was first used by a german scientist Dr. Harald Haas in his TED Global talk on Visible Light Communication[2].

According to Hass, the light which he referred to as D-Light, can be used to produce data rates higher than 10 Gigabits per second which is much faster than our average broadband connection.

Li-Fi can play a major role in relieving the heavy loads which the current wireless systems face since it adds a new and unutilized bandwidth of visible light to the currently available radio waves for data transfer. Thus it offers much larger frequency band (300 THz) compared to that available in RF communications (300 GHz). Also, more data coming through the visible spectrum could help alleviate concerns that the electromagnetic waves that come with Wi-Fi could adversely affect our health.

Li-Fi can be the technology for the future where data for laptops, smart phones, and tablets will be transmitted through the light in a room. Security would not be an issue because if you can‘t see the light, you can‘t access the data. As a result, it can be used in high security military areas where RF communication is prone to eavesdropping[3].

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[1] Vinod Saroha, Ritu Mehta, ”Network Security: Li-Fi: Data Onlight Instead of Online”, *International Journal Of Engineering And Computer Science* 3/1 (2014): 3681-3688.

[2] Anurag Sarkar, Shalabh Agarwal, Asoke Nath, ”Li-Fi Technology: Data Transmission through Visible light”, *International Journal of Advance Research in Computer Science and Management Studies*, 3/6 (2015): 1-12 (available online at: www. ijarcsms.com).

[3] A. Anvith Raj, Vamshi Krishna Sai Nagabandi, Santosh Kumar, *Li-Fi (Light-Fidelity) Technology. Transmission of data through light*.

Light waves do not penetrate through walls. So, they can't be intercept and misused[4].

2. Content

Light Fidelity, Li-Fi, is a relatively new form of wireless communication technology. It uses light signals to communicate data. The excitement surrounding Li-Fi is because it has proven to have higher speeds than Wi-Fi. In the lab, Li-Fi has reached speeds of 224 gigabits per second. The same lab field tested Li-Fi technology in a factory based in Estonia and achieved transmission rates at 1 gigabit per second.

Professor Harald Hass wanted to turn the world's light bulbs into wireless routers. "All we need to do is fit a small microchip to every potential illumination device and this would then combine two basic functionalities, illumination, and wireless data transmission. In the future we will not only have 14 billion light bulbs, we may have 14 billion Li-Fis deployed worldwide for a cleaner, greener, and even brighter future" (Harald Hass Ted Talk 2011).

Herald Hass has proved that data can be transmitted over the light spectrum - this makes Li-Fi a form of optical wireless communication. Li-Fi uses infra-red and ultra-violet (visible light) waves to communicate data. Infra-red and ultra-violet spectrums can carry more information than radio frequency waves. This is why Li-Fi can achieve greater speeds than Wi-Fi.In simple terms, Li-Fi can be thought of as a lightbased Wi-Fi. That is, it uses light instead of radio waves to transmit information. And instead of Wi- Fi modems, Li-Fi would use transceiver-fitted LED lamps that can light a room as well as transmit and receive information. Since simple light bulbs are used, there can technically be any number of access points[5].

Currently, Li-Fi technology is focused on using the light from light-emitting diodes (LEDS) to communicate data. LEDs have become very popular around the world for their efficiency, low environmental impact, and longevity. The LED lights in homes and offices can be turned into wireless routers. LED light bulbs are a semiconductor light source, therefore, the constant electricity supply to the bulb can be altered to make it brighter or dimmer. Using visible light communication (VLC) the current in the LED bulb is flicked on and off at very high rate, functioning like a complex Morse code involving 1s and 0s. The flicking will happen at a speed too fast for the human eye to notice, so humans and animals will not be impacted. Li-Fi will continue after you have switched the lights off because the LEDs will be lit and signaling at a low light level that cannot be recognized by the human eye. To access the Li-Fi network you simply need a device to detect the light signals, with a component to decipher the light signals.

Wi-Fi uses radio frequency waves, a technology which has limited space and is quickly reaching its capacity. The limited capacity is why the radio frequency spectrum is heavily regulated in the US a nd it also provoked many security liabilities.

One of the most endearing facets of Li-Fi is that it uses the visible light spectrum. The visible light spectrum is 10 000 times larger than the radio frequency spectrum and is unregulated. So you don't need a license to take advantage of the light spectrum.

Another upside to Li-Fi is that it uses light spectrum and not radio frequency. Therefore, it emits no electromagnetic interference. This makes it more suitable for highly sensitive areas. Electromagnetic interference can affect communication in areas like mines or disrupt sensitive equipment in places like hospitals.

Data is fed into an LED light bulb which is fitted with signal processing technology. The LED bulb pulses the data at a high non-visible rate to the photodetector. The pulses are interpreted by the receiver into an electrical signal, the electronic signal is then converted back to binary data which is the web content we consume. The LED lights will be networked, so multiple users can access data using a single LED light or move from one LED light to another without affecting their access.

Although Li-Fi has faster speeds than Wi-Fi, it has a very short range. The further away you are from the light source, the slower the speed. That being said, you don't necessarily need to be under the LED light to access Li-Fi because it can use light reflections on surfaces, including walls, to achieve speeds averaging 70 MB/s. Unlike Wi-Fi, Li-Fi cannot penetrate walls because it uses light spectrum. Although not being able to penetrate walls limits the range of Li-Fi, it also makes the technology much more secure. It ensures that users can limit the area of accessibility. The security aspect of Li-Fi has both technology and defence firms very interested.

Due to the speeds that Li-Fi can reach, and its spatial limits, the technology IS ESPECTED TO work well alongside cellular and Wi-Fi technology as an additional option for connectivity. Li-Fi can be used to syphon off heavy traffic from cellular and Wi-Fi networks. For example, Li-Fi can be made available in densely populated areas like a shopping mall or sports stadium, allowing users to consume content rich media like videos or live streaming. As the users will be on the Li-Fi network, this will free up cellular and Wi-Fi network capacity in that area. This is because the uplinks require little capacity - it is the downlinks that strain the networks. The Internet of Things (IoT) is a

[4] Gaurav Singh, Santoshkumar Yadav, Essakkimuthu Nadar, Kumari Gowda Archana Nanade, "Transmission of Data Using Li-Fi Technology", *International Journal of Computer Science Trends and Technology (IJCS T)* 4/2 (2016): 199-202 (available online at: www. ijcstjournal.org).

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revolution that has a lot of experts asking, where will we find the capacity to handle all that data? Li-Fi has proven itself as a viable, efficient and secure solution. A home, office or factory could run its own high capacity network over Li-Fi without adversely affecting public capacity[6]. Moreover, there are areas where radio simply does not work, or is not permitted such as underwater and in aircraft cabins. The possibilities are nearly unlimited[7].

Security of the data transfer is currently one of the most important concerns. Visible light can be reflected but generally does not penetrate materials which can be a security advantage and perhaps a coverage disadvantage[8]. Wi-Fi communication is vulnerable to hackers as it penetrates easily through walls. Radio waves can penetrate through walls. This leads to many security concerns as they can be easily intercepted. Light of course does not penetrate through walls and thus data transmission using light waves is more secure Yet, one serious disadvantage of the. Li-Fi technology ist that it requires line of sight. If the intensity of an external source of illumination such as sun is greater than the intensity of the transmitting LED array then the data to be transmitted is washed out. The receiver cannot transmit back or provide feedback to the transmitter[9].

Arguably the most important criteria of choosing and using the transfer data through internet is the security of the transfer. As we all know, wireless signals delivered by radio waves can go through walls into the outside world, where hackers and other malicious entities might be waiting. Light, on the other hand, can't pass through walls, which means that it's more likely to stay secure than a wireless signal broadcast to the entire vicinity[10]. As long as transparent materials like windows are covered, access to a Li-Fi channel is limited to devices inside the room.

This raises the possibility of creating secure ad-hoc networks in meeting rooms for example – enabling participants to share data without risk of data leaking out. Communication only takes place where the light can be seen, therefore the light can be directed towards certain areas within the office. This creates possibilities in open plan offices to create network zones. Maybe one part of the office connects to a project network, alternatively if you walk to another area you are granted public Internet access**.** On the building infrastructure side, the sender (light bulb) and receiver (sensor) are not necessarily the same device, or even in the exact same spot.

The communication is fundamentally uni-directional. Two uni-directional channels are used back-to-back to create communications. While this in essence is an accident of the technology, it could be used creatively to build security enclaves as the solution effectively has data-diodes built in[11].

Li-fe is a free band and doesn't need license and it uses light[12]. Li-Fi is a visible light communication medium, which is not, required any kinds of spectrum license. It is we didn't pay any amount for communication and license[13].

It is a proven fact that Li-Fi is more secure as compared to traditional Wi-Fi. This is because Wi-Fi routers are generally used by attackers to enter a network and strong firewalls are also unable to safeguard your network from these attackers. One of the common reasons behind this is that the range of Wi-Fi routers is an important factor which enables these security breaches into your Wi-Fi network.

On the other hand, Li-Fi uses light which limits the range of the internet connection and it cannot be increased at any cost. Thus, not letting the bulb be lightened or dimmed manually. This peculiar feature of Li-Fi will protect your network from interference from your neighbours.

Along with those blazing speeds, Li-Fi offers security benefits beyond strong passwords and AES encryption. Because it uses visible light to transmit data, it can't pass through walls, making it practically as secure as sharing files with an external Thunderbolt drive. Furthermore, since light waves don't interfere with other radio signals like Wi-Fi does, it could even be used safely on planes, in hospitals, and in other areas where interference is an issue.

Li-Fi, could provide a substantially increased solution to enhance data security to businesses seeking to improve data protection, from government and defence organisations, to financial, public sector, pharmaceutical, or any 'high data risk' industries.By exploiting specific properties of light, the Li-Fi system prevents both sides of the communications link being intercepted. Professor Haas explains: "Let us consider what Li-Fi means for the security of public and corporate internet access. Wi-Fi signals propagate in all directions and pass through walls and all data within range can be recorded. Because Li-Fi signals travel in directional beams between an access point and a

[6] https://www.sitepoint.com/li-fi-lighting-the-future-of-wireless-networks/.

[7] http://www.securityinfowatch.com/article/12103850/light-enabled-wi-fi-may-be-the-future-of-secure-communications-technology.

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[13] Manas Ranjan Mallick, "A Comparative Study Of Wireless Protocols With Li-Fi Technology: A Survey", *Proceedings of 43rd IRF International Conference, 29th May, 2016, Chennai, India*: 8-12.

terminal, and vice versa, a potential interceptor would need to be in the overlapping space of both light beams. Even an unencrypted Li-Fi access point provides better security than Wi-Fi". "Li-Fi removes the uncertainty of joining a network", he continues. "In a typical Li-Fi installation, ceiling lights which transmit and receive the data are part of the premises and this creates a chain of accountability for the security of the users' data. The inherent security advantages of Li-Fi and the accountability that it offers, provide a supplement to the emerging need for greater data security and responsibility"[14].

Having a global view on the new transfer data technology through by LI-FI one can easily conclude on it's major advantages such as: high speed transmission as high as 500 mbps or 30 GB per minute, Li- Fi uses light rather than radio frequency signals, VLC could be used safely in aircraft, Li-Fi can be integrated into medical devices and in hospitals as this technology does not deal with radio so it can easily be used in such places where Bluetooth, infrared, Wi-Fi and internet are banned. In this way, it will be most helpful transferring medium for us. Li-Fi is efficient under water in sea, where Wi-Fi does not work at. There are around 19 billion bulbs worldwide, they just need to be replaced with LED ones that transmit data. We reckon VLC is at a factor of ten, cheaper than Wi-Fi. Security is another benefit, since light does not penetrate through walls. By implanting the technology worldwide every street lamp would be a free access point. Li-Fi may solve issues such as the shortage of radio frequency bandwidth. Visible light spectrum has 10,000 time broad spectrum in comparison to radio frequency used in Wi-Fi[15].

The genial recognition of Haas to use led frequency as a replacement for wi-fi radio-frequency; enhancing the usable band with tremendously and at the same time making the message transmission more secure and less harmful (no magnetic field interference) has, however a possible disadvantage to be investigated: although led frequencies are not perceived by the human eye as such, it is uncertain weather the brain as such is not aware of the fluctuation of light- the essence of the message. Let it be understood that this issue gas been linked to the occurrence of epilepsy and other related symptoms. Although I am fully aware that this thesis has nothing to do with the essence and the purpose of this article, namely security issues in transfer of data and intellectual property issues I do have the opinion that ignoring the safety and well-being of humans supersede any other arguments.

3. Conclusions

Internet offers without a doubt unlimited possibilities in accessibility, for anyone and everyone to utilize which implies transparency and as consequence, total exposure which automatically will result in vulnerability. Until recently, enormous resources (people, money, research, security) have been allocated to protect and secure the data transfer. This resulted into a huge industry of software programs meant to protect the information, the intellectual property and the secret of communication. Until recently the solution of safety was always searched into software and only lately the revolution of the Li-Fi technology revealed that actually software-like solutions can be solved by changing the way of communicating online. Although many of the previous inventions still remain extremely useful, such us encryption and it variations, other might just not be useful anymore, such us firewalls.

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TRADEMARK PROTECTION SYSTEMS – USE VS. REGISTRATION

George-Mihai IRIMESCU[*]

Abstract

The main purpose of the paper is comparing different trademark protection system, focusing on European jurisdictions and the relevant legislations.
The comparison focuses on the Romanian jurisdiction, as representative for the attributive system, and the Italian jurisdiction, which the doctrine considers representative for the declarative system. For each of them, the relevance of both use and registration are presented in terms of acquiring, consolidating or loosing protection.
By presenting the first to use and first to file systems, the article aims to compare them by outlining the advantages and disadvantages of both systems, and also by showing what they have in common in terms of legal consequences.
The article also describes the approach of international conventions with respect to trademark protection system, focusing on the legislation of the European Union, which is also directly relevant to both jurisdictions chosen to outline the two systems.
Finally, brief commentaries regarding the notion of "use" are made, along with conclusion regarding the analyzed trademark protections systems.

Keywords: *first to file system, first to use system, use, registration, trademark protection.*

1. Introduction - The main trademark protection systems

The doctrine identified three trademark protection and acquiring trademark rights systems: the first to use system (realist or declarative), the first to file system (or attributive) or the mixt system (or dualist)[1].

The declarative system is that system where the trademark rights are acquired by the first person who put the trademark in the commercial circuit. Thus, the occupation is made through the effective use of a mark.

The first to use system does not, however, exclude registration trademark proceedings in the jurisdictions where it is present. In these countries, however, the effect of the trademark application is in principle a declarative one, and not of constituting rights, the act of use being independent of any trademark application, with nuances that we will further show.

Moreover, the act of use should be public and exercised *animo domini*, in other words showing the intention of the owner to appropriate that trademark, the continuous use being a condition to consolidate the right[2] (and not one to acquire the right, as could be interpreted in some situations in the attributive system). We consider there is a fine limit between a certain use duration that serves to determine the seriousness of use and the intention to appropriate, having therefore an attributive role, and the continuation of use that only consolidates the right. Although the intention to appropriate the mark is undoubtedly a subjective attitude, it is proven by means of objective, exterior facts, a possible indication being the continuity of use. However, such a limitation, that implies degree of subjectivity, has more of a theoretical importance than a practical one.

Thus, in order to obtain trademark protection in this system, the doctrine identifies an objective condition (the public use of the trademark) and a subjective condition (the intention of appropriation), which could be proven by any means available, since these are legal facts[3].

In the attributive system, the trademark right is acquired through registration before the national or regional intellectual property offices. Thus the right to a trademark belongs to the first person that filed a valid trademark application for a distinctive sign, with the condition it is registered when the procedure is finalized. However, although the prior use is not, as a rule, opposable, the use or non-use of a trademark do have legal consequences, as we will further detail.

The mixt system combine the characteristics of the two trademark acquisition systems, and it could be identified in the legislations of different states as the delayed attributive system (specific to the British law), the delayed system (where the trademark is not examined on the merits) and the preliminary approval system (used in the Swiss law)[4].

However, it should be noted that the first two systems should not be seen as totally opposed. In both

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[1] Viorel Roș, Octavia Spineanu-Matei, Dragoș Bogdan, *Dreptul Proprietății Intelectuale. Dreptul Proprietății Industriale. Mărcile și indicațiile geografice*, All Beck Publishing, Bucharest, 2003, page 16 and the following.

[2] Ioan Macovei, *Tratat de drept al proprietății intelectuale*, C.H. Beck Publishing, Bucharest, 2010, page 342 and the following.

[3] Florea Bujorel, *Dreptul Proprietății Intelectuale - Dreptul de proprietate industrială*, Fundației România de Mâine Publishing, Bucharest, 2007, page 138 and the following.

[4] *Idem*, page 345.

systems the use of a trademark, as well as its registration before the relevant office, have legal consequences.

2. Historical aspects regarding trademark protection in Romania

Although nowadays, at least at continental level, the attributive system is preferred (especially due to the international conventions as well as due to the relevant European legislation), the "occupation" system, of use priority, was initially preferred by the Romanian legislator for a long period[5].

The first normative act which regulated the trademark protection in Romania was *The Law on factory and trade marks* from April 15, 1879. This law established the first to use system. Thus, the law stated that the trademark adopted by a trader could not be used by another trader and could not be adopted by another trader. Moreover, by means of the Regulation entered into force one month later, the procedure of filing an application with the Trade Tribunal was established, conferring 15 years of exclusive rights to the owner of such application6. Although the provisions regarding the trademark application with the tribunal could have led to the conclusion that the system established by this law is actually a mixt system, this application had rather a declarative role, and not that of a rights constituent, the right to a trademark being owned and recognized to that who firstly used it. Moreover, according to the case-law from the 1950's, the rights to a trademark were owned by that who filed the application only if it has not been previously used[7].

The law from 1879 was the result of the freshly gained independence of Romania and of the Trade Convention signed in 1875 with the Austro-Hungarian Empire, which compelled Romania to issue a normative act which conferred protection to Austro-Hungarian industrialists and traders in Romania. Therefore, although the Romanian economy, mostly agrarian, was not in need of such a normative act, *The Law on factory and trademarks* represented the execution of the afore-mentioned convention. It established the optional principle of factory and trademarks and comprised a single provision regarding consumers' protection, which sanctioned the fraud in their detriment[8].

Given that this law did not correspond anymore to the political and economic context of the 20th century, it was abolished by *Law no. 28 of December 29, 1967 regarding factory, trade and service marks*, which established in the Romanian legislation the first to file system, by filing an application with *The General Direction for Metrology, Standards and Patents*. Thus, article 4 of this law stated that "*Factory, trade and service marks mat be used only after their registration according to the current law. The marks may be used only for the goods, works or the services for which they were registered*". Moreover, article 18 stated that "*the registration of a mark confers the owner an exclusive right to use the mark for the goods, works and services for which the registration was made, for a 10-year term from the filing date*". Besides, this law renounced the optional character of the trademark, and established the obligation to register the trademarks covering goods, but not for services: "*The producing undertakings from the Socialist Republic of Romania are obliged to register and use the factory marks for all their goods designated to the internal consume. The registration of trade marks by sales undertakings and of service marks by undertakings that execute works or provide services, as well as use by them of the registered marks, is optional*"[9].

As we will further detail, the current trademarks law continues to establish the first-to-file system, a solution that is adopted by all the systems of the Member States of the Paris Union.

3. The attributive system – its application in the Romanian law

Article 4 from Law no. 84/1998 on trademarks and geographical indications, republished (hereinafter "The Trademarks Law") settles the attributive system in the Romanian law, having the following content: "*The right to a trademark shall be acquired and protected by registration with RoPTO. Community trademarks shall benefit from protection on the territory of Romania in accordance with the provisions of the Community Trademark Regulation (a.n. European)*"[10].

Thus, the trademark right is acquired through registration before the State Office for Inventions and Trademarks, on national way, or on international way through the system set by the Madrid Protocol, or through registration before the European Union Intellectual Property Office, as European trademarks are valid on the Romanian territory starting with January 01, 2007.

Moving forward, article 36 para. 1, states that "*the registration of a trademark shall confer on its owner an exclusive right in that trademark*", the

[5] Viorel Roș, Octavia Spineanu-Matei, Dragoș Bogdan, *op.cit.*, page 16 and the following.
[6] *Idem*, page 12 and the following.
[7] Yolanda Eminescu, *Regimul juridic al mărcilor*, Lumina Lex Publishing, Bucharest, 1996, page 114 and the following.
[8] Yolanda Eminescu, *op. cit.*, page 32 and the following.
[9] Art. 4, 5 and 18 from Law no. 28 of December 29, 1967 regarding factory, trade and service marks published in the Official Bulletin no. 114 of December 29, 1967.
[10] Art. 4 of Law no. 84 / 1998 regarding Trademarks and Geographical Indications, republished in the Official Gazette no. 337 from May 8, 2014.

subsequent paragraphs and articles regulating in more detail the actions available to a trademark owner for protecting its rights[11].

Thus, the current regulation kept the attributive system adopted since the law of 1967[12].

As shown above, the attributive system is not characterized only by the fact that the trademark application is a condition for obtaining protection, but also by the fact that a trademark, in order to get registered, is subject to examination on relative and absolute grounds. Thus, the doctrine very well underlines that the registration should not be confused with the filed trademark application[13]. Hence, procedural-wise, the trademark application is the initial moment of the trademark registration proceedings, and its major importance consists in establishing the date from which the trademark owner enjoys protection of the right deriving from its trademark (except priorities or other specific legal situations). The registration, however, which represents successfully finalizing the examination proceedings, is the moment that consolidates the provisional trademark rights acquired through filing the trademark, and represents the final moment of the registration before the office.

However, even if the singular public act of use is not constituent of rights, using a trademark or, on the other side, refraining from use, have significant consequences both in the sense of acquiring protection for a trademark as well as in the sense of losing it.

One of the most important legal consequences of using a trademark is acquiring protection for unregistered trademarks by proving the well-known status thereof.

According to the Trademarks Law, the well-known trademark is defined as "*a trademark that is widely known to the segment of the public concerned by the goods or services to which it applies, without being required either registration or use thereof in Romania for the trademark to be opposable*"[14].

The Regulation for Implementing Law no. 84 / 1998 on Trademarks and Geographical Indications (hereafter referred to as *The Trademarks Regulation*) defines "*the level of awareness of the well-known trademark* as *the extend to which the consumer public segment is aware of the existence of the trademark. The geographical area* is defined as *the area of knowledge on the Romanian territory of the well-known trademark*"[15].

Given that well-known trademarks are protected without the need of registration thereof, we can affirm that protection of well-known trademarks is one of the exceptions through which the declarative system is still present in the Romanian legislation. There is, however, an essential difference between protection of well-known trademarks and a trademark protected in the first to use system. Thus, regarding the well-known trademark, the continuous use could be an essential element which leads to the acquirement of rights, by fulfilling the conditions imposed by the Trademarks Law or the *Joint Recommendation Concerning Provisions on the Protection of Well Known Marks*, adopted by the Assembly of the Paris Union for the Protection of Industrial Property and the General Assembly of the World Intellectual Property Organization. On the other hand, as we outlined above, in the case of the first to use system, continuing the trademark use has solely the purpose of consolidating the rights acquired through the first use.

It should also be mentioned that proving the well-known status of a mark, according to the Romanian legislation, does not represent a singular effort. In other words, the owner of a well-known trademark is held to prove the well-known status of its trademark with the occasion of each case, each conflict or matter where it is involved and such proof is deemed necessary. Even if once proven the well-known status with the occasion of the first conflict the subsequent demonstration already enjoy a solid basis, we should not lose sight of the fact that, once the following conflict will appear, the owner will have to demonstrate that the well-known status of its trademark was at least maintained. To this end, we consider the legal provisions in the Republic of Moldova interesting, where the owner of a trademark, with the occasion of a conflict that involves a presumably well-known trademark, has the possibility to file a request of acknowledgement of its well-known status with the Chișinău Court of Appeal[16]. In case the well-known trademark status is accepted, the trademark is entered into the Well-known Trademarks Register, being afterwards published in the Intellectual Property Official Bulletin[17]. We can therefore conclude that these provisions, beside a greater efficiency from the perspective of the owners of the well-known trademarks, which are held to prove the well-known status of their trademark with the occasion of the first rights conflict where they are involved, brings the regime of well-known trademarks closer to the attributive system. This way, the right of the first person who made proves for the first time of the intensive and serious use of that trademark on the territory of the Republic of Moldova is recognized, basically, through a registration.

11 Art. 36 of Law no. 84 / 1998 regarding Trademarks and Geographical Indications, republished in the Official Gazette no. 337 from May 8, 2014.

12 Ioan Macovei, *op.cit.*, page 345 and the following.

13 Florea Bujorel, *op. cit.*, page 140 and the following.

14 Art. 3 letter d) of Law no. 84 / 1998 regarding Trademarks and Geographical Indications, republished in the Official Gazette no. 337 from May 8, 2014.

15 Art. 1 letters n) and o) Government Decision 1134/2010 for aproving the Implementing Regulation of Law no. 84/1998 regarding Trademarks and Geographical Indications, published in the Official Gazette number 809 from December 03, 2010.

16 Art. 32 para. (2) of Law no. 38 / 2008 regarding trademark protection, Republic of Moldova.

17 http://www.wipo.int/edocs/lexdocs/laws/mo/md/md071mo.pdf.

Regarding this system established by the legislation in the Republic of Moldova, although it presents considerable advantages especially for practitioners, we believe that it is not fully in line with the market situation. Thus, the well-known status of a mark is a dynamic situation, fluctuating, to be assessed at various key moments of different procedures. Once a trademark is entered in such a register, the person that will have to make the effort to initiate actions for removing the trademark from the register in question is the counterpart which, for various reasons, may not wish to and assume such effort, although the opposed trademark meanwhile lost the well-known character.

The Romanian legislation also sets rights acquisitive legal effects for the use of a trademark in the case of filing for registration a trademark that is devoid of distinctive character, as a consequence of distinctiveness aquired through use. Article 5 para. (2) provides that "*the provisions of paragraph (1), letters (b) - (d) shall not apply if, prior to the date of the application for registration of a mark and by reason of its use, the mark has acquired a distinctive character*"[18]. More specifically, letters b)-d) of paragraph 1 formulate the following absolute grounds for which a mark is refused registration: the trademark is devoid of distinctive character, the trademark is composed exclusively of signs or indications which have become customary in the current language or in *bona fide* and established practices of the trade and the trademarks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or services.

Thus, this article provides protection to trademarks that, although after examination thereof are not considered sufficiently distinctive to be registered, due to their intensive use have acquired distinctiveness so that they can be registered. Distinctiveness must be proved before the date of filing of the refused trademark.

Moreover, the new Trademarks Directive brings completions in this respect. As regards the absolute grounds for refusal, the old directive provided that a trademark is accepted for registration, for trademarks devoid of distinctiveness, descriptive or generic, if before the filing date of the trademark application it has acquired distinctive character through use. Similarly, in case of a cancellation action, Member States had only the possibility (not the obligation) to provide that a trademark shall not be canceled if the acquired distinctiveness is proven before the date proceedings were initiated[19]. The current Directive, however, eliminated the optional nature, for Member States, regarding the adoption of this solution if in case of the cancellation action, as they are now obliged to provide for this possibility in the national legislations[20].

We believe, however, that both regulations (i.e. those concerning the protection of well-known trademarks and distinctiveness acquired through use) are based on the same principle, namely the protection acquired by a trademark due to its enhanced distinctness acquired through extensive use. Only the prerequisites differ: well-known trademarks are based on the premises that the trademark owner did not file a trademark application for registration of the sign as a trademark before the relevant office, while in the second case, a trademark could not be registered due to lack of inherent distinctiveness, usually established within the examination by means of a provisional refusal. Thus, both result in protection just like a registered trademark, or in its very registration, for a trademark which was not filed for registration or that would not otherwise have been registered, due to its outstanding distinctiveness acquired through use on the market.

Regarding the distinctiveness acquired through use, it is usually a requirement to be fulfilled in case of registration of trademarks consisting of colors or combinations of colors. On one hand, RoPTO's practice has shown that, generally, a color *per se* is not considered sufficiently distinctive to be registered as a trade mark. It is also considered to be against the interest of market participants that certain holders appropriate, only by means of a trademark application, monopoly over a particular color. Thus, by its decision of April 03, 2014, RoPTO's Board of Appeal rejected the appeal filed by the applicant a mark color (blue) for goods and services in Classes 29, 31 and 35. In this regard, the Board stated the following: "*The Commission notes that, within the evidence filed by the appellee – applicant, with the purpose of acquiring distinctiveness through the use of the trademark consisting of the color blue Code Pantone Light Blue 072C, there is no written document – poll, market survey – which clearly show that the trademark applied for registration - blue square (...) - could be recognized by the average consumer as belonging to the applicant (...). In addition, all the evidence filed by the appellee - applicant (packages), is for trademarks that contain the blue color and other word and figurative elements, and not for trademarks or designs / packaging containing only the blue color* per se"[21].

[18] Art. 5 para. (2) of Law no. 84 / 1998 regarding Trademarks and Geographical Indications, republished in the Official Gazette no. 337 from May 8, 2014.

[19] Art. 3 para. (3) of Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks, published in the Official Journal of the European Union of November 08, 2008.

[20] Art. 4 para. (4) of Directive (EU) 2015/2436 of the European Parliament and of the Council of December 16, 2015 to approximate the laws of the Member States relating to trademarks, published in the Official Journal of the European Union of December 23, 2015.

[21] Decision of the Board of Appeal of the State Office for Inventions and Trademarks no. 107 of April 03, 2014 in the file CCM 144/2013.

Another situation where the use of a trademark has a rights acquisitive effect is the extension of the protection of a trademark through demonstrating its reputation or renown. The legal provisions established after the republication of the Trademarks Law in 2010, on the one hand emerging from the old regulations regarding the well-known trademark and due to the need to harmonize the legislation on industrial property *acquis communautaire* read as follows: "*registration of a trademark shall also be refused or, if registered, shall be susceptible of being cancelled if (...) the trademark is identical with or similar to an earlier trademark registered in Romania, within the meaning of the paragraph (2) and it is intended for registration or it is already registered for goods and services which are not similar to those for which the earlier trademark is registered, where the earlier trademark has a reputation in Romania and where, by the use of the subsequent trademark, unfair advantage would be taken of the distinctive character or the reputation of the earlier trademark or if such a use would be detrimental to the distinctive character or reputation of the earlier trademark*"[22]. A similar provision is aimed at protecting European trademarks with reputation in Romania[23]. Without going into further details, we only emphasize that for trademarks with reputation, indeed, the longstanding and extensive use has the effect of extending protection of a trademark proprietor beyond the goods and / or services for which the trademark is protected. There are two essential additional conditions: the need that the trademark whose reputation is claimed to be registered and to demonstrate that use of the subsequent trademark is detrimental to the distinctive character of the trademark with reputation.

On the other hand, lack of the use may result both into revocation of the trademark rights of the owner and into the ineffectiveness of the opposability of a registered trademark.

For example, in opposition proceedings, the applicant of the contested trademark has the possibility to request the opponent to furnish proof the use of the opposed trademark for a continuous period of five years preceding the date of publication of the filed trademark, if the opposed trademark was registered for more than five years. The opponent has either the possibility to demonstrate the use of its trademark or to bring proof of the legitimate reasons that enabled him to use it[24]. If the opponent does not prove the use of its trademark, or the filed evidence is considered insufficient, the opposition will be rejected for those goods and / or services for which the proof of use has not been made. Thus, although the opposing trademarks' holder does not lose its exclusive rights with respect to those goods or services for the future, in that particular case will not be able to claim his rights.

Much more energetic to this end is filing, by any interested person, of a revocation action "*if, within a continuous period of 5 years, as from the date of its entry in the Trademark Register, the trademark has not been put to genuine use on the territory of Romania in connection with the goods or services in respect of which it is registered or if such use has been suspended for a continuous period of 5 years, and there are no proper reasons for non-use*"[25]. This legal provision has as purpose "cleaning the register" of the so-called "blocking trademarks"[26].

Regarding this legal provision, we make only a brief comment concerning the international registration of trademarks designating Romania. These trademarks are not entered into the National Trademark Register. Consequently, the interpretation of the date from which the calculation of the five year period after which the trademark becomes vulnerable for on-use is unclear from the perspective of this article. However, EUIPO case law has outlined the following solution, while arguing an appeal matter where proof of use for an international trademark designating Romania was required:

"*Under article 5(2) of the Madrid Agreement, the Designated Offices have a period of 12 months after the entry of the mark in the International Register to issue a (provisional) refusal of protection. (...)Where (provisional) refusals have been issued (...), the registration proceedings will be considered as terminated only once the respective proceedings have been finally concluded and a final notice has been sent to WIPO by the Designated Office. Austria and Romania are among the Member States that use the 12 months deadline to issue a provisional refusal (...). The Office will on its own motion apply the one year deadline for international registrations governed by the Madrid Agreement.(...) It is for the parties to claim any date that is later than these dates*". In this case, EUIPO considered that the date from which the 5-year period starts to run for the Romanian designation of the trademark is the publication date of the decision of grant in the WIPO Gazette[27].

One last point we want to emphasize regarding the consequences of using a trademark in the

[22] Art. 6 para. (4) of Law no. 84 / 1998 regarding Trademarks and Geographical Indications, republished in the Official Gazette no. 337 from May 8, 2014.

[23] Art. 6 para. (3) of Law no. 84 / 1998 regarding Trademarks and Geographical Indications, republished in the Official Gazette no. 337 from May 8, 2014.

[24] Art. 19 para. (3) of Law no. 84 / 1998 regarding Trademarks and Geographical Indications, republished in the Official Gazette no. 337 from May 8, 2014.

[25] Art. 46 para. (1) letter a) of Law no. 84 / 1998 regarding Trademarks and Geographical Indications, republished in the Official Gazette no. 337 from May 8, 2014.

[26] Viorel Roș, Octavia Spineanu-Matei, Dragoș Bogdan, *op.cit.*, page 19 and the following.

[27] EUIPO Decision no. B 1 437 377 of September 14, 2010.

attributive system effect is to strengthen the rights to an already registered trademark, meaning that a trademark, although registered, may have difficulties in opposing the registration of other trademarks because of its weak distinctiveness. To this end, we take into consideration the *Common Communication on the Common Practice of Relative Grounds of Refusal – Likelihood of Confusion (Impact of non-distinctive/weak components)* issued by EUIPO on October 02, 2014. According to them, the coincidence of trademarks in a weakly distinctive element could be insufficient in the overall assessment of the likelihood of confusion between the trademarks[28]. Thus, it could be in the interest of the trademark holder to demonstrate the enhanced distinctiveness of its trademark or of the components of its trademarks, and this will be done through the evidence of use that it will be able to furnish.

In conclusion, we wish to underline a series of advantages and disadvantages of the attributive system, as they were identified by the doctrine:

Clearly, the main advantage is that a registered trademark confers a clear date from which the owner's trademark rights commence, thus providing a dose of certainty to legal relations. Also, third parties may have a relative image of the trademark rights valid in the market, by simply accessing the relevant registers. Therefore, such a system can create predictability regarding the possibility to register rights. The disadvantages are that the attributive system permits the registration of "blocking trademarks". Thus, a register may be crowded with registered trademarks which the holder does not intend to actually use, or with trademarks registered for more goods or services that are not actually used by the holder. Even if there is the remedy of the revocation action, it is not available for interested persons but only after a period of five years from the registration of the mark has passed (or even more if the proprietor of the blocking trademark fails to pay the publication and issuance of trademark certificate fees). Then, for the owners who use the trademark before registration thereof, the time elapsed between the time of putting the trademark on the market and filing the trademark application before the competent office may give the chance to bad faith third parties to file that trademark. For the remedy provided by law against those third parties, namely the cancellation action based on bad faith, it is not always easy to prove grounds[29].

Also, with reference to trademarks devoid of distinctiveness that enjoy protection only after demonstrating their distinctness acquired through use, it was noted that the temporal element can pose risks to the proprietor of those marks. If such a trademark is filed too early, it will be refused as devoid of distinctiveness and its holder will not have sufficient evidence to prove its distinctiveness acquired through use. In contrast, a long wait may present the risk that another trader who noticed the attractiveness of the trademark, files it on its behalf, or files a variation thereof, leaving the person who used the trademark for a long time with limited possibilities to take action against it (the evidence that is sufficient to demonstrate acquired distinctness may be insufficient to demonstrate the well-known status)[30].

We add to the above a further advantage of the attributive system, namely that an entry in a register provides a more clear picture of the scope of protection of a trademark, both with respect to the designated goods or services and with respect to the exact determination of the protected trademark. To this end, certain registers, including that of the RoPTO, also provide information about disclaimers filed with respect to certain components of the protected trademark. Lastly, there are registers, such as EUIPO's, which in the name of transparency, provide information regarding the whole history of the registration procedure of a trademark, including certain filed oppositions, their text, texts of the refusals, office actions, corresponding decisions and so on. On the other hand, with respect to the declarative system, we consider the dynamism of trade relations as a fundamental advantage. Even if the difficulty of enforceability is often cited as a drawback we are of the opinion that nothing prevents the holder to file an application with the purpose of assuring the publicity of its rights, without prejudice to the rights acquired rapidly as a result of use.

An advantage of the attributive system is the fact that the priority date, obtained by filing a trademark application in a Member State of the Paris Convention can be invoked within 6 months in any Member State of the Convention. In this regard, article 4 of the Paris Convention refers to the "*filing*" as a moment generating the priority period, and not to any other way of obtaining a trademark right[31]. The doctrine also noted that the priority issue is not characteristic for the declarative system[32].

We believe, however, that this opinion should be nuanced, in the sense that there is a situation where the use of a trademark is generating priority, namely by using it ("*presentation of certain goods or services under the trademark*") in an international exhibition as defined by the Convention on international exhibitions signed in Paris in 1928 and ratified by Romania in 1972. However, it is true that the date of

[28] http://www.osim.ro/marci/ro_common_communication2_cp5.pdf.
[29] Viorel Roș, Octavia Spineanu-Matei, Dragoș Bogdan, *op.cit.*, page 20 and the following.
[30] Mihai Andrei Enache, *Metamorfoza unei mărci. Distinctivitatea dobândită,* Revista Română de Proprietate Industrială, no. 5-6, page 47.
[31] Art. 4 of the Convention on the Protection of Industrial Property of March 20, 1883, Paris, as revised and modified, ratified by Romania through Decree nr. 1.177/1968, published in the Official Gazette no. 1 of January 6, 1969 from Paris regarding the Protection of Industrial Property of March 20, 1883.
[32] Ioan Macovei, *op.cit.*, page 343 and the following.

introduction of a product in an exhibition cannot extend the priority date given by a filing in a Member State of the Convention[33]. Also, as we will show below, filing a trademark application is not incompatible with the declarative system. We therefore believe that the existence of a filing, whether or not generating a trademark right, is sufficient for claiming priority under the Paris Convention. Also, as we will show in more detail below, the Paris Convention refers only to the existence of a filing.

4. The declarative system – applicability in the Italian law

As mentioned above, in the declarative system, the right to a trademark belongs to the person that firstly used on the market a certain distinctive sign. Thus, obtaining protection for a trademark does not require the fulfillment of any formalities, be it an application, a statement or issuance of any title[34].

The doctrine states that in case of the declarative system the trademark registration procedure before the national office is not excluded. However, the trademark application has a declarative role, the filing being a means of making the right public, the application representing a public and certain date of taking the trademark in possession. Regarding the scope of protection, according to a part of the doctrine, it covers only the goods or services mentioned in the list covered by the application, and thus the application sets the limits of the protection, while another part believes that the protection extends by default to similar goods or services. Also, an application allows the holder to initiate criminal proceedings for infringement (until the filing the owner only had as available means of defense the civil action for damages, the trademark reproduction representing tort). Also, the application can be filed at the request of the assignee of a trademark appropriated by use, provided that it has been assigned from the first possessor[35].

Regarding the scope of protection, we believe that the assessment must be conducted primarily related to the goods and / or services for which the mark is actually used, and the filed application must be consistent with this reality. Otherwise, we may find ourselves in the situation of "bypassing" the declarative system, or in the presence of a mixt system.

In practice the question of the scope of protection was raised, especially in the case of complex marks. An application, having a declaratory value, provides protection for each component of the trademark? We believe that this issue should be dealt with on a case by case basis, taking into account the overall comparison of the trademarks in conflict. Also, another question is what happens if the application differs in some elements of that mark being the subject the first to use protection? In this case we also consider that an application should be considered linked to a mark which was previously used to the extent that the application does not differ in essentials elements compared to the latter, as it is appreciated, in contrast, in the attribute system, where it is established that a different trademark is an act of use of the registered trademark if it does not differ essentially from the registered trademark.

As regards infringement proceedings, the issue of the retroactivity of the right to file such action for acts that occurred before the application was raised. The greater part of the doctrine considers that infringement proceedings may be directed only against acts of imitation that occurred after the time of filing the application, until then the acts of imitation being only unlawful civil acts, being considered that from this point of view the application acquires attributive character[36].

Moreover, in the use priority system, the application creates an ownership presumption in the favor of the person that filed it. Thus, if a conflict arises between the first occupant of the trademark (through use) and the later occupant (through an application), trademark rights will be recognized to the first occupant to the extent the it would be able to reverse the presumption of ownership of the applicant, proving the conditions of obtaining protection through use. However, if this proof is not made, or there is no evidenced prior right obtained through use, this application will have attributive character, the subsequent acts of use not being opposable to the applicant[37].

However, even in the declarative system, registration of a trademark with the national office may also have attributive character in the situation where at the filing date there is no prior right acquired by another person through use. Thus, the acts of use, subsequent to the filing of such an application, may not be invoked against the holder of that application[38]. It is therefore noticed that the trademark right obtained through the use is independent to the application[39].

The doctrine has identified Italy as a jurisdiction that applies the declarative system of rights. Without wishing to dispute the classification of trademark protection systems accepted by the majority doctrine, we believe that Italy has rather a system in which the use (in the absence of a prior application) and an

[33] Art. 11 of Law no. 84 / 1998 regarding Trademarks and Geographical Indications, republished in the Official Gazette no. 337 from May 8, 2014.
[34] Florea Bujorel, *op. cit.*, page 137 and the following.
[35] Ioan Macovei, *op.cit.*, page 343 and the following.
[36] Yolanda Eminescu, *op. cit.*, page 119.
[37] Florea Bujorel, *op. cit.*, page 138 and the following.
[38] *Idem.*
[39] Yolanda Eminescu, *op. cit.*, page 122.

application (in the absence of previous use) have quasi-identical legal consequences, which is a genuine mixt system in which both use priority and registration priority are accepted.

However, given that Italy is a continental jurisdiction that establishes many elements of the declarative system, we will exemplify the above through the Italian legislation in force, as follows:

Article 12 of the Industrial Property Code introduces the concept of "*novelty*", when establishes that the signs cannot be registered as trademarks if at the filing date "*they are identical or similar to a sign known as a trademark or distinctive sign*" for certain goods and / or services, if due to the identity or similarity between the trademarks and due to the identity or similarity between the goods and services there is a likelihood of confusion from the public, which may also include a likelihood of association. This first paragraph continues by stating that the marks are *well-known* (notorious) in the light of article 6 bis of the Paris Convention. Also, this article provides that a trademark that does not enjoy well-known status, or only a local reputation, does not cause lack of novelty, but a third party that has used the trademark earlier may continue to use that trademark, even in advertising purposes, within the limits of local circulation, despite that the later mark is registered. In those circumstances, the person who has used the trademark keeps the right to use it, but cannot oppose the earlier mark[40].

Analyzing the above, we find that a well-known trademark, in the Italian protection system, has the same legal consequences as in the Romanian law, namely may represent an obstacle to the registration of a subsequent trade mark. However, although simple use, which is not transformed into well-known status, does not confer any rights in the Romanian law, in the Italian law it is accepted that the one who used the trademark may keep his right to do so, in spite of a regitered mark, and even more, regulates the concept of local notoriety, which, again, is not regulated in the Romanian law, as there is no situation where a trademark holder may have rights to a mark only locally. However, the conclusion remains that in the Romanian law use cannot oppose registration unless it is sufficiently intense so that it translates into well-known status.

Moreover, according to the following paragraph, signs may not be registered as trademarks if they are identical or similar to a sign already known as a company name or as a sign used in commerce, if due to the identity or similarity of the signs and the identity or similarity of the commercial activity of that who used the mark and the goods and services for which the mark is filed, there is a likelihood of confusion for the public, which may include the likelihood of association. In this case also, the sign cannot be an obstacle to registration if it is not well-known or if it enjoys a simply local well-known status[41].

In the case of these signs also, the well-known status is the one that enables the enforceability against a further registration.

Lastly, article 25 of this law states that the grounds above also apply if the cancellation of a trademark is requested. Thus, if the same conditions are met, a used trademark can not only be opposed against trademark applications, but also when seeking the cancellation of a registered trademark[42].

Although the Industrial Property Code is not perhaps sufficiently convincing in shaping the declarative nature of the trademark protection system in Italy, the Italian Civil Code takes several additional steps in this direction. Thus, although article 2569 confers exclusive rights to the person who registers a trademark in accordance with the law provisions, article 2571 states that the one who holds an unregistered trademark is entitled to continue using the trademark, even after it was registered by a third person, but within the limits of its initial use[43]. This is the general rule under which the provisions described above from the Italian Industrial Property Code stipulated their detailed provision.

It is also noteworthy that the owner of an unregistered trademark, valid in Italy, has the possibility to successfully oppose the registration of a European trademark or to apply for cancellation (invalidation) of a European registration. Thus, the *Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark* (hereinafter referred to as "European Trademark Regulation") provides at article 8(4) that "*upon opposition by the proprietor of a non-registered trade mark or of another sign used in the course of trade of more than mere local significance, the trade mark applied for shall not be registered where and to the extent that, pursuant to the Union legislation or the law of the Member State governing that sign rights to that sign were acquired prior to the date of application for registration of the EU trade mark, or the date of the priority claimed for the application for registration of the EU trade mark and that sign confers on its proprietor the right to prohibit the use of a subsequent trade mark*"[44]. Article 53 confers the same rights in case of invalidation of a European trademark[45].

[40] Art. 12 para. (1) letter a) of the Industrial Property Code (legislative decree no. 30 of February 10, 2005), modified in 2012.
[41] Art. 2569 and 2571 of the Italian Civil Code (approved through the Royal Decree no. 262 of March 16, 1942), modified in 2012.
[42] Art. 25 para. (1) letter a) of the Industrial Property Code (legislative decree no. 30 of February 10, 2005), modified in 2012.
[43] Art. 12 para. (1) letter b) of the Industrial Property Code (legislative decree no. 30 of February 10, 2005), modified in2012.
[44] Art. 8 para. 4 letters a)-b) of the Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark published in the OJ L 78 of March 24, 2009.
[45] Art. 53 para. 1 letter c) of the Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark published in the OJ L 78 of March 24, 2009.

In other words, the European trademark Regulation allows that national unregistered trademarks are opposed European trademark applications in the conditions determined by the national law in the jurisdiction where they valid. One of the decisions of reference regarding the applicability of this legal provision, referring to opposing an unregistered Italian trademark is the decision of the Court of Justice of the European Union in Case C-263 / 09P "Elio Fiorucci", whereby it is outlined that the person requesting cancellation of a mark by invoking a prior right protected according to the national law is required to provide EUIPO not only information and clarification on the circumstances leading to the conclusion that his right is protected, but also to offer information on the content of the legal provisions according to which his rights are protected[46].

The declarative system becomes therefore important even for holders of rights in jurisdictions applying the attributive system. For example, a Romanian holder of a European trademark may face an opposition filed by an Italian owner, for instance, of an unregistered trademark valid in this territory.

Moving forward, article 1298 of the Civil Code also offers to the person that is the owner of an unregistered sign the possibility to defend its right through the unfair competition action. This article confers protection to the owner of some distinctive signs legitimately used, without making any distinction whether they are registered or not[47].

Regarding the advantages and disadvantages of the declarative system, the doctrine has identified that, in the case of the first to use system, the use by another trader of an occupied sign held is presumed to be of bad faith. Or, as correctly pointed out, a presumption of bad faith is incompatible with the general principles of many law systems, including the Romanian system. Bad faith is a subjective element that must be proved. A trader can use a trademark occupied by another simply by not knowing it is owned by another party, through ignorance, and we agree that no one could presume that a trader knows absolutely all the marks that appeared on the market[48]. Thus, as correctly emphasized, "*the development of the industry and trade and use on a larger and larger scale of trademarks made this presumption of bad faith for acquiring the trademark rights through use priority to meet reality increasingly less*"[49].

The owner of a trademark acquired through use has, however, a number of advantages. As mentioned above, it can be transmitted, even if there is no trademark application filed for that mark. We believe that such a possibility provides dynamism to the market. However, as we mentioned, occupation through use assumes two facts, the objective fact of using, and the subjective intention of appropriation. Could therefore an assignment of an unregistered trademark be challenged, as lacking object, by the interested person(s), if disputed that the initial use did not fulfill the conditions under the law provisions? Does the assignor have, in such a scenario, the obligation to guarantee the existence of the object of the contract? In the registration priority system, the existence of the trademark in registers is clear evidence of the existence of the object.

Also, the owner of a trademark acquired through use will have the possibility of filing an application[50], without its previous use being opposable, as determining lack of novelty (solution that we find normal). Thus, once appropriated through use, a trademark is more likely to be formally accepted to registration, which could be useful for the holder, for example, to further register the trademark on the international route or to enjoy priority under the Paris Convention.

Also in the context of the use priority the question of the admissibility of the trademark right acquisition by acquisitive prescription was raised. It was correctly concluded, however, that this institution is not applicable to the trademark law, since trademarks are intangible assets, while the acquisitive prescription is applicable to tangible assets, which finds itself in the possession of one owner (as opposed to an incorporeal good, which could be used simultaneously by multiple persons)[51].

5. The mixt systems

We have already shown that mixt systems are those that combine both features of the attributive system and the declarative system, as legal effects are granted both to the factual existence of the trademark and to the act of trademark registration.

Such a system is the delayed attributive system, applicable, according to the doctrine, to the United Kingdom system, according to which the declarative application turns, after a certain period of time, into definitive proof of the trademark right for the proprietor of the filed trademark.

Indeed, the national trademarks law (Trade Marks Act) offers an added importance to trademark use. For instance, article 32.3 states that within the trademark application the applicant must declare that the trademark is used by him or by third parties with his consent, or that he has a *bona fide* intention of using it[52]. This text is of great importance especially

[46] Decision of July 5, 2011 in the matter C-263/09P, European Union Court of Justice, para. 50.
[47] Art. 2598 of the Italian Civil Code (approved through the Royal Decree no. 262 of March 16, 1942), modified in 2012.
[48] Viorel Roș, Octavia Spineanu-Matei, Dragoș Bogdan, *op.cit.*, page 17 and the following.
[49] Yolanda Eminescu, *op. cit.*, page 111.
[50] Idem., page 18 and the following.
[51] Yolanda Eminescu, *op. cit.*, page 133.
[52] Art. 32.3 of Trade Marks Act 1994.

in conjunction with the legal provisions stating the refusal to register a trademark that was filed in bad faith (ground that can be basis for the cancellation of a trademark). Therefore, if an applicant did not have the *bona fide* intention to use the trademark for which protection was requested, its trademark may be refused or canceled. In this regard, it is interesting that one of the scenarios in which a trademark application was deemed to have been filed in bad faith is when the trademark has been applied for a much broader spectrum of goods and / or services, other than those for which the trademark may be used. However, the case law has considered that, even if an applicant did not have the intention to use the trademark for certain goods or services covered by the trademark application at the date of filing, but proves that he has taken its use into account afterwards, it can overcome an eventual appeal based on bad-faith[53]. We believe, therefore, that in such a system, the so-called "blocking marks" filed for all classes of goods and services are more vulnerable to being canceled than in a classical attributive system.

However, one of the most important consequences of the use of a trademark in the United Kingdom is the possibility of protecting unregistered trademarks via the "*passing-off*" action. This legal mechanism is born in the English jurisprudence, and involves three elements: firstly that a trademark has reputation or enjoys at least goodwill (hence thee passing-off does not represent a possibility for new trademarks or trademarks unused in the course of trade), the fact that the false representation of the trademark has occurred or is possible and, thirdly, that there is a risk of damage[54].

Also, in the Swiss law, considered representative for preliminary approval system, establishes in principle that the right to trademark is obtained by registration in the trademarks register[55]. Also, well-known unregistered trademarks are protected in Switzerland according to the Paris Convention[56]. The law also allows the person who has used a trademark, even if later it was registered by a third party, to continue to use it as it was used before the filing of the new trademark[57].

6. The approach of the new Directive and of international treaties

Regarding the European Union, within the recitals of *Directive (EU) 2015/2436 of the European Parliament and of the Council of December 16, 2015 to approximate the laws of the Member States relating to trademarks* (hereinafter referred to as "the Directive"), at paragraph 11 of the recitals, it is provided that "*This Directive should not deprive the Member States of the right to continue to protect trademarks acquired through use but should take them into account only with regard to their relationship with trademarks acquired by registration*"[58]. Consequently, even though the Directive does not suppress the right of Member States to continue to protect trademarks acquired through the first to use system, reaffirms the first to file system. Thus, the Member States of the European Union and of the European Economic Area, in virtue of this Directive, may provide for a mixt protection system at best.

The Directive also permits the protection of unregistered trademarks, to the extent that they are protected in the jurisdictions of the Member States where they are invoked. Specifically, the following relative grounds for refusal are set: "*Any Member State may provide that a trade mark is not to be registered or, if registered, is liable to be declared invalid where, and to the extent that rights to a non-registered trade mark or to another sign used in the course of trade were acquired prior to the date of application for registration of the subsequent trade mark, or the date of the priority claimed for the application for registration of the subsequent trade mark, and that non-registered trade mark or other sign confers on its proprietor the right to prohibit the use of a subsequent trade mark*"[59].

Moreover, especially related to the use of registered trademarks, the same recitals state that "*a registered trade mark should only be protected in so far as it is actually used and a registered earlier trade mark should not enable its proprietor to oppose or invalidate a later trade mark if that proprietor has not put his trade mark to genuine use. Furthermore, Member States should provide that a trade mark may not be successfully invoked in infringement proceedings if it is established, as a result of a plea, that the trade mark could be revoked or, when the action is brought against a later right, could have been revoked at the time when the later right was acquired*"[60]. Articles 16-19 and 44-47 of the Directive provide in detail the consequences of not using a trademark in the opposition proceedings, in the infringement action or when an invalidation action is in place.

We can thus conclude that the Directive imposes national legislations to adopt the system of acquiring

[53] http://www.worldtrademarkreview.com/Magazine/Issue/42/Country-correspondents/United-Kingdom-Edwards-Wildman-Palmer-LLP.
[54] http://ip-active.com/trademarks/unregistered-trademarks.php.
[55] Art. 5 of the Federal Law on trademark protection and geographical indications of August 28, 1992.
[56] Art. 3 of the Federal Law on trademark protection and geographical indications of August 28, 1992.
[57] Art. 14 of the Federal Law on trademark protection and geographical indications of August 28, 1992.
[58] Point 11 of the recitals of the Directive (EU) 2015/2436 of the European Parliament and of the Council of December 16, 2015 to approximate the laws of the Member States relating to trademarks, published in the Official Journal of the European Union of December 23, 2015.
[59] *Idem*, art. 5 para. (4) letter a).
[60] *Idem*, point 32.

rights through registration, also establishing, in balance, legal sanctions for failing to use them in order to avoid unjustified charging of registers with blocking trademarks or trademarks that are simply unused. However, the Directive allows Member States to offer acquisitive effects to the trademark use, even the possibility to enforce the rights acquired through their use, according to the national law, without the purpose of regulating these aspects in detail or a harmonization of the legislations of the Member States relating to rights acquired through use of a trademark.

The Paris Convention for the Protection of Industrial Property encourages the filing of trademark application in view of the possibility of claiming the conventional priority. Thus, the Convention does not allow for the possibility of claiming priority resulting from a right acquired through use, in the sense of obtaining protection in the declarative systems. However, the following two nuances should be considered: firstly, the Convention provides that "*any person who has duly filed an application (...) of a trademark, in one of the countries of the Union, or his successor in title, shall enjoy, for the purpose of filing in the other countries, a right of priority during the periods hereinafter fixed*"[61]. The nature of the application is described further: "*Any filing that is equivalent to a regular national filing under the domestic legislation of any country of the Union or under bilateral or multilateral treaties concluded between countries of the Union shall be recognized as giving rise to the right of priority. By a regular national filing is meant any filing that is adequate to establish the date on which the application was filed in the country concerned, whatever may be the subsequent fate of the application*"[62].

We believe, however, that this possibility does not necessarily refer to the member states that have established an attributive system, nor does it impose such a system to the member states of the Union. What is relevant in the applicability of the provisions relating to the conventional priority is the existence of an application, regardless whether it has an attributive or simply a declarative role. Therefore, one can say that the convention encourages the creation of national applications, but does not go so far as to impose an attributive system.

We also referred above to the exhibition priority. We believe, however, that such use is not of the nature of the use that confers legal protection in declarative systems, as it is merely a possibility provided by law to obtain effective protection from the date when the applicant actually used the sign in an exhihbition and intending to register it later. Moreover, this type of priority can only be claimed in the context of an attributive system in which protection is sought by filing an application with claiming this priority.

The remaining provisions contained in the Convention refer to the protection of registered trademarks, regulating legal situations such as use of the trademark in a form that differs from the form in which it was registered, the effects of not using a registered trademark as well as various absolute or relative grounds of refusal of registration of a trademark. However, the Convention makes no express reference and does not exclude the possibility of obtaining protection through use. We believe that this principle is clearly stated with respect to services marks under Art. 6sexies: "*The countries of the Union undertake to protect service marks. They shall not be required to provide for the registration of such marks*"[63].

It is also interesting to analyze the trademark protection system under the Madrid Agreement Concerning the International Registration of Marks and Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, adopted at Madrid on June 27, 1989.

At first glance, these international agreements would require at least a mixt system to the signatory states, since they lay the foundations of an international registration based on filing trademark applications and examination by the national offices. However, the Agreement provides that "*from the date of the registration so effected at the International Bureau (...), the protection of the mark in each of the contracting countries concerned shall be the same as if the mark had been filed therein direct*"[64]. Further, the Protocol retrieves identical provisions[65]. We interpret this provision as meaning that the application filed at national level will have either attributive or declarative value, depending on the protection system applied by the signatory State.

We also mention, without going into details, that the Singapore Treaty on the Law of Trademarks, from March 13-31, 2006, ratified by Romania through Law no. 360/2007 and the related regulations, and the Trademark Law Treaty, adopted at Geneva on October 27 1994, to which Romania adhered through the Law no. 4/1998 – Official Bulletin no. 10/1998 contain, among others, provisions relating to the registration procedure before the national offices.

The TRIPS Agreement contains provision regarding the registration of a trademark and use of

[61] Art. 4 of the Convention on the Protection of Industrial Property of March 20, 1883, Paris, as revised and modified, ratified by Romania through Decree nr. 1.177/1968, published in the Official Gazette no. 1 of January 6, 1969 from Paris regarding the Protection of Industrial Property of March 20, 1883.

[62] *Idem*.

[63] Art. 6 sexies, *idem.*

[64] Art. 4 para. (1) of the Madrid Agreement Concerning the International Registration of Marks, in the form revised at Stockholm at July 14, 1967, ratified by Romania through Decree no.1176 of December 28, 1968 – Official Bulletin no.1/06.01.1969.

[65] Art. 4 para. (1) letter a) of the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks adopted at Madrid on June 27, 1989, ratified by Romania through Law 5/1998 – Official Bulletin no.11/15.01.1998.

the mark in the context of its registration, without reference to the possibility of obtaining protection through the use and covers only the rights acquired by the owner through registration. It is also stipulated that this agreement does not prevent the signatory states to provide that protection may also be obtained through use[66].

Taking all the above into consideration, it is clear that the international agreements encourage the application of the attributive system and especially the filing of trademark applications, probably due to the increased legal security such a certain filing date provides. However, the treaties do not exclude that member states to provide for the possibility of obtaining protection through use, either implicitly or explicitly. However, such a possibility is rather discouraged, by not being regulated internationally and in some cases not even mentioned.

Conclusions

As can be seen from the above, "use" is a notion whose meaning must be interpreted according to the legal consequences are assigned thereof in different national legislations.

Thus, use of a trademark may be creating rights in the declarative systems, the further use thereof representing the consolidation of the acquired right. Also, in the attributive system, use has mainly the purpose of preserving the right acquired through registration, but can also be rights constitutive when intensive use of an unregistered trademark determines its well-known status.

In the doctrine was outlined, as an essential function of the use of a trademark, guaranteeing the identity of the origin of the goods or services bearing that trademark, by the end consumer, allowing him, without any likelihood of confusion, to distinguish those goods or services from those of other traders[67]. Thus, use is the one that allows the creation of the components of distinctiveness - product / service, trademark, consumer.

Also, closely linked to the notion of "using" are the notions of "non-use" and "effective use" of a trademark.

For example, the Trademarks Law considers actual use of a trademark "*use of the trademark in a form that differs in certain respects from that of the registered trademark, but which does not impair its distinctive character*"[68]. Consequently, the way a certain trademark is used is also analyzed, given that, due to certain limitations in practice (the trademark arrangement in promotional materials, on packaging, etc.), it can be used differently from the way it was registered.

Finally, it can be concluded that, irrespective of the protection system in question, nt alloeing unused trademarks is mainly essential, from an administrative standpoint to not overcrowd registers with trademarks that are not actually used, and economically for not preventing other market participants to use the mark if they wanted[69].

It is also interesting to analyze the value of the trademark application in each jurisdiction separately, which can have both attribute value or a simple right advertising value. In this context, it can also be concluded that the international treaties to which Romania is a party, although encourages the applicability of the attributive system and, in particular, filing trademark application at national level, does not prohibit the existence of a system where protection is given by use. However, such a possibility is not regulated in detail.

Regarding the different trademark protection systems, some authors consider that differentiating them is a rather theoretical concern, both the use and registration of a trademark playing different roles depending on the laws of each state[70].

Indeed, we believe that the use and the act of registration are indispensable to any trademark protection system, in different doses and with different legal consequences depending on the context of each jurisdiction separately. As a general trend, if indeed registration really has begun to play an increasingly prominent role in acquiring the trademark right, particularly due to the efforts to harmonize jurisdictions and due to international conventions that provide preference to the registration priority system, use starts to have an increasingly important role for the conservation of rights[71].

Thus, we believe that an increased attention should be given to a more detailed regulation of the possibility of obtaining rights through use, being a system closer to the commercial dynamism that characterizes contemporary society.

[66] Art. 16 Section 2 from Annex 1C of the Marrakech Agreement establishing the World Trade Organization - Annex 1C. Agreement regarding Trade Related Aspects of Intellectual Property Rights signed at Marrakech on April 15, 1994, ratified by Romania on December 22, 1994 through Law no.133/1994 – Official Bulletin no.360/27.12.1994.

[67] Jeremy Phillips, Ilanah Simon, Trade Mark Use, Oxford University Press, New York, 2005, p.5.

[68] Art. 46 para. (2) letter a) of Law no. 84 / 1998 regarding Trademarks and Geographical Indications, republished in the Official Gazette no. 337 from May 8, 2014.

[69] Jeremy Phillips, Ilanah Simon, *op. cit.*, page 14.

[70] Yolanda Eminescu, *op. cit.*, page 113.

[71] *Idem*.

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PROTECTION OF WORKS TITLES FROM THE PERSPECTIVE OF COPYRIGHT PROTECTION AND TRADEMARK PROTECTION

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Abstract

The main purpose of the paper is assessing the possibilities of protecting the titles of works.
One possibility is the protection by means of registered or unregistered trademarks. This route presents difficulties because of the distinctiveness perspective. In this sense, the European case-law has recently developed a constant practice and outlined a series of criteria that should be taken into consideration when examining a trademark consisting of a title.
Another possibility is protecting the title under the provisions of the copyright law. From this respect, the practice has not yet determined a constant practice. However, the dominant opinion is that the originality criterion should be taken into consideration when assessing the protection of a tile.
Finally, brief conclusion are made, including short remarks on the cumulative protection of titles, both as trademarks and under the copyright law.

Keywords: *titles, copyright, originality, trademark, distinctiveness.*

1. Introductory remarks

According to the explanatory dictionary of the Romanian language, the "*title*" is defined, among other definitions, as a "*word or text placed at the beginning of a work or a distinct part of it, indicating summatically or suggestively its content*". It is also defined as "*the part written from the beginning of a movie that indicates the name of the film, the makers, and the studio that produced it*[1]".

The title is, therefore, that word or group of words by which we refer to a work. It is that part of the work that will bear the reputation of the author, or, on the contrary, the burden of a negative reception. Which will remain in the author's record and will remain closely related to his name for posterity.

Although the title is, therefore, of great significance for the author of the work it is designing, as we will further see, its protection encounters real practical difficulties.

In this respect, at a practical level, there are two ways that can be taken into account for the protection of works, namely their protection as trademarks (registered or unregistered), and their protection through copyright law, which we will further detail.

2. Protection of titles as trademarks

Regarding the admisibility of protection as trademarks for titles, related to titles of publications (here we ae considering newspapers, magazines and books), the doctrine emphasizes that the old Romanian regulations contained an express provision through which the titles could be protected as trademarks, regardless of the protection they enjoyed from the standpoint of copyright. Subsequently, the doctrine considered that a distinction should be made between titles of works in general, including film titles, and titles of newspapers, magazines or collections, in the sense that only the latter may enjoy trademark protection. This vision was based on the fact that titles of such periodicals are meant to identify the origin of some commercial activities, materialized through press goods or services[2]. As we will further see, with respect to publications, collections or series, this is one of the lines followed by the European jurisprudence in the matter.

Furher, the main objections to the registration of titles of works as trademarks were identified by the doctrine. It has thus been emphasized that titles do not individualize a corporeal object, a merchandise, but an intangible work, namely the intellectual creation that bears that title. As counter-argument, it is argued that, although the work is intangible, it must not be forgotten that it enters the commercial circuit as bodily objects designed to individualize the form that the work takes[3]. However, we consider this counter argument as departing from the definition of the mark, in the sense that, although product individualisation is one of the roles of the mark, the title will not indicate its commercial origin. For example, considering that the commercial origin is the publishing house that put that book into circulation, the title will not determine it, and consumers will not make a direct link between the title and the marketer. In other words, the title will not meet the distinctiveness condition, even if it will be placed on a product with which the public is in contact. In this respect, different editions of a book may be published

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[1] The Explanatory Dictionary of the Romanian Laguate, Academy of the Socialist Republic of Romania Publishing House, 1975, page 965.
[2] Yolanda Eminescu, *Regimul juridic al mărcilor*, Lumina Lex Publishing, Bucharest, 1996, page 53 and the following.
[3] Yolanda Eminescu, *op. cit.*, page 55.

by different publishers, and so the title will not be able to determine the commercial origin of the product. We can, however, bring another counter-argument, in the sense that the incorporality of the product that bears the mark is not an argument in the sense of not the name as a trademark. A service, for example, although it i not corporal, could bear a trademark.

Another objection raised was the lack of independence of the title in relation to the work, an objection that was contradicted by the case-law in some matters. Also, if for isolated works the title is considered to reflect their content, for newspapers and magazines the solution was different[4]. Again, this solution was adopted by the European office. Regarding the independence of titles, obviously the title of a periodical is independent of its content, the title being constantly in relation to a dynamic content that changes from one issue to the other, which ultimately becomes the subject of copyright. Moreover, in the case of periodicals, in this context, it would be more appropriate to refer to the titles of individual articles than to those of publications. Regarding the independence of titles of works in general, since a title may be carried out by several adaptations of the work of different nature (that is, by derivative works different from the original work), we consider that the title has a certain degree of independence with respect to the work.

With regard to the evolution of the European case-law, although initially, much more generous and permissive with the registration of titles as trademarks, it has begun to crystallize over time a relatively constant practice on this issue. In this respect, we mention that in 2001 EUIPO (at that time OHIM) registered the European trademark THE LION KING no. 002048957 for goods and services in Classes 09 and 41 for which, if that mark had been filed at present, it may have been refused, in accordance with the practice developed over time[5].

Legal provisions considered relevant to the analysis of the registrability of titles as trademarks are contained in art. 7 para. (b) and (c) of the Trade Mark Regulation and reads as follows: *The following shall not be registered: (b) trade marks which are devoid of any distinctive character; And (c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service*[6].

The EUIPO Practice Guidelines, concerning the applicability of letter b), contains a special sub-chapter dedicated to book titles. Accordingly, "*Trade marks consisting solely of a famous story or book title may be non-distinctive under Article 7(1)(b) in relation to goods and services which could have that story as their subject matter. The reason for this is that certain stories (or their titles) have become so long established and well known that they have 'entered into the language' and are incapable of being ascribed any meaning other than that of a particular story. For example 'Peter Pan' or 'Cinderella' or 'The Iliad' are perfectly capable of being distinctive trade marks for (e.g.) paint, clothing or pencils. However, they are incapable of performing a distinctive role in relation to (e.g.) books or films because consumers will simply think that these goods refer to the story of Peter Pan or Cinderella, this being the only meaning of the terms concerned*"[7].

The Guidelines further emphasize that such objections should be presented in very limited cases, such as those in which the title in question is sufficiently well known to the relevant consumer and the mark attributed to certain goods / services may be perceived as referring first of all to a famous book story or title. The issuance of a decision on lack of distinctive character is more likely when it can be shown that several versions of the story have been published and / or there have been numerous television, theater and film adaptations available to a wide audience. Thus, depending on the nature of the wotk designated by the title in question which is filed as trademark, printed matter, films, recordings, plays and performances are goods or services with respect to which objections may be made[8].

As a consequence, the Office seeks to systematize the practice by following the two criteria: one relating to the reputation of that title and the second by the type of work it identifies in order to determine the goods or services for which the mark is not distinctive. However, as we shall see, these two criteria bear a high degree of subjectivity, so they need to be carefully considered on a case-by-case basis.

As far as point c) is concerned, the EUIPO Guidelines do not make a direct reference to possible objections risen to the protection of titles of works. However, as emphasized below, it is a ground invoked by the European Office in its refusals.

Thus, as stated above, Disney Enterprises has filed for registration the trademark THE JUNGLE BOOK for classes 3, 9, 14, 16, 18, 20, 21, 24, 25, 28, 29, 30, 32 and 41 of goods and services. On 16 January 2013, the Office issued a provisional refusal to the effect that the mark was refused for some of the goods and services in classes 09, 16 and 41, generally consisting of supports for audio-video materials,

[4] *Idem*, page 55.

[5] https://euipo.europa.eu/eSearch/#details/trademarks/002048957.

[6] Art. 7 para.14 letter.b)-c) of the Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark published in the OJ L 78 of March 24, 2009.

[7] Guidelines for Examination in the Office for Harmonization in the Internal Market (Trade Marks and Design) on Community Trade Marks, Part B, Examination, Section 4, Abslute Grunds for Refusal, page 15 and the following.

[8] *Idem*.

printed matter, or entertainment. The Office argued that "*trade marks consisting solely of a famous story or book title may be non-distinctive under Article 7(1)(b) in relation to goods and services which could have that story as their subject matter*". The Office also claims that certain stories or titles have "*entered into language*", so it is impossible to be given any meaning other than that of the story in question. He claimed, according to the EUIPO Guidelines, that the JUNGLE BOOK had numerous television, theater and movie adaptations available to a wide audience[9].

However, we consider that the proprietor of such a mark may "bypass" the lack of protection as a result of the lack of distinctiveness for those goods and services which may be subject to that work in the light of the provisions relating to the reputation of the trademark. Thus, if a trademark becomes known for certain adjacent goods, such as, for example, toys in class 28, and such a reputation would have been recognized by the law, it can also successfully oppose the use of its trademark for goods for which the trademark has been refused. Of course, it seems hard to believe that a certain trademark consisting of a title could become famous for complementary goods as long as they are well-known in connection with the work that it designates. In such a scenario, however, it would be interesting to see whether the lack of distinctiveness of the mark for these goods would be accepted as sufficient defense of the defendant. We believe that yes, since the reason for not registering distinctive signs is precisely to leave them to the free use of market participants.

Another conclusion to be drawn is that, in the case of titles, time does not flow in favor of the possibility of registering them as a trademark, as is the case for other marks, which can enhance their distinctiveness through long-term use, or even obtain greater distinctiveness by acquiring the well-known status or reputation. To the contrary, in the case of well-known titles, there is a risk of potential objections from the office before which the mark has been filed.

EUIPO's case-law has also shown that the range of goods for which a certain title may or may not be registered as trademark is flexible and needs to be analyzed on a case-by-case basis. Thus, without going into the details on the merits of the case, in accordance with the practice of the EUIPO's Board of Appeal, in a cancellation action for the mark PINOCCHIO, it held that that mark was not distinctive for various types of toys in Class 28[10]. The reasoning was probably the fact that a Pinocchio toy might be the character itself, which was a toy that came alive. Therefore, although these goods are generally not intrinsically linked to the subject of a particular work, in this case toys, dolls or other such goods were themselves part of the subject of the work.

Another conclusion to be drawn from EUIPO's case-law is the range of works that a title designates. We shall exemplify by the following quotation in the famous decision *Dr. No*: "*However, in the present case, an examination of the documents submitted by the applicant shows that the signs Dr. No and Dr. NO do not indicate the commercial origin of the films, but rather their artistic origin. For the average consumer, the signs in question, affixed to the covers of the video cassettes or to the DVDs, help to distinguish that film from other films in the 'James Bond' series. The commercial origin of the film is indicated by other signs, such as '007' or 'James Bond', which are affixed to the covers of the video cassettes or to the DVDs, and which show that its commercial origin is the company producing the films in the 'James Bond' series. Moreover, even if the profits that the film Dr. No had generated within the Community are capable of showing the commercial success of the film in that territory, the fact remains that they cannot show that the signs in question are used as indicators of commercial origin*[11]". The conclusion we can draw from this paragraph is as follows: Dr. No is able to identify a particular work, namely one of the short stories written by Ian Fleming and the first movie of the James Bond series. Therefore, there may normally be objections to its registration as a mark, insofar as the designated goods / services refer to the subject of the work. But James Bond, although it is the name of the protagonist, and is the title of a series, or a franchise, it can fulfill its trademark role and can indicate a commercial origin. Therefore, it can also be registered for such goods. And, in fact, there are European trademarks JAMES BOND registered for goods and services in classes 09, 16 and 41[12].

As regards the Romanian Office for Inventions and Trademarks, it registered in 2014 the trademark *#Selfie* application number M 2014 01028 for goods and services in classes 09, 16 and 41[13]. This is the title of a successful film among the Romanian consumers, being on the third place in the top of the Romanian films after 2010, one of the films that surpassed it, ranked first, being tits sequel[14]. In this context, can we say that RoPTO does not follow the practice established by the European office? Not necessarily. Thus, while it is true that the registered trade mark covers goods and services to which the European office considers a title lacks distinctive character (magnetic data carriers, entertainment), the movie was launched in May 2014,

[9] Refusal of the European Trademark Application issued on November 18, 2013, page 2 and the following.
[10] Decision of the Second Board of Appeal from February 25, 2017 in the matter R 1856/2013-2, page 12 and the following.
[11] Decision of the Tribunal (Secon Chamber) in the matter T-435/05, para. 25.
[12] https://euipo.europa.eu/eSearch/#basic/1+1+1+1/50+50+50+50/James%20bond.
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3 months before the application date[15]. Thus, the reputation condition could not have been fulfilled.

Another conflict before RoPTO was between the YELLOW SUBMARINE trademark owned by Subafilms Limited and the YELLOW SUBMARINE trademark filed by a Romanian applicant. Subafilms Limited is a company created by the members of the well-known band Beatles to manage the rights for the name YELLOW SUBMARINE. In connection with this name, it should be mentioned that this was not only the well-known song of the band, but also the title of an animated film that had as protagonists members of the rock group.

As regards the earlier mark YELLOW SUBMARINE, as mentioned above, this is evidence that the Alicante Office was more permissive in admitting trademark registrations representing titles, this mark, filed in 1999, being registered for goods and services in classes 09, 16 or 41. The contested mark designates public catering and temporary accommodation services, covered by the earlier marks. Thus, the complementarity of services in class 43 with the goods and services covered by the earlier mark and the reputation of the earlier marks in the European Union were invoked. The Board of Appeal accepted the arguments of the applicant and abolished the decision to register the trade mark in question[16].

A similar solution, concerning the same earlier marks, was issued by EUIPO in 2007. Thus, the YELLOW SUBMARINE marks and their reputation were successfully invoked against the registration of a trademark application with the same verbal element filed for goods in class 31. In this case, the filed trademark was also rejected[17].

It should be noted, therefore, that the distinctiveness of the earlier marks has not been raised nor at national or European level. However, we are of the opinion that such a problem would have been difficult to be rised, since, once registered, the mark enjoys a presumption of distinctiveness, which the Office takes notice of and which may be disputed by the other party, argument which was not invoked.

Can a title be protected as an unregistered trademark? As regards Romania, although this is a jurisdiction conferring exclusive rights for a trademark generally through registration, the well-known mark is one of the exceptions provided by the *Trademarks Law*.

With regard to well-known trademarks, we consider in this context to be of particular relevance the doctrine of protection of well-known trademarks, in the sense that the acquisition of the trademark rights by proving the well-known status of a trademark has the same effect as its registration. In other words, a natural consequence of this is that a well known mark must fulfill the same conditions as a registered trademark, namely: to be licit, susceptible of being graphicaly represented, distinctive and available. In the absence of these conditions, the item may be percieved as a well known sign, but not a well known trademark[18].

Or, we believe that these considerations are the answers to the above question. Thus, even if a title has been well known, in the absence of distinctiveness for the goods / services for which it is well-known, it can not be relied on as a legally enforceable right.

We conclude that titles, as well-known trademarks, may be opposed, similar to trademarks, to goods and services for which they are distinctive (or to those similar to them).

3. Protection of titles throuogh the copyright law

As mentioned above, the main function of a title is to identify a particular work.

Regarding their protection from the perspective of the Copyright Law, the doctrine has underlined that the current regulation makes no express reference. As a consequence, the titles are neither excluded from protection, nor do they automatically enjoy protection as a part of the work. It is therefore clear from the general provisions that "*the titles of works, in order to enjoy the protection of copyright, must satisfy the general requirement of originality*"[19].

In this respect, we refer to the legal provisions that determine the subject of the copyright as follows: "*The original works of intellectual creation in the literary, artistic or scientific field are the object of copyright, irespective of the way of creation, the way or the form of expression and regardless of their value and destination (...)*[20]". At least at a theoretical level, titles fall within this definition, being indisputably an intellectual creation of their author, who may or may not fulfill the condition of originality.

As far as the national case-law is concerned, there have not been many decisions defining a route for determining whether the title of a work is protected by copyright or not. The doctrine, however, cites a fragment of one of the few decisions that have approached - even incidentally - this problem, which noted that "*because copyright extends to essential parts of the work, the title of the novel (n Shogun) is part of copyright protection*"[21].

[15] http://www.imdb.com/title/tt3102208/.

[16] Decision of the Board of Appeal - Trademarks no. 77 of June 30, 2011 in the matter CRM 17 / 2011.

[17] Decision of the Opposition Commission from November 30, 2007 in the matter B 698 821.

[18] Viorel Roș, Octavia Spineanu-Matei, Dragoș Bogdan, *Dreptul Proprietății Intelectuale. Dreptul Proprietății Industriale. Mărcile și indicațiile geografice*, All Beck Publishing, Bucharest, 2003, page 103.

[19] Viorel Roș, *Dreptul Proprietății Intelectuale. Vol. I. Dreptul de autor, drepturile conexe și drepturile suis-generis*, All Beck Publishing, Bucharest, 2016, page 252 and the following.

[20] Art. 7 of Law no. 8 of March 14, 1996 on copyright and related rights, published in the Official Gazette no. 60 of March 26, 1996.

[21] Viorel Roș, *Op. cit.*, page 253.

This perspective offered by this decision can offer an interesting solution to the protection of titles through copyright, but we believe that it should be redrafted, on the one hand, and correlated with the condition of originality, on the other hand, as it was also emphasized in the relevant doctrine.

Thus, with regard to the first aspect, we think it is preferable for the title to be considered a part of the work that is the subject of copyright. "*Extending*", as it was called in that decision, implies a preexisting right which, as a result of the law or other act or legal act, is "*extended*" to this extrinsic element - the title. Or, we believe that the title can only be considered a part of the work that is the subject of copyright.

The next step is to answer the following question: to what extent taking over a title is coptright infringement? In this sense, we consider that, relative to any part of the work, its takeover can not be imputed if the fragment is not itself characterized by originality. And if, in terms of a fragment of a work, the originality can be given by the construction of phrases or by a certain combination of words, with respect to titles, consisting even o one word, we think that the requisition of their originality requirement should be greater in order not to reach the unnatural situation where a certain term is thus monopolized. We therefore do not agree that protection should be extended automatically to any title.

We also want to emphasize that notoriety should not be confused with originality. "*The Great Dictator*" is undoubtedly one of the most well-known films in Charlie Chaplin's film and worlds cinema. Can it be considered an original title?

In the doctrine, some interesting considerations have been signaled regarding the proof of the originality of a work. Thus, the cited author points out that in Romania, unlike in France, for instance, the courts accept a presumption of originality in favor of the copyright claimant, the contrary proof being the burden of the party to whom that right is opposed. It is, in our opinion, reasonaly empahsised, that such an approach is not in the spirit of regulations in the field of intellectual property protection, since if the applicant himself does not prove the originality, in fact, he does not prove the validity of the opposed right. This approach would create even more practical difficulties in the situation where the person who should prove his / her right is a defendant, given that, according to the regulations in the matter, the plaintif is required to prove his / her claims. In such a situation, the defendant would be protected by a simple presumption, which should, in turn, be overturned by the applicant[22].

The older doctrine has drawn a still valid practice, as we will show through the decisions that we will further analyze. Thus, the legislative provisions of the GDR in 1987 are highlighted, which, although perhaps they are no longer up to date, are interesting in the sense that they describe the comment on the *Shogun* decision above: "*copyright extends to the work in its entirety, to its parts and to the title, to the extent that it has an individual creative character*"[23]. Or, we consider the "*individual creative character*" the most appropriate definition of the originality of the title in the context of the protection under the provisions of copyright.

The above-mentioned paper also makes a commentary on the French case-law, which, while adopting the originality solution, is not unanimous, and the French courts appear to be reluctant to recognize the original character of the titles. Also, as a general conclusion, it is noted that the general tendency for periodic titles is to be protected under the trademark regime, the German doctrine being more leaning towards making a distinction between titles of works and publications[24]. We find it natural, since they designate rather the commercial origin of the product (the newspaper), regardless of the varying content of each issue.

As regards the State Office for Inventions and Trademarks, the few available decisions seem to have adopted a filter of originality to determine the opposability of a copyright protected title. Thus, in a decision in 2009, he stated that "*although Law no. 8/1996 does not expressly provide for the titles of the works as making the object of protection, since the phrase "CU LĂUTARII DUPĂ MINE" is original and was created and registered in the Register entitled "Declaration's Bulletin" by the composer Ion Vasilescu in 1939, the Commission finds that the provisions of Rule 15 2 letter f) of GD 833/1998 are applicable*". Also in this decision are cited the doctrinal claims according to which the originality of the title should be appreciated independently of the rest of the work. Also, the originality in this decision is described by the fact that "*from the evidence submitted to the case by the intimate opponent, the phrase "CU LĂUTARII DUPĂ MINE" is identified with the name of the composer Ion Vasilescu*[25]". Or, we believe that this phrase perhaps defines in the best manner the concept of originality with regard to a title.

As the relevant case-law shows, the Alicante Office, in its turn, examines the originality of the titles in order to determine whether a particular title is opposable as copyright. According to the EUIPO Guidelines, for a copyright to be enforceable in a cancellation action, it is the complainant's duty to show the applicable national legislation in force and to argue why the alleged copyright in that Member State could be successfully opposed[26].

[22] Alin Speriusi-Vlad, *Protecția creațiilor intelectuale, Mecanisme de drept privat*, C.H. Beck Publiing House, 2015, pages 211-213 and the following.

[23] Yolanda Eminescu, *Opera de creație și dreptul*, Academy of the Socialist Republic of Romania Publishing House, 1987, page63.

[24] *Idem*.

[25] Decision of the Board of Appeal - Trademarks no. 358 of June 30, 2009 in the matter CRM 108 / 2009.

[26] The Guidelines for Examination in the Office for Harmonization in the Internal Market (Trade Marks and Design) on Community Trade Marks, Part D, Cancellation, Section 2 Substantive Provisions, pages 23-24 and the following.

Thus, an applicant of Swedish origin, in a cancellation action before EUIPO, has invoked, among its rights, the copyright in the publication title on the name LEGALLY YOURS. In this case, the plaintif cited the relevant provisions of the Swedish legislation and provided minimal explanations regarding their incidence. With regard to these claims, the Commission noted that "*it can be said that Swedish copyright law requires the subject of a copyright to be a product of mental labour which indicates a certain degree of "independence and originality". However, the Cancellation Division points out that the applicant has not shown that the sign "LEGALLY YOURS" would suffice to fulfil these requirements. It is not shown that a two-word title of a magazine would constitute a "work" under Swedish copyright law. It must also be noted that one of the words of the title is "LEGALLY", which is not particularly original in relation to a magazine targeted at the legal industry, and might not, therefore, achieve the degree of originality required under Swedish copyright law*". Finally, the Board underlines that the applicant has not sufficiently argued that the title of a literary or artistic work hinders the registration of a subsequent mark under Swedish law[27].

Conclusions

Taking the above into consideration, we can conclude that, at least at the theoretical level, the titles could be protected both as trademarks as well as through the law on copyright.

However, the reigstration of titles as trademarks for goods or services that are directly related to the work may raise the issues of distinctiveness. Thus, a trademark may be refused for such goods or services, or if it is registered it may be cancelled. We also note that in this case the acquisition of reputation by a title makes it harder for it to be register ed, and does not facilitate the process, as it is not the case of a possible distinctiveness acquired on the market. It is therefore advisable to register the trademark consisting of a title as quickly as possible, if not prior to the release of the work, without, however, disregarding the risk that it could be subsequently canceled for certain products or services.

It should also be borne in mind that denominations of publications, series or franchises are easier to register, as they rather have the role of designating a commercial origin, not the name of a precise work.

As regards the protection of the title under the copyright law, the dominant opinion in practice and jurisprudence is directed towards the analyse of the title through the filter of originality.

Finally, can there be a cumulate protection between copyright and trademark protection? We consider that if a title succeeds simultaneously in fulfilling the condition of distinctiveness and that of originality, the law does not prevent the existence of cumullative protection for that name. In this respect, however, the practice raises the following question: can registration of a title as a mark be eluded by the provisions on the limited duration of copyright? If the answer is affirmative, can one say that such protection is against the general interest?

We believe that any response should be nuanced and take into account many factors, as highlighted in an article published by *Thomson Reuters*. The following points should be considered: in the first place, copyright protection and trademark protection have different purposes. Thus, copyright protects the author, while the trademark protects the public on the likelihood of confusion. Therefore, there can be no sign of equality between copyright protection and trademark protection, so that the latter is not a extension of the first. It must also be borne in mind that copyright protects the exploitation of a work, while the function of the mark is to identify the commercial origin. Thus, in terms of opposition, a copyright may oppose unauthorized reproduction of a work, while the mark is opposed to use as a trademark[28].

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THE RESALE RIGHT

Ana-Maria MARINESCU*

Abstract

The article analyses one of the most important rights of the authors of original works of art namely: the resale right. It will be analyzed the subject matter of the resale right, the works of art to which the resale right relates, the rates applicable to the resale right, the persons entitled to receive royalties, the term of protection of the resale right, third-country nationals entitled to receive royalties and the right to obtain information. Also, the article will refer to the EU Directive in the field: Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art. It will be the subject of the article, also, the European Court of Justice jurisprudence related to the resale right, for example the judgment in the case C-518/08 (VEGAP vs. ADAGP), underlying that, in the light of the objectives pursued by Directive 2001/84, Member States may make their own legislative choice in determining the categories of persons capable of benefiting from the resale right after the death of the author of a work of art. One of parts of the article, will analyses the collective management for the resale right, especially: the terms of the collective management, forms of the collective management and examples. For all the above mentioned reasons, the article will refer to the main aspects of the resale right in a comprehensive manner and will analyses in a scientifically manner this very important right of the authors of original works of art.

Keywords: *authors of original works of art, the resale right, Directive 2001/84/EC, jurisprudence, collective management.*

1. Introduction

The resale right is one of the most important rights of authors of original works of art. The resale right was born in France in 1920 and since then it developed, currently being recognized by sixty national legislations[1]. In 2001, the European Commission recognizing the importance and the value of this right adopts the Directive 2001/84/EC on resale rights for the benefit of the authors of original works of art. The major objective of the Directive was to ensure the proper working of the modern and contemporary art market in the European Union[2] and to end the discrimination suffered by some artists resulting from where it their works are resold[3].

As was pointed out in the doctrine[4], the resale right was meant to repair an injustice done to young authors of original works of art, being at the beginning of their career, which are selling their woks with a low price and then becoming famous their works are sold with very high prices. From these resale profit only the assignees. This was the reason for which was regulated the resale right in order to compensate in an equitable manner the lost brought to the authors of original works of art and for them to benefit also from the successive resale of their works. For the above mentioned reasons, the resale right was termed in the doctrine[5] as a pecuniary right to a fair partition.

In favor of the resale right, was taken also into account the fact that the communication to the public and the reproduction rights, have an insignificant value as regards the original works of art

From this point of view, the resale right is becoming the most important economic right of the authors of original works of art and the most common way to exploit the original works of art.

Although the state of knowledge in the concerned field is high enough, the article aims to point the most important aspects regarding the resale right. In order to do this, the article will present the applicable statutory provisions as regards the object, the subject and the content of the resale right, the EU Directive on resale rights for the benefit of the authors of original works of art, will analyses the European Court of Justice jurisprudence related to the resale right, for example the judgment in the Case C-518/08 (VEGAP vs. ADAGP) and some aspects related to the collective management of the resale right.

2. Content

At the international level, the resale right was regulated by **article 14 third of the Berne**

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[1] http://www.adagp.fr/en/author-right/property-rights/resale-right.

[2] http://europa.eu/rapid/press-release_IP-01-1036_en.htm?locale=ro.

[3] *Idem.*

[4] Viorel Roș, Dragoș Bogdan, Octavia Spineanu-Matei, *"Dreptul de autor și drepturile conexe – Tratat"*, All Beck Publishing House, Bucharest, 2005, p. 283.

[5] *Idem.*

Convention, but the Convention provides that the resale right is available only if legislation in the country to which the author belongs so permits. The right is therefore optional and subject to the rule of reciprocity.

In 2001, after barely surviving its perilous journey between the Commission, the European Parliament and the Council (and back again), the **Resale Right Directive**[6] was finally adopted[7].

The Directive promoted harmonization of the substantive conditions for the application of the resale right:

1. eligibility and the duration of protection;
2. the categories of works of art to which the resale right applies;
3. the scope of the acts to be covered i.e. all acts involving dealers in works of art;
4. the royalty rates applicable across defined price bands;
5. the maximum threshold for a minimum resale price attracting the right (€3,000);
6. provisions on third country nationals entitled to receive royalties.

Member States had to implement this Directive before 1 January 2006.

On the Report on the Implementation and Effect of the Resale Right Directive[8] dated 14.12.2011, the European Commission stated that 4 Member States did not implemented the Directive: Austria, Ireland, the Netherlands and the UK. These Member States enjoyed a transitional period to 1 January 2010 during which they could choose not to apply the resale right to the works of eligible deceased artists. These Member States, together with Malta, made use of this provision, and of the option to extend the derogation period for a further 2 years. This derogation ended on 1 January 2012, at which point the Directive was fully implemented in all Member States.

The subject matter of the resale right[9] - the author of an original work of art will benefit of the resale right, defined as an inalienable right, which cannot be waived, even in advance, to receive a royalty based on the sale price obtained for any resale of the work, subsequent to the first transfer of the work by the author.

The resale right will apply to all acts of resale involving as sellers, buyers or intermediaries art market professionals, such as salesrooms, art galleries and, in general, any dealers in works of art.

From the above mentioned aspects, result **the characteristics of the resale right**: inalienable and it cannot be waived. These characteristics transform the resale right in a **unique**[10] **economic right of the authors**, because all the economic rights of the authors can be transferred or renounced.

Also, the unique characteristics of the resale right result from the fact that is not a right to authorize or to prohibit the use of the work, but a possibility to receive a royalty based on the sale price obtained for any resale of the work, subsequent to the first transfer of the work by the author.

The debtors of the resale right are the sellers, buyers or intermediaries art market professionals, such as salesrooms, art galleries and, in general, any dealers in works of art. So, the debtor of the correlative obligation of the author resale right is, in all the cases, the seller[11].

The works of art to which the resale right relates[12] are the original works of graphic or plastic art such as pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs, provided they are made by the artist himself or are copies considered to be original works of art. Results that are covered by the resale right **the original works of art and the copies considered to be original works of art**. In order to comply with the Directive, the copies of works of art have to fulfill the following conditions: have been made in limited numbers by the artist himself or under his authority and have been numbered, signed or otherwise duly authorized by the artist.

Therefore, the works of art to which the resale right relates are the ones done personally by the author and the ones done with its authorization, for example by heirs or third parties.

The Directive sets a **minimum sale price** from which the sales shall be subject to resale right. This minimum sale price may not under any circumstances exceed EUR 3 000[13].

One of the most interesting aspects of the Directive refers to the **rates** applied to the selling price. In the case of the minimum sale price, the rate may not be lower than 4 %[14]. The total amount of the royalty may not exceed EUR 12.500.

The Directive sets down **the term of protection** provided in the Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights[15] and the Berne

[6] European Parliament Directive and that of the Council 2001/84/CE from the 27th of September 2001 on resale right for the benefit of the author of original works of art, published in the Official Journal of European Communities no. L 272 from the 13th of October 2001.

[7] Derclaye,"*Research Handbook on the Future of EU Copyright"*, Edward Elgar Publishing Limited, UK, 2009, p. 16.

[8] http://ec.europa.eu/internal_market/copyright/docs/resale/report_en.pdf

[9] Art. 1 Directive 2001/84/EC.

[10] N. Binctin, *"Droit de la propriété intellectuelle"*, L.G.D.J., Paris, 2010, p. 112 – for these reasons the author named the resale right a "strange" right.

[11] Art. 1 (4) Directive 2001/84/EC.

[12] Art. 2 Directive 2001/84/EC.

[13] Art. 3 Directive 2001/84/EC.

[14] Art. 4 (3) Directive 2001/84/EC.

[15] Art. 1.

Convention[16]: **the life of the author and for 70 years after his death**, irrespective of the date when the work is lawfully made available to the public.

The resale right affects directly only trade in Contemporary and Modern fine art i.e. works by EU living artists, or by EU artists deceased within 70 years of sale.

The Directive allowed Member States to provide for **compulsory or optional collective management** of the resale right royalty[17]. While the majority of Member States provides for obligatory collective management of the resale right, a significant number opted for optional collective management. Beyond this, the Directive is silent on the implementation and administration of the right. There are significant divergences in the national systems resulting in differences in terms of ease and cost of administration, both for art market professionals and collecting societies administering the resale right.

The collective management organizations that are administering the resale right in Europe are: Bildrecht[18] (Austria), SABAM[19] (Belgium), SOFAM[20] (Belgium), GESTOR[21] (Czech Republic), COPYDAN[22] (Denmark), EAU[23] (Estonia), KUVASTO[24] (Finland), ADAGP[25] (France), La Saif[26] (France), Bild-Kunst[27] (Germany), FOEBUS[28] (Greece)[29], IVARO[30] (Ireland), Myndstef[31] (Island) SIAE[32] (Italy), AKKA-LAA[33] (Latvia), LATGA[34] (Lithuania), PICTORIGHT[35] (Netherlands), BONO[36] (Norway), SPAUTORES[37] (Portugal), LITA[38] (Slovakia), VEGAP[39] (Spain), Bildupphovsratt[40] (Sweden), Prolitteris[41] (Switzerland) and DACS[42] (UK).

In Romania, the collective management organization which is administering the resale right is VISARTA[43].

In **Romania**, the Directive was fully implemented in Law no. 8/1996 on copyright and related rights, as amended and supplemented (hereinafter Law no. 8/1996), in the articles 21-23.

The art. 21 (1) of Law no. 8/1996 stipulates that the resale right is applying to **original works of graphic or plastic art or of photographic works**. From this point of view, the Law is limiting the works subject to the resale right only to works of graphic or plastic art or of photographic works. The Law is not enumerating like the Directive the works to which the resale right is applying. From this point of view, in the specialized literature[44] was mentioned that the enumeration from the Directive should had been implemented also in the Law no. 8/1996, because only to this works the resale right can be recognized.

The right is applying also to the **copies of the original works of art or photographic works** that have been made in a limited number by their author himself or with his consent[45]. As was stated also in the doctrine[46], the number of the copies that are considered original works of art, with the condition that the copies were made by the author, was not regulated either by the Directive or by the Law and is stipulated in the Fiscal Code[47]: 8 copies for tapestries and glassware and 30 copies for photos.

Regarding the **rates** applied to the selling price, the Law establishes the following[48]:

a) from EUR 300 to EUR 3,000 – 5%;

[16] Art. 2.
[17] Art. 6 (2) Directive 2001/84/EC.
[18] http://www.bildrecht.at/
[19] http://www.sabam.be/
[20] http://www.sofam.be/
[21] http://www.gestor.cz/cs/
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[41] http://prolitteris.ch/
[42] https://www.dacs.org.uk/
[43] http://www.visarta.ro/
[44] Viorel Roș, *"Dreptul proprietății intelectuale – Vol I. Dreptul de autor, drepturile conexe și drepturile sui-generis"*, C.H. Beck Publishing House, Bucharest, 2016, p. 349.
[45] Art. 21 (3) Law no. 8/1996.
[46] Viorel Roș, *op.cit,* p. 349.
[47] Art. 312 Fiscal Code.
[48] Art. 21 (4) Law no. 8/1996.

b) from EUR 3,000.01 to EUR 50,000 – 4%;
c) from EUR 50,000.01 to EUR 200,000 – 3%;
d) from EUR 200,000.01 to EUR 350,000 – 1%;
e) from EUR 350,000.01 to EUR 500,000 – 0.5%;
f) over EUR 500,000 – 0.25%.

These rates are fixed in the same manner like in the Directive.

Therefore the minimum reselling price is EUR 300. Also, the total amount of the royalty may not exceed EUR 12.500. The minimum sale price is justified by the fact that under this amount the costs for administering the resale right can be higher than the amount obtained by the author.

The seller have the following obligations:

- to convey to the author the information regarding the resale of the work, the price paid and the place where the wok is, in 2 months from the selling date.
- to withhold from the net selling price, without adding other fees and to pay to the author of the amount owed.

The article 21 (6) of the Law provides that the beneficiaries of the resale right or the representatives thereof may request, within 3 years as of the date of resale, to the persons subject matter of the resale right the necessary information in order to insure the payment of all owed amounts. This obligation is provided also in the art. 9 of the Directive.

Also, according to articles 22 and 23 of the Law, the owner or possessor of a work have the obligations:

- to allow the author access to it and place it at his disposal where necessary for the exercise of his copyright, provided that the owner or possessor's legitimate interests are not thereby prejudiced. The owner or possessor may in such a case claim a sufficient guarantee from the author for the security of the work, and also the insurance thereof for an amount representing the market value of the original, as well an adequate remuneration.
- not to destroy the work before having offered it to the author at the cost price of the material and where the return of the original is not possible, the owner shall allow the author to make a copy of the work in an appropriate manner.

A special regulation is established in the case of an architectural structure, for which the author shall have the right only to take photographs of the work and to request the return of reproductions of the projects[49]. This disposition of the Law is in accordance with the nature of the architectural work.

As stated in the doctrine[50], having in mind the frugifer nature of the resale right, it least all the life of the author and is the subject of being inherited for 70 years after the death of author, according to article 25 of Law no. 8/1996[51]. Accordingly, the resale is the subject of the legal inheritance for a period of 70 years and can be transferred also by testament[52].

In Romania, according with art. 123^1 (1) lit. c) Law no. 8/1996, **the resale right is managed compulsory by the collective management organizations.**

Regarding the resale right, the European Court of Justice had ruled only in 2 cases:

The first decisions of the European Court of Justice regarding the resale right was taken in the Case C-518/08 (*VEGAP vs. ADAGP*)[53].

The French legislation limits the beneficiaries of that resale right after the death of the artist to his heirs and excludes all legatees. The artist cannot therefore bequeath that right by will.

The painter Salvador Dalí died on 23 January 1989 in Spain, leaving five heirs at law, who were family members. In addition, by his will, Salvador Dalí established the Spanish State as sole legatee over his intellectual property rights. Those rights are administered by the Fundación Gala-Salvador Dalí, a foundation established under Spanish law, created in 1983 at the initiative of the painter himself.

In 1997 the Fundación Gala-Salvador Dalí granted to VEGAP, a Spanish society, an exclusive worldwide mandate to manage collectively and exercise copyright over the works of Salvador Dalí. VEGAP has, in addition, a contract with its French counterpart, ADAGP, which is responsible for the management of Salvador Dalí's copyright in France. Since then, ADAGP has collected amounts in respect of the exploitation of Salvador Dalí's works, which were transferred by VEGAP to the Fundación Gala Salvador Dalí, with the exception of those in respect of the resale right. Pursuant to French legislation, ADAGP paid the amounts in respect of the resale right directly to Salvador Dalí's heirs. Taking the view that, under Salvador Dalí's will and Spanish law, the royalties levied upon sales at auction of the artist's works in France should be paid to it, the Fundación Gala-Salvador Dalí and VEGAP summonsed ADAGP before

[49] Art. 23 (3) Law no. 8/1996.

[50] Viorel Roș, Dragoș Bogdan, Octavia Spineanu-Matei, *op. cit.*, p. 285-286.

[51] Art. 25.—(1) The economic rights provided for in Articles 13 and 21 shall last for the author's lifetime, and after his death shall be transferred by inheritance, according to civil legislation, for a period of 70 years, regardless of the date on which the work was legally disclosed to the public. If there are no heirs, the exercise of these rights shall devolve upon the collective administration organization mandated by the author during his lifetime or, failing a mandate, to the collective administration organization with the largest membership in the area of creation concerned.

(2) The person who, after the copyright protection has expired, legally discloses for the first time a previously unpublished work to the public shall enjoy protection equivalent to that of the author's economic rights. The duration of the protection of those rights shall be 25 years, starting at the time of the first legal disclosure to the public.

[52] Viorel Roș, *op.cit,* p. 351.

[53] http://curia.europa.eu/juris/document/document.jsf?text=&docid=81364&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid =7645.

the Tribunale de Grande Instance de Paris (Paris Regional Court) for payment of those royalties.

In the course of those proceedings, the French court referred to the Court of Justice the question whether Directive 2001/84 precludes a provision of national law which reserves the benefit of the resale right solely to the artist's heirs, to the exclusion of testamentary legatees.

The European Court of Justice Decision in the case C-518/08 (*VEGAP vs. ADAGP*) stated that art. 6 (1) of the Resale Right Directive[54] must be interpreted in the sense that is not opposing to a national disposition which reserve the benefit of the resale right only to the legal inheritors of the author, excluding the testamentary legatees[55].

For stating this Decision, the Court took into account on the one hand, the fact that the Directive is intended to assure a certain level of remuneration of authors and this purpose is not compromised by the devolution of the resale right to some legal subjects by excluding others after the death of the artist. On the other hand, although the EU legislator had in mind that legatees to benefit of the resale right after the death of the author, didn't considered that is advisable to interfere in the field of the inheritance national laws, leaving to each state the competence to define the categories of legatees. Results that in the light of the Directive the **Member States have the liberty to establish the categories of persons which can benefit of the resale right after the death of author**.

That being so, the Court explains however that it is for the referring court to take due account of all the relevant rules for the resolution of conflicts of laws of succession in order to determine which national law governs the succession of Salvador Dalí's resale right and, therefore, who is the actual successor to that right under that national law.

The second judgment, rendered by the European Court of Justice on 26 February 2015, regarding the resale right was taken in the Case C–41/14 (*Christie's France SNC vs. Syndicat national des antiquaires*)[56].

In the framework of two interesting and contradictory cases rendered by the Court of Appeal of Paris, the French Supreme Court referred a preliminary question to the European Court of Justice: can an auction house transfer the responsibility of paying the royalty from the seller to the buyer by contract?

Article 1(4) of Directive 2001/84/EC states that "The royalty shall be payable by the seller", and that Member States may provide that buyers or intermediary art market professionals, such as salesrooms, art galleries and, in general, any dealers in works of art "shall alone be liable or shall share liability with the seller for payment of the royalty".

The Court stated that "**Article 1(4) of Directive 2001/84/EC** of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art **must be interpreted as not precluding the person by whom the resale royalty is payable, designated as such by national law, whether that is the seller or an art market professional involved in the transaction, from agreeing with any other person, including the buyer, that other person will definitively bear, in whole or in part, the cost of the royalty, provided that a contractual arrangement of that kind does not affect the obligations and liability which the person by whom the royalty is payable has towards the author**".

To explain its position, the European Court of Justice states that the objectives of this Directive are (1) to ensure that authors of graphic and plastic works of art share the economic success of their original works of art (para.15), and (2) to 'eliminate differences between laws which lead, inter alia, to unequal treatment between artists depending on where their works are sold' (para. 16). This is why Article 1(1) of the Directive provides, for the benefit of an author, a resale right, defined as an inalienable right (para. 17), which has to be actually paid to the author (para. 18). Nevertheless, Member States alone may determine the person who is responsible for payment of the royalty to the author (para. 19).

The European Court of Justice specifies that under Article 1(4) of the Directive, if a Member State decides to provide that the royalty is to be payable by a person other than the seller, it must select that person from among the professional persons referred to in Article 1(2), i.e. sellers, buyers or intermediaries (para. 24).

The European Court of Justice finally admits that its position 'may to some extent have a distorting effect on the functioning of the internal market', but that effect is only indirect, since it would arise as a result of contractual arrangements that are independent of the payment of the royalty to the author, who will in any event receive payment (para. 31).

For the above mentioned reasons, about the judgment was said that it will satisfy the auction houses and art dealers in Europe[57].

As **comparative law**, article L. 122-8 of the French Intellectual Property Code defines the resale right (**droit de suite**) as "a non-transferable right to participate in the proceeds of any sale of a work after the first sale by the artist or his/her beneficiaries, when

[54] Article 6 Persons entitled to receive royalties.

1. The royalty provided for under Article 1 shall be payable to the author of the work and, subject to Article 8(2), after his death to those entitled under him/her.

2. Member States may provide for compulsory or optional collective management of the royalty provided for under Article 1.

[55] Ana-Maria Marinescu, *"Gestiunea colectivă a dreptului de autor și a drepturilor conexe. Jurisprudență română și europeană în domeniu*", RRDPI no. 4/2014, p. 126-128.

[56] http://curia.europa.eu/juris/document/document.jsf?text=&docid=162539&doclang=EN

[57] http://kluwercopyrightblog.com/2015/02/27/ecj-auction-houses-may-transfer-cost-of-artists-resale-royalties-to-the-buyer/.

an art market professional is involved as seller, buyer or broker".

According to article L. 122-8 of the French Intellectual Property Code the beneficiary of the resale right are the "creators of original graphic and plastic works who are citizens of a member state of the European Community or a country party to the agreement on the European economic area".

The resale right can also benefit to:

- artists who are not citizens of a member state of the European community or a country party to the agreement on the European economic area "when their national legislation grants this right to artists from the countries mentioned above and their beneficiaries and for the period during which they are allowed to exercise this right in their country" (principle of reciprocity);
- artists who are not citizens of a member state of the European community or a country party to the agreement on the European economic area "who, during their artistic career, have participated in French artistic life and have lived in France for at least five years, even if non-consecutive".

The resale right cannot be assigned (by the users and by the artists) and it cannot be bequeathed. On the death of the artist, it "continues in favour of his/her heirs and, for the beneficial title stipulated in article L. 123-6, his/her spouse, with the exclusion of all legatees and assigns, during the current calendar year and for the following 70 years".

The French Intellectual Property Code precisely defines the works to which the resale right might be applicable, namely:

- graphic and plastic works of art

The resale right is only applicable to graphic and plastic works of art.

Article R. 122-3 stipulates that this includes works "such as pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware, photographs and plastic creations on audiovisual and digital media".

The list is not limitative ("such as"): all graphic and plastic works of art – in particular design works and applied arts – are included.

- "original" works

The resale right is only due for "original" works. This is a specific criterion of originality, which is not the same as the one on which copyright protection is dependent.

As per article L. 122-8, original works are "the works created by the artist him/herself and the copies produced in a limited quantity by the artist him/herself or under his/her control".

Two categories of works must therefore be considered as original:

- Works created by the artist him/herself: painting done by the painter, furniture made in a single copy, marble sculpted by the artist, etc.
- Works made in a limited quantity by the artist him/herself or under his/her control: bronze sculptures, copies of photographs, limited edition designer items. Article R. 122-3 requires that such works are "numbered or signed or otherwise duly authorized by the artist".

This second point marks the boundary between copies produced "industrially", which can generate revenues on the basis of the reproduction right, and copies made in a limited number by the artist or under his/her control, which, as originals, have an increased valued on the art market: in such a case, the artist can perfectly legitimately participate in this enhancement in value thanks to this resale right.

The requirement of a "limited" number of copies does not mean that this number must be small: it simply means that the number of copies made must be finite. In this regard, the presence of numbering or a signature confirms this limited nature. But if other elements can demonstrate unequivocally that the artist has only authorized a limited number of copies, the works concerned will be eligible for the resale right.

The intellectual property code stipulates that the following in particular should be considered to be originals (article R. 122-3):

a) Original engravings, prints and lithographs produced in a limited quantity from one or more plates;
b) Copies of sculptures, limited to twelve, including numbered copies and artist's proofs;
c) Handmade tapestries and textile works of art, based on original models provided by the artist, limited to eight copies;
d) Enamelwork pieces made completely by hand and signed by the artist, limited to eight numbered copies and four artist's proofs;
e) Signed photographic works, limited to thirty copies, regardless of the format and medium;
f) Plastic creations on audiovisual or digital medium, limited to twelve copies."

For other types of works, three general criteria apply: the copy will be considered an original work if it has been either numbered, signed or duly authorized in another way by the artist.

The resale right only applies to sales in which **"an art market professional is involved as seller, buyer or broker"** (article L. 122-8 of the Intellectual Property Code); this includes galleries, auction houses, art dealers, etc.

The French Intellectual Property Code also requires that the sale "take place on French territory" or that it is "subject to value added tax" there[58].

However, certain sales are excluded from the scope of the resale right:

- Sales of works for a price under EUR 750 (article R. 122-5).
- The first transfer of the work (sale, gift) made by the artist or his/her beneficiaries (article L. 122-8).
- Resale within less than three years after the direct

[58] Art. R. 122-2 French Intellectual Property Code.

purchase of the work from the artist, provided that the resale price does not exceed EUR 10,000.

The amount of the resale royalty is determined by applying a percentage to the sale price of the work excluding tax: price awarded by auction for public auctions, sale price received by seller in other cases[59].

It is calculated by applying a reducing schedule based on the amount for which the work is sold (article R. 122-6):

- 4% for the first tranche of the sale price up to EUR 50,000;
- 3% for the tranche of the sale price between EUR 50,000.01 and EUR 200,000;
- 1% for the tranche of the sale price between EUR 200,000.01 and EUR 350,000;
- 0.5% for the tranche of the sale price between EUR 350,000.01 and EUR 500,000;
- 0.25% for the tranche of the sale price over EUR 500,000.00.

The resale royalty is limited to EUR 12,500. Unfortunately for creators of visual arts, it is the only royalty to be limited.

As example[60], for a work sold for EUR 230,000, the resale royalty due will be EUR 6,800, i.e.:

- EUR 2,000 for the first tranche of the sale price (4% x EUR 50,000);
- EUR 4,500 for the second tranche (3% x EUR 150,000);
- EUR 300 for the third tranche (1% x EUR 3,000).

According to article L. 122-8 of the intellectual property code, "the resale royalty is payable by the seller".

However, the art professional involved in the sale is responsible for making the payment (if the sale takes place between two professionals, the seller will be responsible).

Art professionals must inform specially approved collecting societies of any sale on which the resale royalty is due[61].

Failure to declare sales or pay the resale royalty is punishable by the fine stipulated for third category offences[62].

3. Conclusions

Romanian legal regulations concerning the resale right are compliant with the ones provided in the Directive 2001/84/EC.

Accordingly to the detail analyze presented, the main conclusion that rises is that for creators of visual arts, the resale right is currently the most important right in economic terms.

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[59] Art. R. 122-5 French Intellectual Property Code.
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THE LEGAL PROTECTION OF IDEAS

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Abstract

Ideas are purely abstract elements. They pre-exist to creations, are grounded on them, however no one in any field of creation does not have monopoly upon raw ideas. In order to prevent invoking some privative right upon them and, in order to make sure that they are remining no one's and to all in the same time, in order to prevent blocking the creative and research activity by their possible closeness, they are expressly excluded from protection. Romania makes an exception from this rule because by a law whose object of regulation is constituted by good conduct in scientific research, „introducing within your work texts, expressions, ideas, demonstrations, data, hypotheses, theories, results or scientific methods extracted from written works (...) of other authors without mentioning such fact and without indicating the original sources" constitutes plagiarism. And if you retrieve from your own works any idea, theory, or method without indicating such fact, it is called self-plagiarism.

Keywords: *idea, protectable intellectual creations, unfair competition, exclusion from the protection, know-how.*

1. The philosophical notion of idea

Text In philosophy, the idea is a fundamental concept. The etymology of the word is Greek originating from „*eida*" (*eidos*), which means „*I've seen*". Socrates[1] was the first philosopher conceived a theory of ideas (unfortunate idea, because they have found within reasons for sentencing him to death), theory which his disciple Plato[2] takes over and develops (however himself also was partially unsatisfied by it by the end of his life) and which Aristotle[3] the disciple of the second one has criticised it in his turn (it became Aristotle's habit to nit-pick his master all the time), without entirely disavowing it. However, we today know that Aristotle made a lot of mistakes himself, sometimes bad (i.e. Geocentrism theory, which is the worst of his mistakes), although his ideas have changed the European education for hundreds of years and still indebted till this day.

Socrates is the father of maieutic[4], the art of giving rise of ideas in the mind of people, a learning method that pursues bringing to light the thoughts and/or ideas by the means of reflexive dialog, of „midwifing ideas" that are already in there, like the child in the womb of his mother and do nothing else but to reborn following the persistent questioning and provoked answers. And we should underline that Socrates is the one who used the word *„to midwife"* with the meaning of bringing ideas to life, taking advantage of a family experience: his mother was a midwife, his father was a sculptor and by making a

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[1] Socrates (470-399 BC.). His works have not been preserved, however the didactic theses of the latter are made known by his most important discipol, Plato, who stood by him for 8 years and also by Xenofon. Socrates was phisically ugly (outraging the Atheniens, who belived that inner beauty comes from phisical beauty), inteligent, kind, modest, patient, cheerful, pleasant, simpe, brave, with a profound respect for laws. *„He did not write any single row, however it survived by the thoughts shared to others, by his way of life and not less by the way he died,to many authors of philosophical tomes scattered in the dust of the ages"*. D. Cosma, *Socrates, Bruno, Galilei*, Sport Turism Publishing, București, 1982, p. 11. His influence was so great that the ancient Greek philosophers are divided into Presocratic, the grata Socratics (Socrates, Plato, Aristotel) and post or small Socratic. Not few are those who compare its role and destiny with the ones of Jesus.

[2] Plato (427-347 BC.) was Socrate's pupil. He has established (toghether with Socrate and Aristotel) the basis of philosophy, politics and science. He had decisively influenced chrestian thinking through Saint Augustin, Nitzsche naming cristianity as being „Platoicism for the mases". Considered by Petre Țuțea the greatest thinker of Europe. Plato's theory of ideas is found in several of his works (Phaidon, the Republic, the Banquet and Phaidros).

[3] Aristotel (384-322 B.C.) was Plato's pupil and then teacher at his Academy, school to which he had been loial to as long as Plato lived. He left the Academuy after his death (previously naming, his nephew, Speusip, as ruler, for fear that Aristotle will not impose its own philosophy). Aristotel was Alexander the Great's teacher for seven years, his military skills and his triumf in wars is due also to the education received from Aristotle. Former pupil, becoming king, provided to its former teacher generous research funding, Aristotel becoming the first case in history of a scientist to whom research funding was provided. Of the 150 written books (145 by Diogenes Laertios) today only 47 are known. The most famous of his works is Metafizics (however the title was not given by Aristotel, but by Andronicus from Rhodos, the editor of all philosofer's works known today. The education in Europe was considered, especially in the 13th-17th centuries, as being aristotelic and is still tributary to the Aristotelian conception. The main University Centre of aristotelism was Padova University. The padovian Aristotelism was the curricular model of the first institutions of high education within Romanian Countries (Royal Academies in Bucharest and Iasi). Out of all great philosophers of Antiquity, for the Cristian Church the most dangerous was Aristotel, his ideea being the most compatible with Christian dogmas, his acceptance by Cristian Church was realised with the help of Thomas d`Aquino works, the theolog who is to Cristianity the same as Averoes is to muslims and Maimonide to Judaism.

[4] Maieutics is a method of reaching the truth. Maieutike, in Greek, is the skill to midwife children and Socrates considerd that he was *"midwifing"* ideas in order to show the people the truth. Socrates' technique represents a efficient modality to explore deeply ideeas and knoledge. The method cam be used sucessfully for learning, because it stimulated independent thinking and gives students the feeling of *"property"*, discovering themselves what they learn by this method. Socrates spent the last days of his life having dialogs with friends that did not leave him, urging them to think for themselves and ask difficult but essential questions.

comparison between bringing into this world of a new-born with the help of a midwife and bringing to light ideas in people's minds, work to which he had become a master.

Socrates has priority also in formulating the theory of ideas and, by imitating the philosopher's typical attitude, namely being ironical benevolent (even with their judges), we might say that we are fortunate that as there was no law to establish a privative right upon it, Plato and Aristotle were able to freely take over, develop (Plato), heavily revise it (Aristotle) and give it back to the descendants for the good of philosophy and law science, in order to understand what is knowledge, to understand why awareness upon ignorance is the first step to evolution, why you need to know yourself[5], which are the highest virtues, what is reason and many more philosophy concepts. As many acted and still do, philosophers pursuing them to this day. However, we shall see that the priority of formulating his theory, that cannot be challenged, could be exactly the solid argument for acknowledgement of ideas moral protection theory in favour of Socrates and for the resolution according to which the refusal of legal protection of ideas is justified.

What would be the theory of ideas today if Socrates would have had an exclusive right upon it? What would be the theory of Socrates, without the contributions of Plato and Aristotle, and of so many other philosophers and philosophical currents that are based on the thinking of the great Socrates?! And what would they have used this theory for and so many others that they have formulated, if such theories were untouchable by virtue of their exclusive and perpetually recognized right!

Pursuant to the theory formulated by Socrates for the common individual the senses are the meaning to reach knowledge, the object of knowledge being the one perceptible to senses and especially to the sense of vision or such knowledge is limited or even useless. That is why, in his famous dialogues, he sought to free the minds of his interlocutors from the hindrances of logical thinking, the power of seduction of the sensible, knowledge through the senses so that they could penetrate the world of ideas, a world of essences and abstractions.

To truly see, to *"see"* ideas, concepts that are things of the spirit, you must have *"the eyes of the mind"*, eyes that is nothing but reason, which has the quality of being the same in all people.

Reason is the one that allows us to make judgments and demonstrations, is what we should consult when looking for the good, the truth or the state of health of the mind or soul by virtue of which science is. The reason is joining spirits, unlike the senses and interests that divide people.

Socrates names such reason the voice of moral consciousness, the inner voice (his daemon), a voice that tells him what to do and what he does not do to the astonishment, distrust or hatred of those with whom he talks.

The non-conformist Socrates (walking barefoot with shabby clothes lacked any material means, though he could have earned much by teaching, was adored by many and hated by even more Athenians[6]), the lover of wisdom and self-knowledge, the seeker without rest of supreme virtues (good and truth), deplored those who believed that in order to become real, things must be palpable and said that people who see (only) with their eyes are, in fact, blind.

However, Socrates' theory that reality, the world of ideas, is not available to those who, being narrow minded, use only their senses to understand, his ironic dialogues[7], as well as the *"discussions"* he had with his daemon who questioned everything and who no one else besides him heard, not only failed to free the minds of everyone, but, on the contrary, hurt the pride of many who he made enemies of (among those being his three denouncers[8]), and caused the fury of the Athenians, adding to the (political, religious, and philosophical) reasons for which, misunderstood being, he ended up condemned to death by poisoning[9].

Sentence that executed it without crunching, refusing the support of friends who wanted to save him, not to create a precedent that would question the law. In fact, these key words of the philosopher: "the only thing I know is that I do not know anything" sounded less self-irony and more mockery in the ears of those who literally interpreted them, since they came from the one proclaimed by The Oracle of Delphi *"the freest, the most righteous and the wisest of the people"*, few were those who have understood the profound meaning of the statement and its philosophy.

Among them, Cicero who said that Socrates *"lowered the philosophy from heaven, placed it in the city and even in the houses of men"*, an appreciation that is more suggestive, more meaningful and more successful than that of modern philosophers, who considers it *"the most important figure of the history of*

[5] Knowing yourself is the slogan of the Seven Wise Men of Greece. The motto is the creation of Thales of Milet, one of the seven.

[6] Sentenced to death (according to some sources 280/222, 280/278 after another) he refused to be rescued, and at his death theaters were closed in sign of national mourning, an exceptional measure for the time.

[7] Dialogues that he himself provoked, entering into dialogue anytime, anywhere, on any problem, with anyone no matter of their status and not few were those who, following the discussions with him, were leaving despaired, finding that they do not know anymore what they previously thought they knew, and this attitude, through which he managed to upset many, proved to be ultimately imprudent.

[8] Of these, one was also sentenced to death (Meletos, obscure poet) and the other two Lycon, an obscure orator and Anytos, a tanner who Socrates reproached that he did not educate his son and who remained in history and as one who in another process was acquitted because he bribed all the judges, were later punished to exile.

[9] Hated by the narrow-minded spirits, Socrates was accused with the crime of not recognizing the gods acknoledged by the city (atheism), introducing new divinities (his own daemon) and corrupting young people, being condemned to death by poisoning, after provoking once again the wrath of those who judged him, telling them that for the good he had done, he should be living on public expense.

Greek thinking and from which all the later trends of philosophy derive" (woody language!). As it is easy to see, the appreciation of Socrates is about the same but ... dressed in another form of expression.

The methodical Plato, starting from the opposition between the senses and reason, between the reality and the knowledge that Socrates has made, resumed the theory of ideas and developed it in several papers. Plato made a categorical distinction between the world (existence) and sensitive world (existence) intelligible. The first (sensitive existence) is the world that our senses offer us, the world that is accessible to knowledge through senses. The sensible world, says Plato, is the only one in which the narrow-minded and the uneducated[10] believe and have access to, is the world of bodily and natural phenomena, a changing, transient, continually moving and transforming world, a world of contradictions.

In opposition to the sensitive existence, the intelligible existence is accessible to rational type of knowledge, it is the metaphysical world of essential reality, the world of Ideas, a world invisible to our corporeal eyes. For Plato, only the world of ideas is true reality, this being the only immutable, eternal, constant. It is a world that does not exist as a result of our intelligence (which is just a window to this world), but is above it, a world that exists in the spirit of every human before his birth.

The sensible world (of beings, objects) is but a pale, imperfect copy of the perfect world of ideas, physical bodies having no reality unless they participate in ideas as prototypes. By the way of the senses we cannot reach the knowledge of the intelligible world of essences.

According to Plato, the term "**idea**" designates and represents **the essence of things**, which remains **stable and permanent in reality. The idea is the model, the prototype, the primordial form of all beings and all the things in the world and of abstract concepts, among which the highest are the good, the virtue, the truth, the beautiful.** Essence is what makes one thing to be what it is, is that something without which one thing cannot even be conceived. **Ideas are characterized by the fact that they are simple, they exist in themselves and by themselves, they represent an eternal existence (like the immortal soul), universal, unchangeable (immutable) and universal**.

For Aristotle, a disciple of Plato and with whom he was, not often, in disagreement, between the senses and reason there is a continuous relationship, a connection that never disappears, making the senses and reason inseparable. According to Aristotle, the act of knowledge starts with sensations, without them, reason being unable to reach an objective knowledge. But while **senses cannot exceed the limits of perception, reason, overcomes perception, abstracts and formulates concepts**.

And yet, Aristotle also speaks of **imagination, which is independent of senses**, opinions that are products of imagination, imagery provided by imagination, and which are appreciated by the intellect as true or false, as good or bad, and distinguish between immobile substances, known only by reason (divine realities, for example) and moving substances, which belong to the physical world and are perceptible by the senses.

Does Aristotle contradict Plato's theory of ideas? Yes and no! We have previously shown that Plato himself, in his old age, declared himself unsatisfied with his theory and subjected to revision (the Parmenides dialogue contains a critique of the theory of ideas, but not a waiver of it, because abandoning it seemed to him not only inadmissible, but also to create greater difficulties than accepting it). But even if Aristotle was almost ruthless with his master, whom he criticized whenever he thought he was wrong[11], he was not totally disagreeing with Plato as to the theory of ideas, and Plato's merit, that of addressing the problem, is above all criticism.

2. The concept of "idea" in law

Does our incursion in the history of philosophy of ideas help us with our approach? For pragmatists in the world we live in, it is hard to understand how a wise man like Socrates, who could have lived as a Sybarite if he had capitalized his knowledge into money, chose, as he himself said, *"neither to take money to speak, nor to be silent if he does not take money"*. In their eyes, Socrates probably deserved his sentence to death (recent facts show: re-judged after 2400 years in Chicago and Athens, the jurors pronounced contradictory verdicts, the first guilty and innocence, the others[12]) and with him the theory of ideas developed by him should have died. Because the pragmatists among whom we live or the pragmatists who live among us (we do not know which are more) are two kinds: some for which intellectual ideas and creations should be free to use, and for this, intellectual property rights must be abrogated. The others are for whom

[10] To initiate is the action of bringing someone into the science of things they did not know. Initiates are those who have reached a level of evolution far superior to that of an ordinary man. Those whose shared and accumulated teachings allow them to enter the world of concepts concealed by the fine veil of the world of senses. They are the ones who distinguish between illusion and reality.

[11] Aristotle was only paraphrased by Ammonius Saccas who in his work *"Aristotle's Life"*, said: *"Amicus Palton, sed magis amica veritas"*. In fact, in his work *"Nicomahic Ethics"*, Aristotle said: *"Even if friendship and truth are our dear ones, it is proper to give preference to the truth"*. The idea is the same for them both: theory must be based on truth not on the authority of the formulator, but the form of expression is different.

[12] He was acquitted in an organized trial in Athens in 2012 by a court of 10 known judges from several countries. But in another trial in Chicago, a jury of 1,000 people found him guilty. The truth is, the judge said, that the punishment he would have applied was just a fine, but admitting that Socrates was an eccentric, influenced the young people of Athens and contradicted the gods who have memory and are grudge-bearing.

ideas and creations should be the object of holy property right!

What is the purpose for philosophers' discussions about ideas, since they make a theory of ideas without defining the idea or at least without defining it in the meaning of those who, by misconception, out of grudge, because it revealed an unpleasant truth about them and out of envy for his science, even sent to death one of the philosophers?

First of all, we find that the theory of ideas not only out survived the one who "midwifed it", but also that it was resumed and debated by others and that it is either warmly embraced by some or criticized by others (with respect and goodwill, the discussions between the philosophers being more temperate, and the disagreements between them acknowledged as it should in science and not just because they are generating new queries or arguments), or enriched in arguments by those who have been irremediably captivated by the philosopher who lived his life in poverty and died refusing to save himself in order to save a principle of law and a principle of life: the one of law supremacy and the one who says that to die for your ideas is the only way to be above them[13].

Then, because the theory of ideas, although it does not provide solutions to the delicate problem of the appropriate legal regime, helps to identify it. Because, despite the difficulties of understanding the theory of ideas, or the lack of interest in profoundness and even the criticisms formulated by Aristotle for it, this theory, except for being forever gained in philosophy, in the science of law, really offers an argument, extracted from what is essential in it, for refusing legal protection of ideas. Thus, its useful to law and to the solution adopted regarding their regime in all legal systems (except for the Romanian one), the idea that the ideas (the repetition is voluntary, it seems necessary) **are part of the inner world of people**, in opposition to the outside world of things perceived by our senses. That idea is an "image" that exists (only) in the mind of the one who is "midwifing" it, or of the one who resumes it or of those who resume it, believing in it. That idea is a mental representation without its own existence outside the mind of its believer (and outside of which it cannot exist), but which is not dependent on the mind of the one who thinks it.

That ideas are something above thoughts and are more than our thoughts[14]. That ideas have an objective-ontological status, while thoughts have subjective-psychological status. And we would add that, all ideas have the right to be contemplated by contemporaries and history (again Socratics are an example: remember the critique of Plato's theories often made by his disciple Aristotle), at least to know which are good and which can do the evil in front of which we must react to prevent it, when it is possible (remember, of course, that the idea of the pure race has begun the Holocaust).

And for this they must be free. Besides, we say, and we do it instinctively, that we have discovered an idea, not that we have formulated an idea! But, discovering is not one and the same thing as creating, because creating means doing, by intellectual activity, something that did not exist before, meaning to change reality in an original way.

Last but not least, because it is not the least important of the arguments, it must be said that all those who formulated, resumed, developed and give us the theory of ideas (and not only) could be a good example for us: Socratics dominate all philosophical systems. But they have not accused each other and they are not accused either nor the post-Socratics of having stolen the ideas of others, or of stealing one another's ideas. It is true, they did not escape of plagiarism accusations either, but it is even more true that the plagiarists of that time did not make the distinction between ideas and works.

In usual language of today, the **term "idea" is used to designate what the mind conceives or what it may conceive, which is represented in spirit. But also, to generically designate different forms of logical knowledge, such as: general principles, abstract rules, conceptions, theses (broad, fundamental), theories, concepts or scientific discoveries; methods (accounting, education, etc.) or algorithms (based on which computer programs are written), thinking, how to see, opinions, suggestions, solutions, plans, projects, etc**[15].

Encyclopaedic dictionaries identify over 12 meanings of the term, which are the domains in which the notion is used (philosophy, religion, medicine, psychology). In law in general and in intellectual property law in particular, the notion of idea, which has a special importance, is not far away from the philosophical one, the view that the idea is essence, is a spiritual representation of all things and beings, a representation of something, whether that something exists outside, or that it has a purely intellectual existence. It is different from thought and above thoughts. It is essence, imagination, symbol, vision, faith.

And it seems useful for our approach to remind that ideas, both in the science of law and in philosophy, are characterized by the fact that they are simple, that they exist in themselves and by themselves, that they exist in all of us and for all of us, that they are precursors to the mind who revealed them, that they by themselves do not change reality, that ideas represent an everlasting universal existence (like the immortal soul), unchangeable (immutable), or that no one can be stopped to *"midwife"* the ideas, nor to disclose them, because they are equally available to all people, and all the aforementioned make the ideas un-appropriable.

[13] It's a pity that Albert Camus said it before.
[14] Thoughts, says Nitzsche, are just the shadows of our sensations.
[15] The Explanatory Dictionary of Romanian Language.

When and how do ideas become work, protectable intellectual creations?

Ideas (we are talking about the good ones, of course) are the raw material of progress[16], the engine of development in all areas of human activity.

The bad ones, which have not been few, not a few times, have made our lives an inferno. Ideas are found in all areas of knowledge, scientific research, and in all genres of artistic creation. Ideas are everywhere and are just waiting to be discovered.

The Copyright Law does not define either the work or the idea. The lack of definitions is most likely a deliberate gap of the legislator who had deliberately refused to obey those who interpret it and apply it, by defining these complex notions, to certain constraints. It is just that to regulate by special law access to a special protection regime and with such significant consequences, given the rights conferred and the fact that this regime deviates a lot from the common law of goods, obligations, contracts and persons, without defining these notions and leave it to the judges, seems to us, nevertheless, a paradox. The Copyright Law offers, however, the elements by which the notion of work (not the one of idea) can be defined. We are talking about the legal references made to individuals who perform intellectual activity, to their intellectual creations, the legal reality of creation and intellectual activity. The law does not use the word *"spirit"* or derivative of it, but as it is synonymous (partly because it has other meanings, see DEX) with *"intellectual"*, we will also use it to avoid some repetitions, but also because it seems to us in some expressions to be more suggestive.

The notions creation and individuals (creator) cannot be dissociated, because the creator cannot be but a natural person. Only the human being (alone or together with others, independently or in relation of dependence with an employer), as endowed with the power of observing, spying, working with theoretical concepts, understanding and judging, making nature work for the benefit of people, with artistic sense and power to create, can change the environment. Only the creator, physical person, can add to what is already in the world around him, using his mind, his hand and/or tools. This is obvious (at least in the current state of knowledge), and per a contrario interpretation makes it possible to define creation.

The legal entities have no creative capacity, but they can be intellectual property rights transferees and are among the most important and wealthiest in the world of patrimonial rights holders on creations of all kinds. It is true that in the case of collective works, through a legal fiction, they are original holders of rights to creations (made by their initiative, under their coordination and material support), however not even in these cases, legal persons cannot be the authors.

As regards the *"creations"* made by animals, the latter (the animals) are *"goods"*, *"things"* in the sense of common law, objects of the right of property of man, and consequently cannot be *"creators"* in the sense of intellectual property rights. There are animals that *"create"* works and are the subject of transactions, but only the human intervention on them can transform these creations into protectable works. In the case of *"creations"* that are the consequence of natural phenomena such as boreal auras, soil erosion that changes landscape, the form of rocks or cliffs (see *"Babele"*) etc. cannot be protected creations, because they lack what creation is about, the deliberate, conscious change for creative purpose. But it is no less true that such incidents could be the source of intellectual creations made by artists. A well-known Romanian lawyer, Virgil Popovici, a talented plastic artist, was transforming creatively roots of trees (obviously, there are many artists doing that), making exceptional works of them (but not only such works were created by late Virgil Popovici). Not even in the case of "creations" made by machines, things are not different: machines are things and they cannot "create spiritually". No less true is that some of them are the tools by which creators perform works. For example, the photography camera or the filming camera, but in these cases, what gives the outcome a creation status is the man's sufficiently important intervention to make out of a mechanical operation a work of art. In the case of computer-assisted works, it is obvious that human intervention, if any, will confer the outcome the status of protectable work. If there is no such human creative intervention, the outcome produced by the computer will not be protectable.

Human conscious activity, performed with the will to create, to add something new to what exists, and this is a necessary condition for us to find ourselves in front of a creation of the spirit, an intellectual creation. In a certain way, creative work still has the biblical meaning, in which **"Creation"** means the act by which God **created the world, with space and time, from nothing, through His word and will**.

Mutatis mutandis, for people, **"to create"** means to do something that did not exist before, and the word **"creation"** designates the action (of creation) and its outcome, namely the product of creative work, in its various forms of expression (literary works, artistic work, scientific, computer software, architectural works, plastic art, artistic photographs, inventions, utility models, designs, models etc.). God has left much to man to make life more enjoyable, lighter, safer.

Human activity, to be creative in the above-mentioned meaning, cannot be the fruit of hazard, of chance, even if it cannot be completely excluded from the creative process and sometimes plays a very important role. The case of penicillin discovered by Alexander Fleming in 1928 is a proof, but this is not the

[16] Surely the same thing has been said by many others before us. We have identified among them for example, Bertie Charles Forbes (1880-1954), the founder of Forbes magasine, who said that *"ideas are the raw material of progress"*. http://www.intelepciune.ro /citate_celebre_maxime_cugetari_despre_Idee_224.html

only case in which the hazard played a decisive role, and we remind that even in the case of penicillin, from the discovery of the antibacterial properties of the blue mold and the idea that this could be useful for the treatment of certain illness until the achievement of the drug that saved millions of lives, the road was long: 12 years of research and testing were necessary for the discovery and the idea to materialize in a miraculous pharmaceutical product[17]. And it is obvious that what changed reality was the creative activity following the discovery of the antibacterial properties of blue mold, and not the discovery itself, which happened anyway by chance.

Spontaneous realization, the one lacking creative activity, lacking will to create and conscious creative process, cannot be considered as intellectual creation and cannot be protected. For example, simple conversations between people, no matter how intelligent they are, no matter how full of substance, dialogues in television shows on different themes (not those in which roles are interpreted from works, of course), the movements of athletes in an arena (not those of circus performers), not following a creative process, will not be protected. Some improvisations may, however, have the status of intellectual creation. For example, an artist on stage who forgets his role and starts to improvise. But in the case of the ones without discernment, the issue seems more delicate. If the person creates in moments of lucidity with the will to create, the outcome will be a protectable creation. If he created in moments when the discernment is lacking, it is difficult to admit that the result is a work of his spirit[18].

The same goes for those who, in various ways, bring to public knowledge, raw historical facts, information, data from any field, songs, customs, words used in various places, etc., if these people did not perform creative activity and not have done nothing but reveal what existed before their discovery, communicating to the public simple data and facts that do not alter reality by their intervention. Historical information provided to the public in specialized papers are also not protected, susceptible to protection being merely the personal way of expressing it (if any). For example, the fact that Mrs. Clara, the wife of Basarab I and mother of Vlaicu Vodă was a Catholic bigot and who wanted to Catholicize Wallachia, are historical facts. These were processed by Alexandru Davila in the play "Vlaicu Vodă" (1902), but also in many other historical works, such as Constantin Gane - *"Past lives of ladies and gentlemen"* (1941), which are truly intellectual creations and the theme can be taken by anyone who wants it and does it differently than others. Historical works are, of course, full of such data, and writers often process them in their own way of expressing, without branching the rights of historians.

We can, in relation to the above, define the protective intellectual creation (the work) as the product of the spiritual activity carried out with the will to achieve something that did not exist before, to modify the existing reality, the product of that activity from which a creation of spirit is born, in a more general sense, to include technical creations in its definition, an object upon which the creator is recognized with an intellectual property right. What is protected by the laws of intellectual property is the form of expression, the form in which the idea was put into the work, the form of original expression. The idea is put into value in an original creation (not through the idea or ideas underlying it) or in a new creation, useful and applicable in industry repeatedly and with the same result, but the idea itself is not protected. Form must exist and be perceptible to the senses. The idea does not! Form should not be mistaken, it should not be mistaken with the merits in the case of copyrighted creations. In the case of new and useful works in the industry, the form is of interest only to the extent that it helps the merits to be understood, clear, reproducible by the specialist without any creative activity.

Ideas...! In the activity of intellectual creation, ideas are the ones from which the works are born and give substance to the works, but our conception on the role of ideas in works and of the idea-work or work-idea dichotomy has evolved much in the last two centuries of intellectual property history. And I am reminding, the French Revolutionaries of 1791, for example, did not make the distinction that we are doing today, since the work and the idea were one and the same to them. This follows from the statement made on January 7, 1791, by Stanislas de Boufflers in his Report on the Law of Inventions: "If there is a real property for man, this is his thought; It is the least susceptible to alter, it is personal, it is independent, it precedes any transaction; Neither the tree that grows in the field is not so indisputable own by the owner of the land **as the idea that is produced by the spirit of man and belongs to the author.**" Citing to the right value the contribution of the said revolutionary (which proved to be not exactly original[19]), we can only say that the distinction between ideas and works was natural and necessary, as well as the distinction between the work and the support the work is placed.

However, we hear lately, and more often, statements such as: *"In such a work we have found no idea"*, or *"the thesis X lacks any personal idea"*, or *"the content of ideas of Y work is poor"* etc., which means that in our mind, there is a close connection between the ideas underlying a work and its value. And yet, in

[17] It was not until 1940 that the wonder medicine was obtained. In the experiment at that time, 50 mice were infested with deadly streptococci. Half of them were treated with penicillin and survived. The others died of septicemia.

[18] See Mihai Eminescu case.

[19] Pierre Recht said that *"revolutionary legislation has only plagiarized the form and substance of Louis d'Hericourt memoirs' and the Parisian librarians' lawyers of 1778"* (apod C. Colombet, op. Cit., P4). And A. Bertrand in *Droit d 'auteur*, troisième édition, Dalloz, 2010, p.8, “denounces” another rapporteur (Lakanal) to the reproductive right law adopted in 1793 to have been stolen from a certain Baudin.

copyright, the work is protected independently of its value[20]. It is not the same with the scientific and technical creations, in which the innovation contribution, which is objectively appreciated, is a condition of protection of creation, namely, the condition of release of the title. No less true is that valuable ideas generate valuable intellectual creations and, in the case of scientific works, the content of ideas is very important.

French theologian and writer (in English language), Ernest Dimnet, in a work written in 1928, "*The Art of Thinking*," the best-seller in his time, but almost forgotten today, said that ***"ideas are the roots of creation***[21]. Why did not the theologian-writer go forward with his idea? It may not have Socrates's knowledge of "midwifing" an idea at the end, or perhaps because he was a theologian, he was not as free of mind as the one who had the daemon in it. Because if we were to continue Dimnet's idea, then we could compare the result of creation to a tree, whose roots do not reveal to our sight at all, although they are the ones that support it and give it the sap of which it rises and they are one and the same. Except that beyond the roots of the tree there is the soil, the minerals, the water, the sun, without which the seeds would not fructify, could not feed. In other words, and continuing with Dimnet's idea, we believe that it can be said and argued that at the origins of any creation the idea is only a part (very important), because to it adds culture, reading, experience, grace, gift, power to be creative, the inspiration, the hand of God placed above us and giving us all or... nothing. And all these (and also others) might be arguments to ask with more humbleness the recognition of a right, its content, its extent and its duration when we do. Whatever the state we ask of.

Since ideas are things of the spirit as well as works, since ideas are the origin of intellectual creation and give substance to them, because they are introduced into work, ideas are part of it and are their very essence, how we identify the idea and how do we distinguish between idea and work that incorporates it, the work on which is based on? Because the demarcation line is thin, sometimes even very difficult to spot. Ideas in themselves do not imply a transformation of what previously existed. Creation activity, starting from an idea or from several ideas, involves such a transformation, it is supposed to do something that did not exist before. It assumes a form of personal, original expression, different from any other before the same idea.

Ideas act differently in the various forms of intellectual creations performance, depending on the mode of processing, the way they are perceived, the capacity of the person who processes it or wants to transmit it, but this it is already a problem of expression, putting ideas into work. For example, in a certain way - original - the idea will be expressed by a composer or by a dramatic author, whose creations will be protected by copyright and, in a different way the same idea will be expressed by performer or singing performers whose performances of the work will be protected by copyright-related rights, which in principle can not infringe copyright. There is a difference between specific ideas of scientific works, also among those there are different ideas depending on the domain to which they belong to, and the ideas in artistic works.

In the case of literary works - and here we include the scientific works - the creation process involves several steps, without which it cannot exist: the idea (the essence, what is transmitted through the work, the profound meaning of the work), the composition (the concretisation of idea or ideas, chaining the ideas of the work, internal organization structure, the subject, the intrigue, the action, the narrative, the characters) and the external form (the way the author expresses his ideas, presents them to his audience). In the case of scientific works, the content of ideas is important, the way of organizing and explaining ideas.

In the case of plastic art, the idea takes the form of the image (the artist translates his ideas into images), while in the case of musical works, the idea takes the form of sounds.

For Constantin Brâncuși, for example, **the idea behind the opera** is vital: "All those who regard my sculptures as abstract are madmen. What they believe is abstract is all that can be more realistic**, because the real does not mean the outer form of things, but the idea and essence of the phenomena**. "

And he added: "*I am neither surrealist nor baroque, nor cubist nor anything of this kind; I, with my new*, ***come from something that is ancient*** *...* ", suggesting, quite transparently, we believe, that ideas are not necessarily in him, that they do not belong to him, that they pre-exist and that he only gave them life in a personal form in his sculptures. The same Brâncuși another time said, telling how a bird entered his workshop and did not find the exit, hitting the window: ***"I do not create birds but flights"*** and in the same register, another famous sculptor, Henri Moore, said about him that ***"Brâncuşi was the one who gave our era the consciousness of pure form"***[22].

We do not know if Brâncuşi read Socrates and Plato, but what he says it does look too similar with what the great Socratics said about the sensible world and the intelligible world, of what we see with our eyes and what we see with the eyes of the mind, about the essence of things.

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[20] We do not agree entirely with the solution of Romanian legislator. How can there be "work" of no value?! In German law, for example, a minimum value is required. We even believe that the condition of a minimal value is implied, since we are talking about works that are, by definition, valuable.

[21] Ernest Dimnet (1866-1954), writer and French priest, established in the USA after the First World War, is the author of *"The Art of Tinking"*, published in 1928 in the US and in 1930 in French ("*L'Art de Penser*"). However we must mention the author of the idea every time we say the same thing?! Quote is available on www.citation-celebre.com.

[22] Henry Spencer Moore (1898-1986), the most important English sculptor of the twentieth century, one of the modern sculpture animators.

And if we think that Brâncuşi has freed the sculpture of the mechanical imitation of nature (the mimesis manifested in the plastic arts which was one of the reasons why Socrates and Plato were not at all friendly with the artists, considered by them as imitators), following the expression of the essence of things and the unity between the sensitive and the spiritual, his vision of the world of ideas resembles quite a lot with that of the Socratics. But if Brancusi did not study the parents of philosophy, it means that is true that the great spirits are still meeting somewhere sometime. We try to imagine a Brâncuşi in dialogue with Socrates[23] and Plato together! And we can now understand Valeriu Butulescu, who in the play "The Golden Bird" puts an interesting but not quite Orthodox line in Brancusi's mouth: ***"I make ideas from the matter, hitting the chisel! My ideas have a lot of weight. They have gender. Breathe"***. However, I remind that narrow-minded spirits (which, moreover, were also creators, intellectuals and Romanian academics) refused to accept the testament by which C. Brâncuşi left the Romanian State his workshop in Paris and 200 of his works (his sculptures having one of the highest market shares).

The idea of dressing bridges, trees, buildings or *"decorating"* hills with yellow umbrellas is simple and obviously does not involve creative effort. But putting it into work in a personal, original form is protected. A French artist of Bulgarian origin, Christo Javacheff, however more known in the US than in Europe, had the idea of wrapping in canvas a bridge in Paris (Pont Neuf).

Preparatory work lasted from 1976 until 1985 and cost 19 million French francs. The bridge (the oldest in Paris) as it was wrapped by him and which was presented to the public on September 22, 1985 (for 14 days) was an ephemeral artwork that transformed an architectural work into a work of art and is protected by copyright. It could not be photographed or filmed without his consent. One cannot decorate another bridge the same way without its consent. But his idea cannot be protected: anyone who wants to pack another bridge in a different way can do it without Christo's consent. Anyone who wants to decorate a bridge can do it without Christo's consent. He also packed the Reichstag building in Berlin, a field with yellow umbrellas, etc. A plastic artist of Tunisian origin, El Seed, after the Paris City Hall decided to cut off all the "locks of love" hanging on the Arts Bridge drawing the wrath of the Parisians, painted the bridge in graffiti, writing on its parapets in Arabic, stylized in pink colour, a quote from Balzac's Pere Goriot: *"Paris is actually an ocean; You can measure it, but you will never know its depths."*

No one can claim monopoly on any idea. Plastic artists will always be able to paint the blooming sunflower, even if Van Gogh wrote to a friend that "sunflower belongs to me in some way", they can paint iris, poppy fields, landscapes that have been painted before, models etc. without breaching anyone's rights. However, they cannot reproduce the paintings made by those before them! As anyone can write about love, about trying to get through guilty love, treason, war, without breaching the rights of Octav Dessila, Stendhal or Ernst Hemingway, etc.

Anyone can write a law paper in any field without violating the rights of those who have written on the same subject. Obviously, in all cases, the condition required to become a copyrighted work is the personal approach of the theme, the content of ideas that cannot be substantially different from that of the pre-existing works.

Free by definition, the idea becomes a protectable creation when the author puts it in its own way in its own words that represents it, in its lines and colours, in its own harmony of musical sounds, in the way of using the lights, in its personal form of expression which confers to creation what we call originality or, where appropriate, when the idea materializes in a new technical creation, susceptible to being put into practice, to be industrially reproduced with the same result (invention, drawing, model). This means that the originality conferred by the personal touch in the case of aesthetic creations, of expression and transformation of the idea into a new and useful creation in the industry for new and useful creations that makes the difference between the raw and unprotected idea and what outcomes from the idea processed in a new, personal, original or new and useful form: protectable creation! And even if the attachment of a work on a support is not a copyright protection condition, in the case of technical creations this attachment on the support is a condition for granting the protection title (patent or registration certificate). However, in both cases ideas are present and constitute the starting point for the achievement of any creation, whatever its genre.

The idea remains, however, outside of any protection, the rule being provided by the law of copyright by a rule from which its imperative nature is deduced. Thus, according to art. 9 of Law no. 8/1996, *"The following can not benefit from the legal protection of copyright: a) ideas, theories, concepts, discoveries and inventions contained in a work, whatever the way of taking over, writing, explaining or expressing was(...) "*. And if that express provision was missing, then we would deduce it from the rule formulated in art. 7 and 8 from the Law that indicate the **form of expression** and **intellectual creative work** as those that **give the creations originality, a condition without which there can be no protectable work.**

3. Reason of excluding idea from protection

The theory that ideas are free and cannot belong exclusively to anyone, so they can not be protected by

[23] It is blind who sees only with the mind's eyes, Socrates said. My sculptures are even for the blind, Brâncuşi said.

intellectual property rights was formulated in the 19th century, at the end of the 18th century there were, as we have previously shown, confusions in the distinction between ideas and works. But even after 100 years since the intellectual property laws were adopted in France (in 1791-1793), even for the father of moral copyrights, the theory formulated by him in 1872, the distinction was missing. Thus, Andre Morillot has indeed argued to justify the theory of the personalist nature of copyright, and not with reference to the exclusion of ideas from protection, but the argument remains valid here also, that "***being the owner of an idea means being a person and good, subject and object of the same right, the holder of a legal relationship whose two terms will be the same person, in a word, be your own owner, which is legally impossible. "***

In the second half of the last century, this theory was developed by Professor Henri Desbois, his argument that ***"les idees sont de libre parcours"*** is considered a principle of copyright, in our laws the exclusion of ideas from protection is a settled legislative solution (Article 9 of Law No 8/1996). However, on Desbois' arguments, other authors have added over time their arguments in support of the same thesis, the exclusion of ideas from protection, and of course, others can be added. And we note that while the basic idea is that of excluding ideas from protection, the arguments and form of expression of this idea cannot be very different in all opinions formulated to support the thesis of exclusion from protection, the argument of society's interest being the most used.

Exclusion from the protection of ideas is a traditional principle in the law of intellectual property and in accordance with the interest of society.

1. Exclusion from the protection of ideas is a traditional principle in the law of intellectual property and in accordance with the interest of society. Henri Desbois[24] shows that ideas, even when touched by genius, are by their very nature and by their purpose free, and their protection would be contrary to their tradition and nature. Indeed, to recognize an exclusive right, a monopoly on an idea would be excessive, because such protection would lead to the recognition of an exclusive right over the creation fund protected by copyright. The monopoly on one or some ideas would paralyze the creative work, because it would mean that no one can process the idea in another form of expression, no one could do another work on the same subject, with the same message, for That it would be counterfeit. However, an idea can be exploited in different forms of expression, and freedom of expression can not be limited, because it would even mean limiting the freedom of creation. Therefore, the exclusion of ideas from protection was and is pursuant with the interest of society.

I remind that in the Constitution of Romania, in accordance with the Universal Declaration of Human Rights (Article 27), freedom of expression and freedom of creation of any kind are fundamental freedoms (Article 30), as well as the right to work (Article 40), and the kind of work is the right of free choice by everyone. Limiting creative work by monopoly on ideas would even limit the right to work and the right to choose the type of work.

2. **Ideas are not original, and originality is a condition for the protection of works by copyright.** We have detailed above the issue of idea-work binomial and the moment when the idea becomes work and we have shown that ideas are not works and are not protectable because they lack originality. We add to the arguments detailed the one's of Professor Andre Lucas that state *"in the case of ideas, intellectual effort does not justify protection for them (...) and this because the law recognizes privative rights, but subordinates this recognition to the fulfilment of certain conditions: for example, novelty, inventive activity and industrial applicability in the field of patents, originality in the field of literary and artistic property. Creations that do not meet these legal requirements are reputed to belong to public domain"*[25]. Later, Professor Lucas added to his arguments, pointing out that even since 1928 the French courts have stated that *"in the field of thought, ideas must remain eternally free, and they cannot be the subject of a private right"* and *"it has become a fundamental principle for copyright"*[26]. Ștefan Cazimir[27] says that for him **coming up with an idea is an inexplicable phenomenon, most often indebted to hazard,** and the distinguished philologist with a mind full of ideas, although he was also into politics, did not invoke any right on his political ideas. We remind, in context, that our politicians still accuse one another of theft of political ideas and that it was a time when accusations of political ideas theft were fashionable. But such allegations also meet elsewhere. For example, in France, a French presidential candidate in the 2012 elections, Nicolas Dupont Aignan, stated that he should receive money from other competitors because they took over his ideas on which he has copyright. He requested to Jerome Sujkowski, a young French attorney-at-law specialized in intellectual property law to comment on Aignan's statement in an article on protecting ideas in which he said, among other things, that "he cannot imagine that

[24] H. Desbois, *Le droit d`auteur en France*, Dalloz, 3e édition, 1978, p. 22.
[25] André Lucas, *Traité de propriété littéraire et artistique*, Litec, 2000, p. 28.
[26] André Lucas, Henri-Jacques Lucas, Agnès Lucas-Schloetter, *Traité de propriété littéraire et artistique*, LexisNexis, 4e édition, 2012, p. 38.
[27] Ștefan Cazimir, Critic and literary historian, professor of philology at the University of Bucharest, founder of the Free Trader Party, inspired by the play *"A Lost Letter"* by I. L. Caragiale, deputy in the Romanian Parliament in three successive legislatures.

N.D. Aignan would be "Null" in copyright, so he will start from the premise that he only tried to amuse his audience"[28].

3. **Exclusion from the protection of ideas is a solution stemming also from the principle of freedom of industry and trade.** It is a fundamental and general principle of today's world, and according to it, the individual is allowed anything that is not expressly forbidden by law (as opposed to the authority which is permitted only what the law expressly states). It is part of the broader and more general principle of freedom, which is the most important foundation of the legal order of modern states. Freedom exists in all human activities - **thinking, movement, expression** - and in all areas of law: public, penal, labour, economic. In the economic life, the principle of liberty takes the form of trade and industry freedom, by virtue of which every person has the right undertake, to participate in the life of another, to participate in business life and to compete with others.

The origins of this freedom are, in fact, much older and much deeper. They are found in the right to life of every human being, right emanating from an obligation, from the divine obligation of every human being to preserve their life and that can be assured by and through the freedom to undertake and to trade and to compete with others. This right to life implies also freedom of competition and freedom of competition implies the freedom to offer products and services identical to those available on the market, which means that these products and services can be freely copied, however such thing cannot be valid but for the perfect competition. The exclusive right of creators on their creations is, in fact, the opposite of competition (the perfect one, of course), but the extension of protection to ideas would have adverse effects, compromising the very idea of competition.

4. **Exclusion of ideas from protection is justified by the application of proportionality principle.** This principle has become the new star in law, being consecrated as such both by the European Court of Human Rights and by the Court of Justice of the European Union, which have consistently held within their jurisprudence that there must be proportionality between the aims pursued by legislators and the means used to achieve them.

In our country, the principle of proportionality has constitutional value, in art. 53 paragraph (2), is provided that the restriction of exercising of certain rights or freedoms may be ordered only if necessary and proportionate to the situation which determined it. However, applications of this principle are found in other matters, even in the Constitution. For example, the statutory system of taxation must ensure the correct setting of tax burdens (Article 56); The exercise of rights and freedoms cannot infringe the rights and freedoms of others (Article 57); Expropriation can only be done with just and prior compensation (Article 44), etc.

To recognize a monopoly over an idea or ideas would not only be contrary to the principles on which copyright is based (the form of expression, original, conscious and creative activity, having the purpose to change what exists and to achieve something new, which did not exist before), but also contrary to the general interest, and this interest justifies the solution of non-protection of ideas by intellectual property rights, sacrifice being necessary for the protection of a superior interest. And if the right to work and the choice of work, if the freedom to create and to express yourself is the rule, the limitation of these rights and freedoms can exceptionally take place in order to achieve a legitimate objective in a democratic society in a precise manner and proportionate to the objective pursued. In our case, legitimate limitation is achieved by excluding ideas from protection, from recognition of any privative right over ideas. The protection of ideas (purely abstract elements) would allow the holder monopoly over an idea preventing anyone from using this idea, thinking, creating, expressing, working, earning a living through intellectual work. Therefore, recognition of a monopoly over an idea or concept would not allow the principle of proportionality to be observed: limiting access to ideas that would emanate from the acknowledged / awarded monopoly would not be proportional with the objective pursued, that of raising collective good through innovation, through creative activity.

5. **It is unknown and it cannot be known to whom the idea "belongs" to, in order to award the exclusive right.** The impossibility of establishing the person who had the first idea seems to us to pertain to evidence based field. As with the evidence based field, it seems to us that a person can formulate the same idea without knowing that someone else has done it before. One and the same idea can be formulated by an infinite number of people. One and the same idea can be reached by an indefinite number of people by different means. To admit that one of them may have a privative right on the idea means denying the right to study, to research, to experiment, to reach the same conclusions, or, starting from the same idea, to reach different conclusions and different modalities to practically harness the idea.

We also believe that the recognition of an exclusive right over (certain) ideas would be contrary to the interests of the one who claims it too. It would limit the possibilities of that very person to have access to other ideas himself blocking his creative work also. To admit the acknowledgement of privative rights upon ideas it would mean to block the creative work of all, to generate chaos in the world of creators, a world on which overall development depends.

[28] Jerome Sujkowski, *„Les idées ne peuvent être protégées”*, http://www.unpeudedroit.fr/author/jerome-sujkowski/.

4. Criticism upon refusal to protect ideas by intellectual property rights

With reservations justified by the idea we support, that ideas are not protectable by copyright, we must mention, for the sake of truth, that the refusal to protect ideas by intellectual property rights is not considered a solution protected against criticism, and that there are many critics, bringing arguments that can put into question the fairness of the solution adopted by special laws.

The first criticism[29] upon the resolution that refuses to copyright[30] the ideas is that it is difficult to say when we are in the presence of an idea or a work, and even if the distinction can be made, then we must admit it is paradoxical to exclude valuable ideas from the field of copyright, while copyright protects even worthless creations (but we note that in the case of new and useful creations, industrial applicability virtually excludes protection upon worthless inventions, respectively without useful effects, invaluable for the economic activity).

A second argument is that denying the protection of ideas by copyright equates to the refusal to examine the originality of many creations of form. Here we must say that in the case of scientific works the concern for the form of expression is low (although the plagiarism charges are not few, they are related to take-overs in general, without distinguish between the unprotected and unprotected ideas and the form of expression). In scientific papers, language is otherwise standardized and is even more standardized and more constrained as the level of technicality is higher. On the other hand, scientific papers must communicate content, information, ideas. However, we believe that standardized language makes it difficult for the author and that, limiting the protection to the form of expression, the content of ideas cannot however be monopolized, anyone having the right to write papers on topics that have been previously dealt with. And if we compare scientific papers to what is happening in other areas of intellectual property, we can mention that in the case of weaker trademarks, protection is even weaker.

Finally, as soon as the idea has been formalized, as soon as the idea has acquired a form of personal expression that represents the true author, copyright must no longer be of interest but for the creation of form which resulted, thus, is also inappropriate to use the term "idea" anymore. Such a conception, we must admit, is not contradicted by art. 7 of the Law no. 8/1996, which protects all works, whatever their form of expression, so too in the case the work is summary. And it is to be noticed that according to art. 1 (2) of the Law no. 8/1996, the work is protected even unfinished, meaning somewhere between the stage of idea and the stage of work.

5. Exclusion from protection and protection of ideas by special law in Romania

We have not identified another system of law in which ideas are, at the same time, explicitly excluded from intellectual property rights (as the case in all legal systems) and protected by a special law, outside of Romania. We are (also) from this point of view, a special case, we are overly original, to speak in our matter's terms, because, contrary to the resolution with principial value, to exclude from the protection ideas through intellectual property rights, by a Law (No. 206/2004), whose object of regulation, according to its title, is *"good conduct in the scientific research, technological development and innovation activity"*, that the ideas are recognized as having appropriation vocation and legal protection, since their mere exposure into a written work or oral communication without indicating the author is considered plagiarism. However, this is a protection which the special laws of intellectual property expressly refuse, and the exclusion of ideas from protection is in line with the provisions of the international conventions to which Romania is a party and with the legislative solutions of other countries.

We are the only country in the world that has two categories of ideas, with a regime defined by special laws: some excluded from copyright protection, subject matter of which is the scientific work, others protected by a special law dedicated to ethics in the activity of Scientific research, a law that made plagiarism, which has no legal existence anywhere in the world, to have such an existence in Romania.

Following the model consecrated by international conventions in the field of intellectual property rights, our laws exclude ideas from protection in any areas of knowledge and / or creation. Thus:

According to art. 9 of the Law no. 8/1996 on copyright and related rights, cannot benefit from the legal protection of copyright (…): ***ideas, theories, concepts, scientific discoveries, processes, methods of operation or mathematical concepts (…), whatever the modality of taking over was, writing, explaining or expressing***.

According to art. 7 of the Law no. 64/1991, on invention patents are not considered inventions, especially: a) ***discoveries, scientific theories and mathematical methods***; (...); c) ***plans, principles and methods of exercising mental activities, gaming or economic activities*** (...) and (d) ***presenting information***. These provisions "***shall not exclude the patentability of the objects or activities referred to in***

[29] For details, see Christophe Caron, p. 72.

[30] In the case of creations useful to industry, the idea becomes invention, topography, design, model, brand and will be protected by the title of protection released, but it is protected as a materialized idea and in the form in which it has been materialized, and can be exploited by other creators as well.

this paragraph except to the extent that the patent application or the patent relates to such objects or activities considered per se". We note from the cited text that the exclusion of ideas is missing from listing. But any invention is an idea or a succession of finalized ideas, thus the exclusion of ideas is implicit. In formal terms, rendering an invention patent requires the formulation of the request, description, drawings and claims of the invention, or this means that it is understood that the simple idea (which precedes the invention) cannot be protected.

Likewise, in the case of utility models (minor inventions or to use one of our older terms, innovations), things are similar, by art. 1 of the Law no. 350/2007 being excluded from protection the same categories as in Art. 7 of the Law no. 64/1991. As with proprietary and patent-protectable inventions and inventions protectable by utility model (small inventions), it must be disclosed clearly enough and completely for a person specialised in the field to be able to achieve it, which means that the level of idea has also been surpassed and that the idea is not protectable.

Law no. 129/1992, with regard to models and designs, by art. 9, excludes from protection only designs and models contrary to public order or good morals, but the exclusion of ideas from the protection is implicit since for the registration of a design or model it is required that these should be described and represented graphically, which obviously requires surpassing the stage of a simple idea.

Law no. 16/1995 on the protection of topographies of semiconductor products also implies a rule of exclusion from protection of ideas in this field when, by art. 13 stipulates that for the registration of the topography it is necessary to establish the regular deposit, which is made up, among others, of the application containing the date of the first codification of the topography, the date of its first commercial exploitation (if applicable), as well as a technical documentation, graphs and texts containing sufficient information to enable the identification of the topography and to highlight the electronic function of the semiconductor product incorporating the topography and two copies of the semiconductor product if it has been produced and commercially exploited. However, this binding documentation for the valid constitution of the deposit also implies that the state of simple idea has been overcome.

And in the case of work secrets (know-how or savoire faire), things are about to be clarified, because on 8 June 2016, Directive (EU) No. 943/2016 on the protection of know-how and business confidential information (commercial secrets) against unauthorized acquisition, use and illegal disclosure, Member States are required to adopt the Acts binding as laws and necessary administrative acts to implement the Directive by June 9, 2018.

The Directive does not bring anything new in terms of definitions in relation to those formulated in the previous doctrine, but the Directive formulated will put an end to the disputes that still existed. According to art. 2 of the Directive, *"commercial secret"* means information that meets all the following requirements:

a) are secrets in the sense that they are not, as a whole, or as presented or articulated, elements of those, generally known or easily accessible to persons in circles normally dealing with the type of information in question;
b) have commercial value due to the fact that they are secrets;
c) have been the subject of certain reasonable measures, in the given circumstances, taken by the person that has legal control upon that information in order to be kept secret.

The only reference to ideas in the Directive is made in reason (3) and it refers to innovation as a catalyst for new ideas and to the fact that innovation allows ideas to appear on the market, thus confirming again the important role of ideas for creative work, and the fact that they must remain free.

Agreement on trade-related aspects of intellectual property rights (TRIPS[31] or ADPIC[32]), **it also refuses the idea of protecting ideas.** The agreement[33] is, as it is well known, the vivid proof of the commercialization of intellectual property rights, and if the ideas would have found a place of protection in any international convention, then this agreement would have been the right place. But the Agreement not only did not become the act of birth for the protection of ideas, but, on the contrary, it also represents the unequivocal manifestation of the international community to protect ideas through copyright. Thus, in art. 9.2. of the Agreement provides that *"copyright protection will extend to expressions,* ***not to ideas, procedures, methods of operation, or mathematical concepts as such."***

The same meaning is found in the provisions of art. 2 *("The extent of Copyright Protection")* of the World Intellectual Property Organization Treaty on copyright, concluded in 1966[34] that provides "copyright protection extends to expressions, not to ideas, processes, methods of functioning or mathematical concepts as such. "

Law no. 206/2004 on good conduct in scientific research, technological development and innovation

[31] *TRIP 'S i*s the acronym of English title of the agreement, respectively, *Trade Related Aspects of Intellectual Property*. It has 177 member states.
[32] *ADPIC* is the acronym of French title of the agreement, respectively, *Accord sur les aspects des droits de propriété intellectuelle qui touchent au commerce.*
[33] Approved on behalf of the European Community by Council Decision of 22 December 1994 concerning the conclusion, on behalf of the European Community, within its sphere of competence, of the agreements obtained at Multilateral Trade Negotiations in Runda Uruguay (1986 to 1994) (Decision No 94/800 /CE).
[34] Ratified by Romania through Law no. 205/2006.

(amended by Government Ordinance No. 28/2011 and GO 2/2016) deviates from the solutions established by international conventions and intellectual property laws of modern legal systems, this law declaring ideas to be protectable[35] and that the act of acquiring ideas is the deviation or, as the case may be, the plagiarism offense.[36]

In reasoning this law, it is shown that its adoption was necessary for several reasons:

1. Romania ratified by UGO no. 26/2002, Memorandum of Understanding between Romania and European Communities on the Association of Romania to the Framework Programs of the European Communities for research, technological development and demonstrative activities and the creation of Research and Development Innovation Area in the EU, agreed programs for the period 2002-2006.
2. Funding for research that contravenes ethical principles must be prevented, given that *"all that is scientifically and technologically possible is not necessarily desirable or admissible"*;
3. It is necessary to regulate issues of ethics, integrity, professionalism and honesty, by excluding dishonest actions, and for this purpose a National Ethics Council has to be set up, elaborate the Code of professional ethics and deontology for research-development personnel and establish the procedure in case of reporting deviations from good behaviour;
4. It is necessary to align with international regulations or those adopted in other countries, including the UNESCO Universal Declaration on Human Genome and Human Rights, the Charter of Fundamental Rights of the European Union, the Convention for the Protection of Human Rights and the Dignity of Human Beings, Directives 2001 / 20, 83/5/70, 86/609, 98/44, 90/219 /, French Law no. 94-654 on the donation and use of elements of the human body (...) and other normative acts from other countries on the same subject.

It is not of interest in the present work except for those provisions of Law no. 206/2004 regarding plagiarism, self-plagiarism and protection of ideas, demonstrations, data, hypotheses, theories or scientific methods that Law no. 8/1996 expressly excludes from protection. What was the reason for the legislator to render contradictory rules in this matter (protection of ideas and plagiarism)?[37].

First of all, we must note that the references in the Memorandum of reasons for Law no. 206/2004 to international, European and countries in Europe normative acts **is correct only to the extent that it concerns research having as object human beings and animals, none of the acts mentioned in the memorandum of reasons is not related to plagiarism, self-plagiarism or protection of ideas, data, methods, theories.** And what we need to discuss is not the need to regulate good conduct in the research activity, that seems to us to be obvious, but the solutions adopted by the legislator in one and the same matter and which is, in Law no. 206/2004, contrary to a traditional resolution in law and in all legal systems and contrary to the solutions established by at least two international conventions to which Romania is a party.

Secondly, the regulation of plagiarism, self-plagiarism and protection of ideas through Law no. 206/2004 is contrary to Law no. 24/2000 regarding the normative technical norms, art. 14 and art. 17 of this Law, which stipulate that regulations having the same object usually are comprise in a single normative act, that a normative act may contain regulations from other matters only in the extent they are indispensable to the achievement of the purpose pursued by it, and that contradictory normative acts are abrogated. The two laws cannot coexist in the part where they contradict and become inapplicable or at least are generating arbitrary solutions.

Third, if it were considered that Law no. 206/2004 is a derogatory law from Law no. 8/1996 (which sanctions the plagiarism of works in Article 141, without using this name for the incriminated act[38]), this should have resulted expressly from the regulation with a wording such as: *"By way of exception to the provisions of Art. 9 of the Law no. 8/1996, in scientific research, ideas, data, theories, methods ... are protected, and their appropriation constitutes plagiarism."*

It can be considered that Law no. 206/2004 is a special law? The answer is no, Law no. 206/2004 has as a matter of general regulation that is not subject to other regulation (Article 15 of Law 206/2004), being "special" only with reference to the contrary resolution to Law no. 8/1996, of excluding ideas from protection. And if the regulation contained in Law no. 206/2004 on the protection of ideas and their plagiarism would be considered special, then this regulation is contrary to certain international conventions to which Romania is a party (the TRIPS Agreement and the Treaty of Rome on Copyright, indicated above) and it cannot be applied, pursuant to art. 20 par. 2 of the Constitution (the priority application of international treaties). Because if a privative right is acknowledged upon ideas, by Law no. 206/2004, then they will have the

[35] Daniela Negrilă "Protection of ideas through copyright. Application in the field of Code for University Studies for Doctoral Studies", Romanian Journal of Intellectual Property Law no. 1/2017, pp. 26-33.

[36] For an extended analysis of the plagiarism provisions of Law no. 206/2004, see Sonia Florea, "Plagiarism and Copyright Infringement" in the Romanian Journal of Intellectual Property Law no. 4/2016, pp. 109-134.

[37] See Matei Dănilă, "Considerations on plagiarism from the point of view of the originality of the work and of the right to cite. Self-plagiarism and protection of ideas, pleadings and preaching" in the Romanian Journal of Intellectual Property Law no. 3/2015, pp. 55-75.

[38] Specialized papers and jurisprudence, even the Constitutional Court (see Directive No. 624/2016) use the term, but nowhere in Law no. 8/1996 (not even in French Intellectual Property Code) the word is not used, although Art. 141 of the Romanian Copyright Law incriminates it as an offence, that is what even in commune language we understand by plagiarism.

same regime as copyrighted works, the right upon them being considered to belong to the category of fundamental rights referred to in art. 22 par. 2 of the Constitution. Our legislator's resolution is also contradicted by art. 30 (freedom of expression) in the Romanian Constitution, but this worth a separate discussion.

We must, of course, make a point: that the scope of Law no. 206/2004 is limited to personnel carrying out research and development activities, provided by Law no. 319/2003 regarding the status of research development personnel, as well as by other categories of personnel, from public or private environment, benefiting public funding for research-development[39]. Obviously not, being discriminatory and cannot be said to be a positive and acceptable discrimination, since on the basis of independent scientific work, a person can access positions requiring relevant knowledge, experience and relevant outcome. This is not the issue that we have come to discuss here, but we do think that it cannot be ignored by the legislator who must intervene to eliminate the contradictions, being bound to this intervention by art. 15 of the Law no. 24/2000 regarding the rules of legislative technique.

We believe, of course, that the good conduct in the scientific research activity requires to respect the work of predecessors, the results of their work, the priorities in the formulation of ideas, theories, concepts, methods, etc. That is inexcusable even the mere silence of the names of those who, before us, have researched, wrote, enriched the knowledge we have today and from which we intellectually feed ourselves to understand and carry on our work further. That it is unacceptable to forge the results and promote on criteria other than fair competition. But we believe that regulating excessively and regulating in contradiction, regulating with disregard the traditional resolutions from other legal systems, resolutions adopted by international conventions, these are wrong measures, however moral / ethical the intended purpose is, and that the Romanian solution is exotic. If ideas are, forever and ever, a territory of everyone and of no one, if ideas are and must be free, if ideas are in the public domain, then they cannot be legally protected. We also believe that priorities must be recognized and that this attitude of recognition of predecessors' merits is a matter of good conduct, morality, and morality is far more than law[40].

6. And yet, ideas ... and unfair competition

On the idea that ideas (we could avoid repetition, but we would lose ... the idea!) cannot be protected by copyright we must give priority to Henri Desbois[41], in the specialized works being considered an adage (traditional principle) the statement made by him in the 70s of the last century: ***"les idées par essence et par destination sont de libre parcours".*** But in a work published in 1996, another great personality of intellectual property law in France, Professor Andre Françon[42], pointed out that the resolution excluding ideas from protection was not unanimously accepted in French case-law, awards admitting the protection being rendered by **commercial tribunals** since years 60s-70s of the last century. Before the Court of Cassation of France, First Advocate General Raymond Lindon[43], referring to that case-law, requested, in the name of equity, the acknowledgment of a protection for ideas. Professor Françon has shown that this issue is of practical importance especially in the case of advertising ideas and advertising creations, because they are the subject of lucrative activities performed by individuals or by specialized companies that are prosperous, and specialists are not confined to providing ideas, but also to mentally prepare campaigns, posters, radio and television broadcasts, etc., or the refusal to give them an indemnity for their ideas put into work is unfair. But, Professor Françon said, although there are arguments of fairness in favour of recognizing rights in favour of those who provide ideas to others, the protection of ideas by copyright is not possible because copyright laws protect the form of expression, which means that the exclusive right it is not attached to the idea, but to the form under which it is exposed.

Is there, however, a solution that satisfies the principle of equity and allows those who provide ideas to obtain a reward or be compensated for the use of their ideas without their consent? Life is always ahead of the law, and sometimes the distance is very great.

Walt Disney, for example, bought ideas for his animated films (a common thing in cinematography), and even created a method (working technique?) (which cannot be protected by any intellectual property right) in which the first step was "midwifing" ideas (finding/ discovery/ identification) by a first category of his collaborators ("the dreamers"), the second step of

[39] For the analysis of the scope of Law no. 206/2004, see Alin Speriusi-Vlad, "About plagiarism, copyright and the protection of ideas or a coherent theory of plagiarism", in the *Romanian Journal of Intellectual Property Law* no. 4/2016, pp. 88-92.

[40] For a very interesting vision of Plagiarism and Doctorate, about Alexander Baumgarten "Can the History of Ideas Say Something About Doctorate and Plagiarism?", *Romanian Journal of Intellectual Property Law no. 1/2017*, pp.19-25

[41] Henri Desbois (1902-1985) was a professor at Pantheon-Assas University of Law, Economics and Social Sciences. The prestige enjoyed in France and in the world by this author and his works is immense. An intellectual property research institute, integrated in the Paris University II, bears its name. The third edition of his work *"Droit d'auteur en France"* was published in 1978, at a time when in this field, it was very little written about, and in this country. The originality condition was researched in jurisprudence by Henri Desbois in the 1950s, and the paternity of the theory is attributed to him, although studies later demonstrated that the notion of originality has been used in jurisprudence since the nineteenth century.

[42] Andre Françon (1926-2003), *Cours de propriété littéraire, artistique et industrielle*, Litec, p. 152.

[43] Raymond Lindon (1901-1992), former prosecutor appreciated by A. Françon, who speaks eloquently about him. After World War II, he was a prosecutor accused of lawsuits against French collaborators during the German occupation. He is the author of the *Le Secret de rois de France ou la véritable identité d`Arsène Lupin* (1949) and a work of judicial anecdotes: *Quand la justice s`en mêle* (1965).

developing them, putting ideas into work by other collaborators ("developers") and the third step was critique of ideas and form which were put into work by Disney himself. A method of work that he put into practice in a successful business with intellectual creations that delight the world. But at that time cinematography was already an industry with huge profits behind which, as for now, a huge number of ideas materialized in creations of all kinds: scenarios, specially created music, decors, costumes, lighting systems, fastening brackets for images and sounds, image and sound fixtures, imaging and sound processing techniques, computer software, artistic and technical countless creations.

On the Internet, there are today "business ideas" sites (and if they are "free" then they are most likely educational programs for which someone pays), others with business proposals (made by people who have ideas, but have no money, or do not want to risk their money). And it should be remembered that Disney himself knocked to the door of 301 banks before finding the bank willing to finance the greatest idea that the creative genius had, that of the Amusement Park opened on July 17, 1955 in California under the name Disneyland.

We paid little attention to the idea-work binomial so far, in earlier works, indicating only the possible discussion on author quality when the idea belongs to a person and the work is done by another person and we believe that the correct answer to this question is the one provided by Professor Françon, previously exposed: copyright protects the form of expression, not the idea, so the provider of the idea cannot be the co-author. But the question still remains: is it fair to do that? It is fair that the person who provided an idea that was put into work or whose idea was usurped should not benefit from his ideas, when they are of course valuable. Because, saying that ideas cannot be protected by a special right, such as intellectual property law, does not mean that valuable ideas cannot, however, be protected by the application of common law rules, action in civil liability (contractual or, as the case may be, tort) or the action in unfair competition.

If we admit that ideas are the engine of progress (Forbes has said and succeeded in life!), then there must be solutions to protect the providers of ideas, and life gives us such examples. It is true, the ideas we are talking about here are valuable ideas, ideas that can bring benefits to entrepreneurs (business models, distribution optimization, workspace design, or new distribution models - eMag, for example), but even those ideas that can be a raw material for intellectual creation, some of which can be valuable, but not valorised because time has not yet come for them[44], or the entrepreneur or creator who will put them to work is not there yet.

However, talking about valuable ideas, it is implied that we have other type of ideas also (invaluable, still ideas) and that seeking solutions only for the valuable ones presupposes that we already operate with a criterion which is discriminatory, or copyright does not even admit such a criterion for the creations it protects. In addition, it is possible that the value of an idea may be revealed later, or find the recipient willing to put it into practice so late that the one who "midwifed" the idea may not even be alive. But the law has never offered solutions to all problems, and the legislators have always taken care to let judges find the right solutions for unregulated assumptions (see Articles 3 and 4 of the 1864 Civil Code and Article 1 (2) Of the new Civil Code).

We do not see an impediment in concluding a contract between the seller / supplier of an idea and the one who has been given the idea, the principle of contractual freedom provided by art. 1169 of the new Civil Code, giving the parties the **freedom to conclude any contracts and to determine their content within the limits imposed by law, public order and good morals**. Maybe art. 12 of the new Civil Code, which provides that **anyone can dispose of his goods** and art. 1657 of the new Civil Code, which provides that **any good may be sold freely** if sale is **not prohibited or limited by law**, convention or testament, could be considered impediments, since the doctrine and case law are unanimous in the appreciation that ideas **are to all and to none at the same time, and that they cannot form the object of a privative right recognized by law**. However, we do not believe that by concluding a contract whose object is the supply / delivery of an idea, a rule of public order would be breached, since art. Art. 1169 The Civil Code leaves the parties the possibility to determine the content of the contract, and art. 1225-1226 of the Civil Code, concerning the subject matter of the contract and the object of the obligation, also are not imperative, as the parties can freely set the object of the obligation to which the debtor is engaged. And if we admit that a contract having as object providing / delivery of an idea can be concluded, we must admit that it is admissible also the action for contractual liability.

As regards the possibility of an extra-contractual (tort) civil action, based on the provisions of Art. 1349 and 1359 of the Civil Code, following the "appropriation" of another's idea, a principial value observation must be made. That a civil liability action for the “theft” of an idea implies the recognition of a privative right for idea on the basis of the law, or this is not possible because it cannot be recognized on the basis of common law what the special law expressly refuses to do. If it is accepted that the idea is in the public domain, then it is available to all and its use is free, it cannot be sanctioned if it is used by someone other than the one who claims to have a right over it. **However, it cannot be disputed that the "owner" of the idea may have the interest to harness it, either personally or through third parties, and that interest is legitimate and**

[44] You can resist the invasion of an army, but not an idea that has come its time, said Victor Hugo.

serious, and by the way in which it manifests it, creates the appearance of a subjective right (art.1359 New Civil Code). This seems to us the most delicate issue for engaging the liability of the usurper.

As to the proof of the priority on the idea, it could be evidence for the Claimant "envelope with ideas" filed with OSIM (see Article 66 letter f) of Law no. 64/1991 on Patents for Invention and Order no. 63/2008 of the General Manager of OSIM approving the instructions regarding the establishment of the "Envelope with Ideas" service), bringing to knowledge of the idea (ideas) by publishing in specialized papers or conferences, correspondence with the usurper for jointly carrying out a work on the idea that is the subject of the complaint, etc., although with the exception of the correspondence with the usurper of the idea and the negotiations with him for the joint performance of a work, based on a given idea, the others cannot prove the "theft" of the idea, but only of the possible priority.

It is an effective remedy for punishing the theft of ideas, action for unfair competition, action at the hands of competitors on the same market, **and sanctioning not a violation of a victim's privative right, but the wrong, unethical behaviour of the Respondent with respect to its competitor**, an action whose resources and possibilities **of sanctioning incorrect behaviours** are infinite. In this case, the Claimant shall have to prove that the conditions of tort liability are fulfilled in the condition requested by common law (the action for unfair competition being a species of the latter) and even if the evidence of the unfair act is not simple, it does not seem impossible to us. Of course, the action in unfair competition implies that the parties are competitors on the market, but the notion of competitor is interpreted in the case-law of the CJEU extensively, and the quality may also extend to individuals.

It is, however, paradoxical that intellectual property law (including industrial property here) to be so severe with ideas, and common law to be so generous with ideas. But we must not forget that the reason of intellectual rights is protection of creative activity in all its forms of manifestation and that creating means doing something that has not previously existed.

The paradox appears to be even greater if we consider that ideas find refuge and protection solutions in competition law, which is opposite to intellectual property rights, because intellectual rights generally give a monopoly of exploitation[45], and competition, by definition, fights monopoly. But there is also an answer here: Intellectual property rights are governed by special laws, applicable with priority to the matters they regulate. And by special laws, ideas are excluded from protection.

Altruism, disinterested action in favour of others is a virtue, but the businessman's peculiar is fierce competition, not the practice of virtues. Entrepreneurs seek profit-making, not providing knowledge or success recipes, unless they bring a benefit. But creators and researchers are also competitors, and for researchers, competition involves value, valuable ideas, valuable results. In the case of creators, although creations are protected independently of their value, whether they like it or not, the benefit is proportional to the value of creation. A value that is given by the idea behind it and which is not protected by the originality of creation.

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[45] See for this matter art. 40 within the Agreement on Trade-Related Aspects of Intellectual Property Rights according to which "members agree that certain practices or conditions relating to license concession with regard to intellectual property rights that limits competition may have prejudicial effects on trades and impedes the transfer and diffusion of technology."

THE HYSTORICAL, PHILOSOPHICAL AND LEGAL FUNDAMENTALS OF COMBATING UNFAIR COMPETITION

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Abstract

Unfair competition is abuse. It is abuse against freedom of competition. Abuse against freedom of initiative and freedom of commerce. Who shall obey the laws of honour and probity? Who has the obligation to do it? Fair businessmen! Who says unfair, means contrary to the objective behaviour of honest man in business. Of man for whom the freedom of the other cannot be violated by the exercise of his liberties, because he understands his own freedom as a necessity. Business morality is a particular form, a species of universal morality, the sum of legal constraints and honest commercial practices sanctioned by law. But the world of businessmen is not populated by angels.

Keywords: *unfair competition, freedom of competition, monopoly, freedom of commerce and industry, abuse of freedom.*

1. Introduction

Competition is rivalry in a field of activity, it is a competition between people who act on the same market in order to monopolize it and to get the most profits. There is competition when the consumer has alternatives in choosing products or services, competition being related to the freedom of choice. By pursuing its goals (promoting innovation, efficient resource allocation, limiting economic power, fair distribution of income), competition is an efficient means to organize markets, economies. The purpose of prohibiting acts of unfair competition is to ensure respect for fair market behaviour. Observing the freedom of others.

Freedom of competition derives from the freedom of trade and the freedom of industry being acknowledged constitutionally [(Article 135 (1) and (2).] Competition is the active form of freedom of initiative and freedom of trade. An essential feature of market economy and a must for economic progress. But if economic freedom (to undertake and to trade) is outside any constraints and has solid support provided by the basic rule of private law according to which the individual is allowed everything is not expressly forbidden by the law (for example, individuals cannot carry out economic activities upon which the state has reserved monopoly), competition is only acceptable if it is fair, namely if respects *"honest practices and the general principle of good faith, in the interests of those involved, including respect for consumers' interests"*.

2. Freedom, an understood necessity?

According to Blessed Augustine[1], if no one asks what freedom is, we know, but if anyone asks us what it is, we do not know it anymore. Still, Augustine de Hipona wrote a lot about freedom and its limits, concluding that man does not have a complete power of choice, meaning that not everything that man does depends on free choice. Supporter of the principle of divine grace, he does not give up the principle of man's freedom of will, making a synthesis between affirmation of divine grace and assertion of liberty. Man has the power to choose between good or bad, but there is no perfect balance between freedom of choice and divine grace, which only Adam had it and which he destroyed by the original sin. However, will never decides without reason, without being attracted to a good that it perceives. But this perception does not lie in the absolute power of man; God is the one that determines either the external causes of perception or the inner light that acts upon the soul.

Augustine de Hipona examined the individual's freedom in relation to divinity. Philosophers, trying to discuss it in layman's terms, of relationships between people and between people and states, define it negatively: freedom is a lack of any constraint. In other words, freedom means not being impeded to do what you want and to say what you want, to be in charge of what you do and what you do not do by your own will. Freedom requires self-determination without any external intervention and independent choice of behaviour. Jean-Jacques Rousseau also defines it as negative by saying that ***"freedom does not consist in the fact that people can do everything they want, but***

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[1] Augustin de Hipona (354-450), philosopher, theologian, bishop, doctor of the Church, is one of the four parents of Christian Church, alongside Ambrose, Jerome, and Gregory the Great.

in the fact that they must not do what they do not want to".

Are we really free, or are we ever free in the sense of these definitions? We believe that for people, pure and simple freedom is an illusion, a chimera. According to Constantin Noica, freedom is the opening that closes, although he speaks of the *"closure that opens"*[2]. Freedom is the openness that offers the possibility of choosing between several alternatives and closure in the choice made. If freedom implies a choice (which is not just between yes and no) then the process of choosing is already a form of constraint and then the choice makes us prisoners. We are determined in our actions by the reasons for which we make a certain choice and in which reason has a decisive role. We are determined by necessity. The necessity understood by and through reason.

The first to notice the contradiction between freedom and necessity was the Stoics[3], but it was a long time before freedom was defined also as an understood necessity.

For Baruch Spinoza[4], truly free is only God. Only He, having total independence, can attain the ultimate freedom. Does Spinoza contradicts when he says that freedom cannot be denied not even to man guided by reason, since he also says that everything (therefore reason too) is determined by the necessity of the divine nature, and free is God alone? We think so; it is a contradiction in what Spinoza says.

But does man, who is driven by reason and pursues the good, does he do it for himself or for others? For Spinoza, the man who is guided by reason is free only with others. Man is freer in collectivity, in a state where he lives by law, than in loneliness where he obeys only himself. But in collectivity, freedom cannot be dissociated from the laws that are necessary in order for the common good, collective good, to be asserted. Spinoza does not oppose freedom to necessity but to constraint, because only in the case when action is the result of constraint, it is not a manifestation of freedom.

The idea of freedom as necessity (constraint), still shyly formulated by Spinoza, is developed by Kant[5], but the latter considers that divine freedom and human freedom are equally important, and that the divine origin of reason[6] and good is worthless if is not also put into practice. But for this there is a need for reason, knowledge, experience, because he emphasizes on the knowledgeable, discerning subject. Kant's man is subject to causality and, implicitly, to necessity. He has to act in all circumstances according to the *"categorical imperative"*, that is why the freedom of the individual implies rational action, action which is decided by the compliance of his own will with the duty to act for the good, presupposes a conformation based on his own convictions, on education, altruism, subordination of individual interests to those of the group. Man is free because he conforms to good will.

For Hegel, reason as freedom cannot be limited to the individual regarded autonomously, as his predecessors see it. For Hegel, freedom of each is conditioned by its acknowledgement by others because we are free only together or we are not at all, hermits cannot be counted not even as an exception to this rule, because their hermitage has another goal, that of Communion with God, not with people. Isolated freedom does not even exist for Robinson Crusoe[7], because he was compelled to live on his island, not by his own desire.

Mutual recognition of freedom, the recognition of other's freedom, can only take place in communities organized as states, which is the only form of political organization of people that makes it possible to unite individual wills in a collective will. In such an organization, man acts in accordance with his needs pursuant to collective needs, the necessity not being a denial of liberty, because they are not mutually exclusive. Moreover, the individual wills joining as a collective will, it is in everyone's interest that the state and its institutions act well, this being the very guarantor of individuals freedom and that is why everyone must get involved in public life. In the absence of involvement, states can evolve only towards dissolution or dictatorship. But in this case we come to the conclusion (already formulated by Montesquieu) that *"philosophical freedom consists in the exercise of our will, or (at least, if we take into account all systems), having the conviction that we are exercising our will"*[8].

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[2] Paul-Gabriel Sandu,"Freedom in need and becoming a being" https://cerculnoica.wordpress.com/2007/11/17.

[3] The philosophical current, the initiator of which is Zenon of Kition, appeared in the year 300 BC. The name comes from the ***stoa polikie***, which was the porch painted at the entrance of Zenon's school in Athens. It was the most important philosophical movement until the adoption of Christianity as a state religion in Europe. Among the Stoics' ideas, we mention: there is nothing immaterial; the world is only one, the matter-spirit dualism not being permitted; fire is the sole element and is represented by God; knowledge is based on senses and perceptions; the universe is governed by absolute laws; the essence of human nature is reason; man must live in harmony with nature; virtue encompasses wisdom, courage, justice, and temperance.

[4] Baruch Spinoza (1632-1677), a Jewish-Dutch philosopher with a monistic representation on the world.

[5] After Immanuel Kant's death (1804), his followers named the alley that led to his crypt in the graveyard, *„Stoa kantiana"*.

[6] Kant wrote *Criticism of pure reason* in 4 months. He published the first edition in year 1781.

[7] Robinson Crusoe's story is used to demonstrate that he was free until Friday showed up, which become his slave. It was only his release that would have made Friday his equal, which was also a condition for Robinson's freedom. The man who restricts the freedom of other or others is not free, even when they survive only by the memory of their will. The affirmation belongs to Carol Voytila, who became Pope John Paul II, to whom the saviour of a Jewish child, whose parents were killed in the camps, presented him in order to be Christianized. The future Pope refused to do so saying that his parents would have wanted him to grow up like any Jew in his religion.

[8] Montesquieu, *About the spirit of laws*, Vol. I, Scientific Publishing House, Bucharest, 1957, p. 232.

3. Freedom in law

The two great philosophers wrote before, during, and after the French Revolution (many others have written, but we must limit ourselves to them due to lack of space), but for neither of them we cannot possibly acknowledge the right of priority for enouncing the idea of freedom-necessity, because these ideas are known to us and present at least since Sophists, meaning that they have an age of over 23 centuries. And we do not know whether philosophers have influenced revolutionaries or revolutionaries influenced philosophers in formulating the idea of freedom as a necessity. I would rather say that at the end of the eighteenth century, these ideas become current again, they were floating in the air, their time was here, and philosophers and revolutionaries put them into work and expressed them differently and originally.

We cannot, however, not notice that in the Declaration of the Rights of Man and of the Citizen, the definitions of freedom are rather philosophical than legal. Thus, in the first article of the Declaration, it is stated that ***"people are born and remain free and equal in rights"***, art. 4) states that ***"freedom is to be able to do everything that does not harm the other." The exercise of the natural rights of every person knows no limits other than those that are needed by other members of society to enjoy the same rights. These limits can only be determined by law "***, *and by art. 5) it is ordered that "the law has the right to prohibit only dangerous actions for society.* ***Everything that is not prohibited by law cannot be prevented, and no one can be compelled to do what the law does not order"***.

Not even Abraham Lincoln is too far from philosophers, nor does he approach too much of jurists when he says that ***"in collectivity, freedom is not the right to do what we want, but the right to do what is right"***.

The Universal Declaration of Human Rights, adopted on December 10, 1948, when human rights were, in many parts of the world, only words that didn't fit in Courts anymore, and in libraries were carefully hidden, takes parts of the Declaration of French Revolutionaries and thickens something where the need was felt to do so to reaffirm the principle of freedom as an understood necessity.

Is the fundamental right and freedom one and the same thing? If you ask some, yes, if you ask others, no. We shall not analyse this controversy, because another is the subject of our endeavour. We will confine ourselves to mention that Professors Ion Muraru and Simina Tănăsescu[9] say that between freedom and law there is no trenchant opposition[10], that the fundamental right is a freedom, and that freedom is a fundamental right, that the use of both concepts are based on a historical tradition, but also that the expressivity and the beauty of legal language and we believe that for the sake of expressiveness (to science being quite difficult to be beautiful in language), it is worthwhile to do, sometimes, and carefully, the concession of putting a sign of approximate equality between the two terms and that we can, with their help, shade and / or potentiate arguments, demonstrations or theories.

We believe that man cannot have absolute freedom, being limited by necessity, by laws (natural and social). In law, freedom is bordered by social laws, Montesquieu defining it as *"the possibility of doing what law allows; If a citizen could do what they forbid, he would no longer have freedom, because the others could do the same"*[11].

The individual has a greater degree of freedom when his actions concern him exclusively, in which case state intervention is almost excluded, and a lesser degree of freedom when his acts or his conduct concern others, in which case, for defence of the rights and freedoms of others or of general interests, the state must intervene. In other words, freedom relates not only to the individual, taken separately, but to others also. Or especially to others. But freedom is not limited only by social laws, and it is not fair to speak of *"freedom (only) within the law"*, if we admit that from the point of view of the science of law freedom is to be able to do what does not harm others. But there is a fallacy between the philosophical concept of freedom and freedom in the science of law, because in the philosophical sense freedom consists in understanding necessity, and this also comes from knowing objective laws, the laws of nature, the mastery of the forces of nature, and not just social laws.

Freedom does not imply positive obligations from other individuals, taken separately. But it implies an obligation on the part of the state (the community) to ensure the conditions for unhindered exercise of individual freedoms, including by means of legislation. The rest are held only by the imperative of abstaining, by the negative obligation not to do something that prevents the exercise of the other's freedom. That is why it is right to say that freedom preceded the law, the latter being nothing more than a limitation of freedom. Or the means of limiting freedom. And yet, the law itself declares the following as being absolute: freedom of thought, freedom of conscience, freedom of opinion.

4. Freedom of commerce and industry and free competition

Perhaps nothing can explain the binomial freedom better - the necessity and the way in which the freedom of everyone is limited by the freedoms of the other than the analysis of the relationship between freedom of commerce and industry and freedom of competition. Competition is the active form of free

[9] I. Muraru, Simina Tănăsescu, *Constitutional Law and Political Institutions*, Lumina Lex Publishing House, Bucharest, 2001, p. 162.
[10] Apud Valerică Dabu and Ana Maria Gușanu, Law and freedom. Legislative inconsistencies. Criminal Law Journal no. 4/2013.
[11] Montesquieu, *op. cit.*, p. 82-83.

initiative. Or the abuse of freedom of initiative, violates the freedom of the other.

As it is well known, by successive measures adopted, the French Revolution abolished the privileges, monopolies, taxes (because they were not being consented by the people), and the devious prisons of the debtors, abolished professional associations, but these measures didn't have positive effects only, on short term they had the effect of creating chaos and wild competition, with adverse consequences on economic activities.

The Declaration of the Rights of Man and of the Citizen, adopted on August 26, 1789, facing the evidence that taxes are the *"soul of the state"*, reintroduced tax obligations abolished shortly before, carefully declaring them as *"a necessity freely accepted"* by every citizen (the 1793 unapproved Constitution, speaks of a *"honourable obligation"* to contribute to the state's general expenses through taxes and duties and about the *"consent"* of taxpayers' to pay them, but try not to pay them and you will see how free and freely consented this obligation is!).

The law of March 2-17, 1791 (known in French and Belgian law as the Decree d'Allende, as its initiator[12]) abolished corporations (considered to be contrary to the right to work), proclaimed freedom of initiative, commerce and freedom of competition[13]. And if the first two freedoms do not have a different content then the one thought-out by French revolutionaries, the freedom of competition has diversified and enriches its content even today. Since then, these freedoms are part of the legal and economic life of modern states. According to art. 7 of this law, *"any person is free to do any trade or exercise any profession, art or occupation that it considers to be good for it; However, it will be obliged to obtain a patent beforehand, to pay for it the levy established by law and to comply with the regulations established or that may be established for them. "*

The doctrine considers that the d`Allarde Decree formulated two principles:

- The freedom of initiative, namely the freedom to conduct an economic activity (by which we understand the freedom to undertake and freedom of trade) and the freedom to practice a profession (which we believe can be included in the broader concept of freedom of initiative);
- Free competition, consisting in the fact that the economic factors must observe the ethics in order not to falsify in any way the competition. However, this ethics in the D'Allarde decree seemed to be limited to a principle of economic neutrality of the state, which, in order to be able to respect competition, could not carry out industrial or commercial activities in a way that would break the balance between competitors. However, to persons of public law there was acknowledged the right to pursue economic activities if they are justified by the general interest. It is, however, difficult to say if D'Allarde had the complete representation of consequences of his act, if he considered a principle of perfect competition (we can assume, however, that he thought so, since he addressed the issue of state neutrality, the perfect - hypothetical competition - being one where no consumer has the power to influence prices), making it harder to believe (but not entirely excluded) that he made the law with which remained in the history of law as one who is considering "illicit competition". In no case, however, I do not think it is right to suspect him of demagogy, as it is claimed by some political actors to argue for legal solutions when he proclaimed these freedoms.

By d'Allarde Decree, freedom of initiative and commerce and free competition gains legislative legacy and also, little by little, the status of basic market economy principles that have been adopted as such in more and more countries and competition law becomes, after passing through the New Continent an important branch of law, making it interesting for the economy, but also for intellectual property. By this normative act, the freedom of commerce and industry, which they consecrated, *"allowed the valorisation of human activity, and the abuse of these freedoms is considered unfair competition"*[14] and allowed it to be sanctioned by the judges. Only that it had to pass half a century from adopting the principle of free initiative and competition for judges to qualify the abuse on freedom to act as unfair competition and nearly 100 years until competition laws became part of the legal life, and competition law, a branch of law.

We can assume that for both French revolutionaries, the two freedoms, respectively the freedom of initiative[15] (to undertake or to carry out economic activities) and the freedom of trade (to sell the products) originated in the natural right of man to acquire the means of existence: food, clothing, housing, personal comfort. However, descending more in the quest for origins we find that these freedoms have in fact, a correspondent in an obligation, in the divine responsibility of every human being to preserve his life. To take care of his or her life and those to whom he or she is indebted by blood or marriage links to do so. But

[12] Pierre d`Allarde (1748-1806), military, political and businessman.

[13] It is argued - especially in political environment - that the French Revolution "*has demagogically proclaimed freedom of trade and industry - as if selection is nothing more than the manifestation of freedom of competition."* See Cătălin Predoiu, "The New Civil Code will disturb the *status quo*, not only doctrinal but also institutional, in legal environments", available on *Juridce.ro* on October 18, 2011. But the Decree d'Allende is considered the act of birth for competition law. See in this respect Bernard Remiche, Vincent Cassiers, *Droit des Brevets d 'Invention et du savoir-faire*, Larcier, 2010, p. 670 and 672 and Andrée Puttemans, *Droits intellectuelles et concurrence déloyale*, Bruylant, Bruxelles, 2000, p. 103.

[14] Andrée Puttemans, *op. cit.*, p. 103.

[15] Our Constitution speaks in Art. 135 (1) about freedom of initiative and competition and in art. 135(2) about State's obligation to ensure freedom of trade and protection of fair competition.

also to be solidary with others and to help them in need. Obligation whereon the Constitution of Romania treats as right to life (Article 22).

Nevertheless, what is the connection between free competition, freedom to create and intellectual property? The answer seems simple: where there are competitors, where free initiative is active, there is also abuse of freedom. And it seems that this happened and was noticed faster in the field of technical creations and distinctive signs, where competitors are intelligent, inventive, good observers, interested and connoisseurs on markets, people who see easily the opportunities and advantages that can be gained by means of unfair methods. And in the entrepreneur world, not all cultivate all the virtues, and perhaps the rarest of those cultivated is honesty, otherwise there would not have been a need for such a broad regulation on competition issues. And it cannot be a coincidence that freedom of initiative and abuse of this freedom that manifests itself in the form of dishonest competition has become part of our lives since the beginning of industrial revolution. Wherever economic activities flourish, we shall also face abuses of freedom and we shall encounter unfair competition phenomena.

Let us remember, therefore, that when the Viennese organizers of the sixth international exhibitions in 1873 invited the US to attend the event, the invitation was received with reservations, the American industrialists being unwilling to publicly expose their achievements due to the high risk of theft, possible risk due to low level of protection of inventions abroad (they had a patent law since 1812 and a patent office since 1815). That is why the United States conditioned their participation to the exhibition by the adoption by Austria of a patent law, which was adopted in the same year by the organizing country. But Austro-Hungary spilled its humiliation from this incident over Romania, which was forced in 1879 to adopt a trademark law in order to comply with an obligation assumed by a trade convention concluded with the same country in 1875. But we must admit that not even for the Austrian the forcibly adopted law of inventions was not that bad, nor did the adoption of trademark law for us, after we had promised the Austrians four years before we would do so, Romania becoming part of the small group of countries that had a trademark law.

But how can be unfair competition be punished in the absence of a special regulation?

In France, respecting the tradition, the judges took one step further in front of the law. Or maybe, by doing so, they have only complied with the obligation to judge also in absence of laws, as provided by art. 4 of their Civil Code and now: *"the judge who will refuse to judge under the pretext of silence, obscurity, or inadequacy of the law, may be prosecuted as guilty of denial of justice*". A text that existed also in the previous Romanian Civil Code (in article 3).

In the absence of a special law, the French jurisprudence has sought and attached to the principle of civil liability for punishing the abuse of freedom of initiative, on the basis of art. 1382 of the Civil Code (following the amendments adopted in 2016, Article 1240 and with correspondent in the old Romanian Civil Code in Article 998, and in the new Civil Code, in Article 1349) considered to be the most effective legal basis of the action for damages-interests in the case of abuse of free competition. Thus, grounded on the action on civil liability, the action on unfair competition still did not permit to the offended trader but the reimbursement of the damage incurred on the basis of a lengthy and costly procedure[16], which did not confer the benefit of the obligation to terminate the actions or the possibility of ordering the provisional suspension of non-honest competition by the judge. That is why, in practice, the victims of such acts preferred to refrain from taking legal action.

As during the nineteenth century, the economic confrontation was more and more fierce, ruthless and increasingly unethical (remember, it was the period of the industrial revolution, the beginning of the international exhibitions, the war between the partisans and the opponents of the patents), the judges were, however, forced to put competition (increasingly wild) within the limits of reasonable conduct, even in the absence of special regulations. The first decision to punish acts of unfair competition was pronounced in France in 1833, which was based more on moral arguments than on legal considerations, the most used argument being that no indulgence is justified to the one who acts in bad faith *(malitiis non est indulgendum - there is no indulgence for malice)*. The appeal to this Latin legal adage means that the action on competition was considered admissible only if the bad faith of the Respondent could be established.

In the mid-nineteenth century, and in any case before the adoption of 1883 Paris Convention on the Protection of Industrial Property, France used the expression **"acts of unlawful competition"** to designate abuse of freedom of initiative, the same expression being used in 1850 by a court in Brussels. In the second half of the nineteenth century, the French and Belgian courts began to use the expression **"unfair competition"** for unethical conduct in business. Those acts were in particular related to the misuse of distinctive signs, trademarks and factory brands belonging to another, and that is why the 1883 Convention also referred to unfair competition, to which, as revised in the year 1900 dedicates an entire article (10 bis). In year 1858, the name of "unfair competition" was also used in doctrine[17] in a work by Edouard Calmels, and in 1875 in a treaty by Eugene

[16] Procedures are (longer) lengthier and more costly in our county also after the adoption of the new codes, from this point of view the civil procedure does not have the expected effect.

[17] Edouard Calmels (1818-?) Des noms et marques de fabrique et de commerce et de la concurrence déloyale.

Pouillet[18]. But in 1895, James Vallotton[19] published in Lausanne, a work entitled "*La concurrence déloyale et la concurrence illicite: étude de jurisprudence*".

French jurisprudence has priority also for progressive formulation of a planner for unethical behaviours and for which the moral fundamentals are predominant, even if the establishment of bad faith maintains its status as a necessary condition for finding the act of unlawful competition and to grant damages. France was, however, deprived of legal grounds to take legal action in civil liability, of the possibility to order measures in order to terminate unlawful competition acts, and the solution could only be that of compensating the victim for the damage incurred.

In **Germany** also, after the principles of freedom of initiative and the free competition were legislatively acknowledged by the Code of Industrial, Trade and Craft Professions adopted in 1869, abuses were starting to emerge, but the judges did not react as the ones in France, by sanctioning the abuse of freedom of initiative on the basis of non-contractual liability, but it must also be said that the legal, political, economic and social context was different in Germany from the one in France, and the disputes between the two countries were not such as to encourage the exchange information on jurisprudence.

It seems appropriate to mention here that the birth of unified Germany was signed in a famous place, the Mirror Hall of the Palace of Versailles, where other important historical documents were signed but **which bear the seal of one of the great acts of unfair competition** (not few), and which is related to industrial property (of course, if we relate to the present times and not to those of the 17th century when the act occurred, the acts)[20].

It is right to speak of Germany[21], of course, only after signing the act of unification, of peace with France (whose emperor, Napoleon III, defeated in 1870 at Sedan, at the date of the peace treaty was signed, was still the hostage of Germans) and the proclamation of Wilhelm I of Germany as Emperor of Germany, all these acts being signed so that the humiliation of France would be complete on January 18, 1871, in the Mirror Hall of Versailles. **A hall decorated with mirrors made by the French 200 years before, following an act of unfair competition whose victims were the Venetian craftsmen, because the mirror manufacturing process was made known to them and the mirrors could be made in Paris (Since 1665) only after four Venetians were *"bought"* by the French.** In Venice, whose wealth was due to mirrors they made, the process was kept secret under the death penalty for those who had disclosed it, and the inveiglement of craftsmen would undoubtedly qualify today as an act of dishonest competition.

Even before the unification in 1871, the German states had numerous competition problems, especially since in 1815 Prussia (the most powerful German state before unification) adopted a law of inventions that impeded imports between German states for products based on patented inventions, the problems being resolved only after the unification in 1871 and the adoption in 1877 of a federal invention law[22]. Competition acts continued to be aggressive also in unified Germany, but German courts did not follow the French model and refused to apply civil liability rules in the field of unfair competition. This determined the legislator of unified Germany to adopt laws between 1894-1896 which additionally regulated also some competition issues (e.g. the trademark law of 1896), so that in 1909 Germany would adopt a General Law against unfair competition.

This final law outlined in a general manner the prohibition of unfair competition, targeting all acts contrary to good morals committed by anyone in business for competition purposes. The law also regulated an action for termination of acts, allowing for a rapid provisional prohibition of unfair competition acts, which was an important development compared to the situation in France where judges could not order measures for termination of competition acts under the civil liability actions regulated at that time by art. 1382 of their Civil Code.

In the US, a law in 1890 (Sherman Act) introduced rules of competition, with regulations needed due to the increasing number of agreements in vital fields of economy, such as railways, oil industry, banking system, that endangered the stability of economic system. Another law, adopted in 1914, complements the first one, inter alia, by prohibiting mergers that could affect competition, by prohibiting a person to occupy director positions in two or more companies, prohibiting sales conditional on the failure to conclude transactions with competitors of the seller. In this way, the acts considered to be unethical behaviours are starting to be acknowledged in law.

Belgium has the merit of harnessing the experience of their neighbours (France and Germany)

[18] Louis-Marie-Eugene Pouillet (1835-1905), lawyer, writer, president of ALAI (International Literary and Artistic Association). *Traite des marques de fabrique et de concurrence déloyale en tous genre*, the first edition being published in 1875.

[19] James Vallotton published his work *„La concurrence déloyale et la concurrence illicite: étude de jurisprudence"* in 10 editions in three languages. He has written several papers in the field of the right of free navigation on international rivers and on administrative law issues. An important piece of work concerns Romania: *„De l`opinion juridique du comité Chamberlain sur le litige roumano-hongrois et de sa portée en droit international"*.

[20] King Ludwig II of Bavaria, admirer of King Louis XIV of France (Sun King), impressed by the Palace of Versailles, which he visited in 1867, wanted a similar one and began his construction in the year 1878 on the island of Herrenchiemsee on Lake Chiemsee in Bavaria. The works were stopped in 1886, with the king's death, and the palace was not finished.

[21] The Holy Roman Empire of German Nation (a multiethnic empire that included territories of Italy, Burgundy and Bohemia) ceased to exist in 1806, after the defeat of Emperor Francis II by Napoleon Bonaparte at Austerlitz. But even in the form of organization that wanted to be a continuation of the ancient Roman Empire of the West, it was, in reality, a decentralized, elective monarchy, formed of principals, duchy, comrades in vassal relations.

[22] The law was adopted after, as in the US, in the German Constitution of 1871, the adoption of a federal law on inventions was provided.

and has contributed a lot to the theoretical and practical development of unfair competition combat system. The Belgian doctrine states that *"if the history of action in unfair competition is very singular, and if this branch of law has experienced unrivalled development and unmatched clarification in Belgium, it has probably happened because Belgian jurists have fed from German experience as much as from the French one, not excluding anything and retaining the best of each of the two systems in order to create a third perhaps more complete and undoubtedly more effective. International Union Law has also played a major role in the elaboration of Belgian law"*[23].

The expression *"unfair competition"* is used in Belgium for the first time in a sentence of Liege Tribunal in 1853, rendered also in connection with misuse of distinctive signs, and in 1865, in a court ruling In Brussels, which sanctioned the behaviour of an employee who left the company where he held the director position, along with several people, and then set up an enterprise with the same object of activity as the one he had left, ruining his former employer. The action against him was admitted on the same grounds as in France, respectively Art. 1382 of the Civil Code, its manoeuvres being classified as unfair competition with the consequence of obliging the Respondent to pay damages to the Claimant.

Belgium also played a significant role in introducing within the text of 1883 Paris Convention special provisions regarding the obligation of states to ensure the citizens of the Union of Paris an effective protection against unfair competition. Extensively prepared, the convention main concern was patents protection and trademark protection. In the adopted version, the Convention contains a general reference to unfair competition (the expression gaining since then international acknowledgement) in art. 1 paragraph 2), which shows what is the subject-matter of the protection of industrial property: *"patents, utility models, drawings or industrial designs, trademarks or factory brands, service marks, commercial names and indications of origin or names of origin, **and also the suppression of unfair competition"***.

As it is well known, the Convention has been revised several times[24], the first of these reviews took place in Brussels on 14th of December 1900. On this occasion, art. 10 bis. was introduced, which limited in assimilating asylum seekers to nationals on protection offered against unfair competition. On 2nd of June 1911, during the Review Conference held in Washington, art. 10 bis has been amended to oblige Member States of Paris Union to provide Union citizens with effective protection against unfair competition. On this occasion, the British delegation proposed amending Art. 10 bis, by stating the concept of unfair competition, but for procedural reasons, the proposal could not be included in the text.

The First World War reiterated the need for more effective combat against unfair competition on international scale, which is why at the Review Conference held at The Hague in 1925, was formulated and introduced in the text of the Convention by art. 10 bis par. 2) and 3) a definition of unfair competition and the main dishonest acts specifically prohibited.

Thus, according to art. 10 bis par. 2) "*constitutes an act of unfair competition any act of competition contrary to honest practices in industrial or commercial matters*". Article 10 bis. par.3) states that **they will have to be forbidden especially**:

1. any facts which are likely to create by any means confusion between the competitor's undertaking, products, industrial or commercial activity of a competitor;
2. false allegations in the course of trade which are likely to discredit the competitor's undertaking, products, industrial or commercial activity;
3. indications or statements the use of which in the course of trade is likely to mislead the public as to the nature, mode of manufacture, characteristics, suitability for use or quantity of the goods.

Is the definition of unfair competition given by the Paris Convention satisfactory, since it defines the competition tautologically, stating that unfair is what dishonest is? Perhaps not.

However, the definition has the merit of making it possible to exit from the repairs register as a consequence of a culprit (as it was before) to operate with a positive rule of conduct, a rule of deontology. This, because the acts and / or deeds mentioned in art. 10 bis par. 2) of the Convention are prohibited, in the presence of any of them not being necessary to examine whether the Respondent acted intentionally or was in bad faith.

At Lisbon Review Conference (31st of October 1958), Art. 10 was introduced requiring the Union countries to provide citizens of the other countries of the Union with appropriate legal means to effectively suppress all the offences referred to in Articles 9, 10 and 10 bis and to provide measures to allow trade unions and associations representing industrialists, producers or interested traders and whose existence is not contrary to the laws of their respective countries, to bring to justice or before the administrative authorities in order to suppress the offences referred to in Articles 9, 10 and 10bis, to the extent that the law of the country in which protection is sought allows this for trade unions and associations in that country.

[23] Andrée Puttemans, *op.cit.* , p. 107.

[24] The Convention was revised, in turn, in Brussels on 14 December 1900, in Washington on 2 June 1911, in The Hague on 6 November 1925, in Lisbon on 31 October 1958, and in Stockholm on 14 July 1967. Romania acceded to the Paris Convention for the protection of industrial property on October 6, 1920, and the revised form in Stockholm in 1967 was ratified by Decree no. 1177/1968.

5. Conclusions

As it is easy to see, 75 years have been necessary for unfair competition to be defined in international law, to establish the facts and acts considered unacceptable in business, to impose an obligation on the Member States of the Union to provide effective means of sanctioning these facts. But if the beginnings of regulations to combat unfair competition are related to industrial property over time the competition field has gone beyond this sphere. And in the European Union, competition issues occupy a central place, a place we will talk about in other articles.

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TRANSPARENCY OF COLLECTIVE MANAGEMENT ORGANIZATIONS (COLLECTING SOCIETIES)

Mariana SAVU*

Abstract

According to art. 133, paragraph (7) of Law no. 8/1996 on Copyright and Related Rights: „the collective management organization (collecting society), which is the sole collector, is required to issue the authorization through a non-exclusive license, in writing, on behalf of all recipient collective management organizations and to ensure both transparency of collection activities and the related costs in relations to the recipient collective management organizations. They have an obligation to support the collection activity." This special rule applies only to sole collectors and it cannot be transposed to the collectors appointed in various collection fields by ORDA, even if they are subject to mandatory collective management.
Otherwise, in accordance with art. 130, paragraph (1), letter (i) of Law no. 8/1996, the obligation to ensure transparency in the collection activity operates also regarding the collectors from areas other than „private copying", according to which „the collective management organizations are required as follows: i) to ensure transparency of collective management activities in their relations with the public authorities which have the right to control and, through them, with the users;". Under these circumstances, such obligation to ensure transparency exists and it is also applied by CREDIDAM, and the latter has entirely complied with it over time by submitting to ORDA on annual basis all the documents as required by law, as well as any other document required by it during inspections. We shall further show that CREDIDAM has also provided all the information, as enlisted in art. 2 point A of the draft decision, including to the recipient organizations.

Keywords: *related right, collective management, transparency, circumstances, right.*

1. Introduction

ORDA[1] has requested the collective management organizations to communicate their opinion on the transparency obligations of collective management organizations designated as collectors. The collective management organization which manages performers' rights, i.e. CREDIDAM, introduced the distinction between the concept of sole collector and the one of collector on source/collection field, as well as the transparency obligation contents incumbent on the collective management organizations from both categories.

After receiving the opinions from all the colective management organizations, ORDA communicated them a draft decision on transparency.

We emphasize that the original draft text drawn for discussion by the collective management organizations is distinct from the one in ORDA's Decision no. 114/2016[2], regarding the burdens imposed on the collective management organizations which are appointed as collectors by ORDA, based on the principle of representativeness criteria. In our opinion, there is no legal basis for regulating the transaprency requirement beyond the provisions of the Law no. 8/1996 on Copyright and Related Rights *(hereinafter referred to as „**Law no. 8/1996**"),* as well as the fact that collective management organizations already are bound to transparency according to current legal provisions. Moreover, most of the information provided through the administrative document issued by ORDA was communicated by the collecting body to the recipient collective management organizations, and the not provided one, i.e. the information communicated by the users showing the actual use of the repertoire managed by the recipient collective management organizations, namely that set out *in paragraph B of the initial draft*, due to its confidential nature, is the prerogative of recipient organizations to arrange to get it by their own.

ORDA has communicated the opinion of collective management organizations regarding the advisability of issuing the decision on transparency obligation of the organisations designated as collectors. Following such correspondence, ORDA announced the collective management organizations that **a decision on the transparency obligations shall not be issued** regarding the rights subject to mandatory collective management. As grounds for its conclusion, ORDA considered that this decision, as it would be drawn up in accordance with the current legal framework, cannot be applied.

Surprisingly, without having a prior dialog with the collective management organizations on the amendment of the original draft decision text and without us being communicated the reasons for the reconsideration of ORDA's initial position, the latter issued the *Decision no. 114/2016 on transparency obligations of the collective management organizations designated as collector /sole collector for the rights subject to mandatory collective management*, published

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[1] The Romanian Office for Copyright.
[2] Published in the Official Gazette, Part I, no. 889 dated November 7th, 2016.

in the Official Gazette, Part I, no. 889 dated November 7th, 2016.

In our opinion, the text of ORDA's Decision no. 114/2016 is unclear and we requested clarifications from ORDA for the provisions considered unclear, in order for it to be understood correctly and consequently implemented by the collecting collective management organizations. Except for the material error correction contained in art. 2 point A letter e) of the administrative document, **ORDA's clarifications were added to the text of the decision regarding its key provisions,** by comparison to the version published in the Official Gazette, a fact which lead to a different construing, conclusion supported even by the recipient collective management organizations.

2. Content

In order to analyze which are the transparency obligations of the collective management organizations designated as collector/sole collector we previously have to check if there is any difference between the collective management organization designated as collector for a certain category of right-holders and the collective management organization designated as collector for all the categories of right-holders, the so-called sole collector.

2.1. ON THE CONCEPT OF SOLE COLLECTOR

About the concept of sole collector, ORDA's opinion is that art. 133 should be correlated with art 107^1 of the Law no 8/1996, so that both concepts exercise the same basic rights and obligations for the collective management organizations which fulfill these functions.

As far as we are concerned, we believe that the procedure for appointing the sole collector for the „private copy" field is different from the procedure by which ORDA appoints the collector of remuneration payable to the same category of holders, so that neither of the two concepts overlap, because they do not give rise to the same rights and obligations as tasks of the organizations which fulfill this function.

More specifically, as ORDA states, according to art. 107^1 of Law no. 8/1996, „*The compensatory remuneration for private copy will be collected by a collective management organization as sole collector for the works reproduced after sound and audiovisual recordings and by another collective management organization as sole collector for works reproduced from paper, in the conditions of art. 133 paragraphs 6) - 8). The two collective management organizations, with tasks of sole collector, are appointed in order to obtain the vote of the majority of beneficiary collective management organizations, upon the first summons, or by obtaining the highest number of votes upon the second summons, irrespective of the number of persons present. The collective management organizations appointed by vote will submit to the Romanian Copyright Office, the minutes based on which they were appointed. Within 5 working days since the date of submission, the Romanian Copyright Office shall appoint the sole collector based on the decision of the General Manager, which will be published in the Official Gazette of Romania, Part I.*"

As such, according to art. 107^1 of Law no. 8/1996:

1. For the private copy field, there shall be a sole collector for works reproduced from paper and a sole collector for the works reproduced after sound and audiovisual recordings;
2. The sole collector for the works reproduced after sound and audiovisual recordings shall collect for several categories of copyright and related rights holders, respectively for: authors (of music, film directors, visual arts, etc.), performers and producers (of music, of audiovisual and cinema works);
3. The sole collector shall be appointed by the recipient collective management organizations, and ORDA shall issue a decision to be published in the Official Gazette and by which it appoints the collector, as agreed by the organizations involved;
4. ORDA's powers and obligations in appointing the collector are limited; it can only take note of the agreement between the organizations and issue the decision, without examining the criteria and conditions contemplated by the parties;

However, according to art. 133 of Law no. 8/1996, „*(1) Collection of the amounts payable by users or by other payers shall be made by the collective management organization which repertoire is used*.

(2) If there are several collective management organizations for the same creative field, and the rights managed are from the category of these referred to in art. 123^2, the recipient organizations establish through a Protocol to be submitted to the Romanian Copyright Office in order for the following to be published in the Official Gazette of Romania, Part I, at their expense:

a) the criteria for distribution of remuneration between organizations;
b) the collective management organization which is to be appointed among them as collector in the fild of said right-holders, by the decision of the General Manager of the Romanian Copyright Office;
c) the manner of recording and justifying the expenditure on actual coverage of the collection costs of the collecting society (collective management organization).

(3) As referred to in paragraph (2), if the recipient collective management organizations fail to submit the above mentioned Protocol to the Romanian Copyright Office within 30 days from the date of entry into force of the Methodologies, the Romanian Copyright Office appoints among them a collector in the field of said right-holders, based on representativeness, by decision of the General Manager.

(4) For the circumstance provided in paragraph (3), the sole collector appointed by the Romanian Copyright Office cannot allocate the collected amounts either between the recipient organization, or to their own members, unless after submitting a Protocol to the Romanian Copyright Office concluded between the recipient organizations and by which they set up the criteria regarding the distribution of collected amounts. Collection costs, in this case, shall be separately registered and must be justified by documents concerning the actual cover of the collection costs of the collective management organization that is collecting in the field of said right-holders.

(5) Upon the expiry of the 30 day period as provided in paragraph (3), any of the collective management organizations may request the Romanian Copyright Office to initiate the arbitration proceedings conducted by arbitrators, in order to set up the criteria regarding the distribution of collected amounts between the categories of recipients. The arbitration proceedings, as well as the subsequent stages are referred to in art. 131[2] paragraphs (3)-(9).”

As such, according to art. 133 of Law no. 8/1996:

1. For the rights that are subject to mandatory collective management, the criterion required by law in order to determine the remuneration payable to right-holders is *the actual use of the repertoire*;
2. ORDA practice was to appoint a collector among the collective management organizations operating for a certain category of right-holders, this collector subsequently collecting from users the amounts payable to right-holders and to distribute between them such amounts;
3. For the rights which are subject to optional collective management, if there are several collective management organizations that represent the same category of right-holders, according to art. 133, paragraph (2) of Law no. 8/1996, they should conclude a Protocol in order to establish the criteria, the collecting organization and ways to recognize the amounts;
4. In the absence of a Protocol, ORDA shall appoint by decision, based on the criterion of representativeness of the collecting organization, and will subsequently establish the criteria based on protocol or by arbitration within ORDA, whether the conclusion of the protocol is not possible;
5. Thus, if the organizations fail to agree upon the conditions for concluding a Protocol, ORDA shall intervene with extensive powers over the proceedings referred to in art. 107[1] of Law no. 8/1996 and appoints the representative organization.

2.2. REGARDING THE LEGAL STATUS OF COLLECTIVE MANAGEMENT ORGANIZATIONS

Based on the fact that ORDA places the sign of equivalence between the **sole collector** in the field of “private copy” and **the collector appointed** for the other fields of collection, it rules that the provisions of art. 133, paragraphs (6-8) of Law no. 8/1996 also applies upon the collectors appointed for the other collection fields.

However, we cannot ignore the provisions of art. 107[1] according to which „*The compensatory remuneration for private copy will be collected by a collective management organization as sole collector for the works reproduced after sound and audiovisual recordings and by another collective management organization as sole collector for works reproduced from paper, **in the conditions of art. 133 paragraphs (6) – (8)***”.

As such, the provisions of art. 133, paragraphs (6) – (8) which refer to the sole collector are applied to the equitable remuneration on the “private copy”, and their application cannot be extended to other field, by analogy, when Law no. 8/1996 sought to create an exceptional procedure for the field of private copy. Or, in hour opinion, contrary to the facts shown by ORDA, the sole collector applicable rules may not apply also for the other fields.

In this respect, the provisions of art. 133, paragraph (7) according to which „*the collective management organization, **which is the sole collector**, **is required** to issue the authorization through a non-exclusive license, in writing, on behalf of all recipient collective management organizations, and to **ensure both transparency of collection activities,** and the related costs in relations to the recipient collective management organizations. They have an obligation to support the collection activity.*”

Or, this special rule applies only to sole collectors and it cannot be transposed to the collectors appointed in various collection fields by ORDA.

The collector assigned on various collection fields fits with the collection costs within the percentage set by the Arbitration Awards or by Civil Judgments of the Courts, and for the sole collector, the costs are determined by the Protocol signed by the recipient parties.

Otherwise, in accordance with art. 130, paragraph (1), letter (i) of Law no. 8/1996, the obligation to ensure transparency in the collection activity operates also regarding the collectors from areas other than „private copying”, according to which „*the collective management organizations are required as follows: i) to ensure transparency of collective management activities in their relations with the public authorities which have the right to control and, through them, with the users;”*

Under these circumstances, such obligation to ensure transparency (before ORDA, the sole control authority, before the members and to the general

public) exists and it is expressly provided by law and also applied by CREDIDAM, and the latter has entirely complied with it over time by submitting to ORDA on annual basis all the documents as required by law.

The Law no. 8/1996 concerns the obligation of all collective management organizations (so not only of the collective management organizations designated as collectors/sole collectors) to have transparency before:

1. public;
2. members;
3. ORDA.

Consequently, the law does not require the collecting collective management organizations to report, for the sources of mandatory collective management, their entire activity to the collective management for which they collect, organizations which are competing in the market, in the opinion of the Competition Council, and also of Bucharest Court of Appeal – Administrative and Fiscal Disputes Section.

Thus, these transparency obligations are:

1) Transparency obligations towards the public

CREDIDAM communicated to the public through its website www.credidam.ro, the mass-media and its magazine, "Info CREDIDAM", the following data, according to **art. 125[1]** of Law no. 8/1996:"

a) the categories of right-holders it represents;

b) the economic rights they manage;

c) the category of users and the categories of natural and legal persons who/which have payment liabilities for compensatory remuneration for private copy to the right-holders;

d) the laws under which the operate and collect the remunerations payable to right-holders;

e) the collection methods and the persons responsible for this activity, both locally and centrally;

f) the working schedule".

2) Transparency obligations towards members:

Likewise, every year, all the updated information has been posted on CREDIDAM website, according to **art. 134[1] paragraph 1** of Law nr. 8/1996, with subsequent amendments and supplements:

"a) the Statute;

b) the list with the members of central and local governing bodies, the members of the internal commissions and the list of local liable persons;

c) the annual statement on the balance of undistributed amounts, the collected amounts on categories of users and other payers, amounts withheld, the management costs and the amounts distributed on categories of right-holders;

d) the annual report;

e) the information regarding the General Assembly, such as: the date and place of convening the agenda, the draft resolutions and decisions adopted;

f) other information necessary to inform the members".

3) Transparency obligations towards ORDA

The Law no 8/1996 on Copyright and Related Rights, with subsequent amendments and supplements, clearly states the documents that collective management organizations must submit to ORDA in order to comply with transparency principles. Thus, according to **art. 135 paragraphs 1 and 2** of Law no. 8/1996, CREDIDAM submitted to ORDA the following documents, in the first quarter of each year, after its General Assembly:

"a) the annual report, approved by the General Assembly;

b) the annual report of the Audit Committee, presented to the General Assembly;

c) the Decisions of the Courts regarding the registration of changes to the Statute, approved by the Romanian Copyright Office;

d) the updated repertoire;

e) the representation contracts with similar foreign organizations.

(2) the documents referred to in paragraph 1 letters a) and d) shall be submitted to the Romanian Copyright Office, in a form established by the decision of the General Manager of this Office."

In conclusion, transparency obligations incumbent on the collective management organizations are expressly and exhaustively provided by law.

On the other hand, there is no legal basis for the undersigned to be required to submit to the other collective management organizations the same documents which the law requires to be disclosed to ORDA, and art. 133 paragraph (7) cannot be applied by analogy, as there is no basis in this regard, the more that this rule expressly states that it applies to the single collector.

Although we share the opinion expressed by ORDA regarding competitive activities in the field, we have shown that, on several occasions, the collective management organizations have been treated (by the courts, the Competition Council) as undertakings who are subject to the Competition Law no. 21/1996, so in this case we are in a situation of competing undertakings, given that both CREDIDAM and two other collective management organizations are operating in the field of performers. Or, under these circumstances, until clear regulations in this regard, ORDA cannot require collective management organizations to offer information and violate the confidential nature of business secrets.

2.3. ON THE ISSUES POINTED OUT BY ORDA AND POSSIBLE REMEDIES

ORDA has identified a series of problems that come from a number of errors of Law no. 8/1996. Regarding the errors pointed out here, we specify that, in practice, a number of inconsistencies arose in the text of Law no. 8/1996, but we consider that such errors can

only be overcome when amending the law and not by a decision issued by ORDA.

The reason is that any amendment to Law no. 8/1996 can be done only by another normative act with a force greater than or equal to it, namely by meeting the principle of hierarchy of normative acts, according to Law no. 24/2000 on Legislative Technique for Law Drafting. As such, ORDA, in virtue of its regulatory powers, in cannot intervene in changing a law (*stricto sensu*) by its decision (which represents a unilateral administrative act) in favor of the collective management organizations representing 2% of the repertoire used on the Romanian territory and to the detriment of the collective management organizations that manage 98% of the repertoire used on the Romanian territory.

Despite all stated arguments, in the sense that a regulation decision for the transparency obligation is not necessary, ORDA's Decision no.114/2016[3] was issued, an administrative act that shall be analyzed below.

The transparency obligation of collective management organizations assigned as collector in the field is already regulated, expressly and exhaustively, by the provisions of Law no. 8/1996 on Copyright and Related Rights. The provisions of art. 133, paragraphs (6) – (8) refer to the single collector, and they apply to equitable remuneration in the field of „*private copy*". Their application cannot be extended by analogy to the other fields, given that Law no. 8/1996 sought to create an exceptional procedure for the field of private copying.

According to art. 133, paragraph (7) of Law no. 8/1996, as quoted above, it applies only to sole collectors and it cannot be transposed to the collectors designated by ORDA for various fields of collection, even if they are subject to the mandatory collective management.

Besides, even for collector in other fields than the „*private copying*" the obligation to ensure transparency operates in the collection activity, in accordance with art. 130, paragraph (1), letter i) of Law no. 8/1996, which states that „***the collective management organizations have the following obligations: i) to ensure the transparency of the collective management organizations in relations with public authorities which have the right to control and, through them, with the users;"***

We appreciate that the transparency in the collection activity of the collecting organization can be assessed only in relation to the relevant information for the activity of the recipient collective management organizations. In other words, the gross amount collected for members other than belonging to each recipient collective management organization, cannot be regarded as constituting a legitimate interest for these collective management organizations. We do not know the relevance and, moreover, we have not been communicated any reasons why a recipient organization should know the amount collected by CREDIDAM for its members, for direct or indirect foreign members. Also, one should also note the arbitrary and oscillating context in which the decision was issued. We recall that ORDA firstly concluded that it is unnecessary to issue such a decision, and then, only a few months later, it issued the Decision no. 114/2016, on the basis of some undisclosed letter from other competing collective management organizations.

ORDA places in charge of the collective management organization designated as collector, the obligation to communicate to the recipient organizations that are competing entities on the market, documents received from third parties, i.e. users, documents having the character of "trade secret". According to art. 130 paragraph 1 letter h) of Law no. 8/1996 it is the task of the collective management organization to request them, and where these users refuse to communicate them, these organizations can invoke the legal provisions.

The transparency obligation is already regulated at national and European level, without the need to legislate through an administrative act, beyond the legal provisions in force.

ORDA has regulated the transparency obligations of the collective management organizations designated as collectors/sole collectors for the rights subject to mandatory collective management.

Even the issuing authority considered that the title of the initial draft decision contravenes the provisions of Law no. 8/1996, being changed upon publication in the Official Gazette of the final version of the text.

We have introduced the difference between the concept of **„collective management organization designated as sole collector"** and **„collective management organization designated as collector in a field"**, by showing for each of them the incumbent legal obligations. However, without acknowledging the thoroughness of this distinction provided by the legislature, when issuing the Decision no. 114/2016, ORDA appreciated that it is necessary to refer to both categories of subject matters. For better illustrating the above, we show below a comparison between the titles given to the initial draft and, subsequently, the final text of the decision, as pbulished in the Official Gazette:

THE TITLE OF THE DRAFT SUBMITTED BY ORDA	THE CURRENT TITLE OF ORDA'S DECISION NO. 114/2016
The draft decision on the transparency obligation of **collective management organizations designated as collector**	Decision no. 114/2016 on the transparency obligation of **collective management organizations designated as**

[3] Decision no. 114/2016 on Transparency Obligations of collective maangement organizations appointed as collector/sole collector for the rights subject to mandatory collective management.

for the rights subject to mandatory collective management	**collector/sole collector** for the rights subject to mandatory collective management

Compared to the above, the title of the draft was changed in order to be applied to CREDIDAM, which is a collective management organization that cannot be considered as sole collector for the purposes of Law no. 8/1996, but a collector on source/field of collection. The transparency obligations provided for each of the two collective management organizations above, are referred to differently in Law no. 8/1996. The art. 133 paragraphs 6–8 refer to the sole collector, and this applies to equitable remuneration in the field of „*private copying*"[4] and only for the sole collectors (UPFR and OPERĂSCRISĂ.RO) and cannot be transposed upon the collectors appointed by ORDA in various collection fields, even if they are subject to mandatory collective management, such as CREDIDAM.

Beyond the terminology used by the legislature in Law no. 8/1996 and the obligations incumbent upon each collective management organization, be it a sole collector, or a collector in certain field/source *(e.g. public communication)*, **it is essential to note that the national legislation regulates the transparency obligation incumbent upon the two organizations**. Therefore, a regulation beyond the legal provisions already provided, by ORDA's Decision no. 114/2016 respectively, supplements the legal framework without any grounds or reasons. The Law no. 8/1996 already provides for the transparency obligations of CREDIDAM, namely: **art. 125[1] – towards the general public**; **art. 130 paragraph 1 letter f – towards the members** and **art. 135 paragraph 1 – towards ORDA**. They were also detailed on the www.orda.ro website. As one can see, the legislature did not provide for the transparency obligations incumbent upon one collective management organization by comparison to another collective management organizations competing in the market.

Moreover, at Community level, the Directive 2014/26/EU of February 26th, 2014 in Chapter 5 speaks about the transparency of the collective management organization towards the other collective management organizations for which it manages rights ***under a representation agreement***. Beyond the fact that this condition is not fulfilled when it comes of the relationship between the collective management organization appointed as collector for the rights subject to mandatory collective management and the recipient collective management organizations, you shall see that ORDA's Decision no. 114/2016 exceeds including such legal provisions. In other words, by an individual administrative act the transparency obligations of the undersigned are unduly extensive, such obligations which are not provided for even at European level. We mention that, Law no. 8/1996 has implemented, since 2004, all the transparency obligations incumbent upon the collective management organizations, which are provided for by the above directive.

Therefore, we consider that ORDA's Decision no. 114/2016, extends the content of transparency obligation as much as possible, beyond any national and European legal provision.

By ORDA's letter no. RGII/INT/8266/ 11.11.2016 - RGII/IES/No.8266/17.11.2016[5] **the provisions of ORDA's Decision no. 114/2016 are changed, thus leading to other obligations imposed to the collective management organizations concerned.**

The text of ORDA's Decision no. 114/2016 lacks in precision, which is why CREDIDAM was forced to seek further clarifications from the issuing body in order to apply it. Thus, even if **ORDA's decision is a unilateral administrative act, it must be clear, precise, and unambiguous regarding its enforcement by the subject of law which it is intended for**. Writing a confusing, unclear text, even for the person who is subject to that regulation, it lacks predictability and can cause serious damages to the subject of law.

Specifically, by corroboration of the title of art. 2 with point A letter a), it results clearly that only the gross amount collected for the recipient organizations toward which there is a transparency obligation, must be communicated to them. But, by ORDA's letter no. RGII/INT/NR.8266/11.11.2016-RGII/IES/NR.8266/17.11.2016, the same provisions have been construed to refer to the total amounts collected by CREDIDAM for all the performers, for whom and whose repertoire it grants non-exclusive licenses to users.

Thus, we find ourselves in a situation where the text of ORDA's Decision no. 114/2016 expressly provides an obligation incumbent upon CREDIDAM, and then, by ORDA's clarification, to be substantially amended. An indisputable proof in this respect are the opinions of other recipient collective management organizations: „***In this context, the clarifications brought by ORDA, while having no regulatory power, their mere exposure in some letters does not ensure and guarantee the practical application thereof, and from this perspective we are convinced that ORDA knows ...***[6]" In other words, although the text of the decision concerns the disclosure of the gross collected/distributed amount payable only to recipient

[4] According to art. 133, paragraph (7) of Law no. 8/1996 on Copyright and Related Rights: „the collective management organization, which is the sole collector, is required to issue the authorization through a non-exclusive license, in writing, on behalf of all recipient collective management organizations and to ensure both transparency of collection activities and the related costs in relations to the recipient collective management organizations.".

[5] Not published.

[6] UNART letter no. 2495/21.11.2016; first page, last paragraph; not published.

organizations, by a later document this obligation is changed, providing that it refers to the total collected/distributed amounts.

There unquestionably follows, firstly that the text of ORDA's Decision no. 114/2016 is neither clear, nor predictable and, secondly, that the same was amended by extending the limits of the obligation initially set. Or, the legal standard, even if in this case it is an individual administrative act, it is binding and „*it must be clear, comprehensible, as the addressees should not only be informed in advance of the consequences of their acts and deeds, but to understand the legal consequences thereof. Otherwise, the principle ignore nemo censetur legem could no longer be applied, which would have serious consequences for the security of social relations, for the existence of society in general*[7]*"*.

Beyond the issues above, if the collected gross amount indicated in letter a) refers to the total amount collected by CREDIDAM on collection sources for all the performers, **then the letter d) cannot be implemented, because d) is never equal to a) – h)**. ORDA wrongly claimed that at letter d) does not indicate a calculation formula, as the text of ORDA's Decision no. 114/2016 is clear on this aspect, and the texts of the law shall be construed to the effect and not in a sense that produces no effect. Considering that the formula indicated in letter d) should not apply, as stated, it would mean that the second sentence of the text of the decision would not produce any effect, in which case this mention is not justified. Including the wording of the text and after correlating with the other provisions, it is very clear that the collected gross amount indicated in letter a) refers to the gross amounts collected for the members of recipient organizations, in which case the letter d) can be implemented based on the calculation formula specified in the decision at letter d), namely d) = a) – h).

Moreover, by ORDA's letter no. RGII / INT / NR.8266 / 11.11.2016 – RGII / IES / NR.8266 / 17.11.2016, **the point B) of art. 2 in ORDA's Decision no. 114/2016 was also changed**. Thus, if the initial construing of the decision text as published, referred to the communication of the list of works used by indicating the holders (Playlists), through the clarifications brought, ORDA has extended this obligation to all the information required by art. 130 paragraph 1 letter h) of Law no. 8/1996.

Likewise, also the assertion of ORDA's letter no. RGII/INT/NR.8266/11.11.2016-RGII/IES/NR.8266/17.11.2016, namely that: „ ... in ORDA's Decision no. 114/2016 neither playlists are specified (either raw or processed) nor established a form in which the collective management organizations should communicate the information provided by users on the use of the repertoire managed by the recipient organization, in order to determine the remuneration distributed to the latter.", shows that the decision text lacks in clarity.

The legality of the administrative act represents one of the most important validity conditions of administrative acts and refers to the obligation of its compliance with the constitutional provisions, with the laws adopted by the legislative power, including with all normative acts that have a higher legal force. This feature shall be assessed, both in relation to the relevant provisions at national level, and also at international level. Thus, the illegality hypothesis of ORDA's Decision no. 114/2016 provisions, must be assessed in relation to other national and European legal provisions in force governing the transparency obligation.

Neither the provisions of art. 2 point B) of ORDA's Decision no. 114/2016 as published, nor the exhaustive construction given by the letter of clarification are to be found in the existing national or European legislation at this moment.

The provisions of art. 2 point B) set as a task of the collective management organization appointed as collectors to communicate certain information which is not **related to collection but to the distribution that each collective management organization must do for its members**. CREDIDAM is not in the legal position to intervene in the distribution activity of other collective management organizations, and such interference was not prescribed by the legislature in the provisions of Law no. 8/1996 and, consequently, it is neither the prerogative of ORDA.

The information provided at art. 130 paragraph 1 letter h) of Law no. 8/1996, is covered by the **confidentiality clauses** that CREDIDAM must comply with. These are trade secrets having economic value as a result of the business model implied by the information they contain regarding the duration of advertising during TV shows, the income earned by users, retransmitted programs etc. Disclosure of such confidential information without the consent of the users from which they emanate, makes the collective management organization responsible for the damages caused by these facts.

Under art. 1 letter d) of Law no. 11/1991 on Fight against Unfair Competition: *„**trade secret** – **any information which, in whole or in part, is not generally known or is not easily accessible to people who usually deal with this kind of information and acquires commercial value by the fact that it is secret, for which the legitimate holder took the reasonable steps under the circumstances in on order to be kept under secrecy; trade secret protection operates as long***

[7] The principle of legal security as legal foundation of the rule of law, case law markers, Ion Predescu - Judge of the Constitutional Court, Marieta SAFTA – Assistant Chief Magistrate – „*In a rich case law, the European Court of Human Rightsstressed the importance of ensuring accessibility and foreseeability of law, instituting a series of markers which the legislature must consider in order to ensure these requirements. Thus, in cases like Sunday Times vs. the United Kingdom of Great Britain and Northern Ireland, 1979, Rekvényi vs. Hungary, 1999, Rotaru vs. Romania, 2000, Damman vs. Switzerland, 2005, European Court of Human Rights stressed that "there can be regarded as "law" only a rule formulated with sufficient precision to enable the individual to regulate his/her conduct".*

as the conditions set out above are cumulatively fulfilled;". During time, CREDIDAM has taken active measures in order to protect the trade secret represented by works used list indicating the holders, notified to users, meaning it established including a procedure, since 2012, to classify them as confidential information.

Likewise, ORDA's interpretation that the above information may not represent trade secrets is based on the wrong legal reasoning, in our opinion. Asserting that: „***the recipient organizations do not have the capacity as third parties in relation with the users but with the organization appointed as collector***" cannot be accepted, as the only one that can say to whom/which third party allows access to such secret information is the holder of the trade secret itself. **ORDA cannot subrogate the holder of this right, and neither CREDIDAM nor the recipient collective management organizations**. The users are the only ones that, as subjects of law that can invoke the protection of confidential information against any third party, authorize for them to be disclosed or not to other subjects of law than CREDIDAM. Although obtaining such information is achieved by fulfilling a legal obligation of users, namely the provisions of art. 130 paragraph 1 letter h) of Law no. 8/1996, this is not enough to conclude that, after obtaining it, the same can be disclosed to other third parties.

More specifically, the undersigned cannot invoke any legal provision to exempt itself from liability that may be drawn for disclosing certain secret information to other people. It is wrong to assume that the legal effects of the legal basis that allows obtaining this information can be extended „*ope legis*" through CREDIDAM to the competing collective management organizations. CREDIDAM showed through its opinions communicated to ORDA that the recipient collective management organizations could have effectively invoked the provisions of art. 130 paragraph 1 letter h) of Law no. 8/1996[8]. We think that this proposal is a fair and legal solution by which the recipient collective management organizations could legally get the above information. These legal provisions apply uniformity to all collective management organizations, providing the same rights and obligations for them. Law no. 8/1996 provides an **OBLIGATION** for all the collective management organizations to ask directly from users all the information needed for distribution, this being one of the objects of activity for which they were established.

Since art. 134[4], paragraph (4) of Law no. 8/1996 expressly regulates as incumbent upon the collective management organizations the confidentiality obligation regarding the information received from users during the access procedure to data of their members, the more this obligation subsists in the relations with the other collective management organizations on the market.

Regarding legislation at EU level, none of the articles 18, 19, 20 and 21 of Directive governing the transparency obligation both to users, right-holders and between other collective management organizations with which they concluded representation agreements, **do not provide for the communication of information referred to in art. 2 point B) of ORDA's Decision no. 114/2016**. Likewise, art. 18 paragraph 1 letter d of the Directive speaks about making available certain information „*(...) except that the collecting society cannot provide this information for objective reasons related to reports made by users."* It is noted that the Community legislature has taking into account the possibility that some information cannot be disclosed due to confidentiality.

We have not identified any legal basis for issuing this decision, unless the provisions referring to the prerogative of issuing authority to issue administrative acts that must be in accordance with Law no. 8/1996.

Stating the grounds for administrative acts represents an additional guarantee of legality and effective protection of citizens' rights and freedoms. Verifying this condition can diminish the risk that the issuing authorities might issue arbitrary, unfair decisions. Doctrine is unanimous in assessing that, to the extent that the law imposes the obligation to state the grounds, the administrative act issued in breach of this obligation is null and void.[9] Indicating some letters and of the legal basis which empowers the administrative authority does not represent the rightful grounds for issuing this decision. Accordingly, the subject of law is damaged, being unable to properly exercise its rights of defense as provided by art. 1 paragraph (3) in conjunction with art. 31 paragraph 2 of the Constitution of Romania. These legal provisions require, as a prerequisite to the rule of law, **the obligation of public authorities to provide accurate information to citizens on matters of their personal interest**, a condition which cannot be seen as fulfilled as far as no legal basis is indicated.

Likewise, we refer to the case law of Bucharest Court of Appeal – 8th Section – Administrative and Fiscal Disputes which ruled by the Decision no. 2973 on September 10th, 2012 issued on appeal that: „***stating the grounds for an administrative decision cannot be limited to considerations of issuer's competence or the legal grounds thereof, but it also contain elements in fact which allow, on the one hand, the recipients to know and assess the justification for the decision, and on the other hand, to make it possible the exercise of judicial reviews.***" In this case, besides the jurisdiction,

[8] Art. 130 alin. 1 lit. h – „to ask for users or for their intermediaries to communicate information and send the documents needed in order to determine the remuneration amounts they collect, as well as information regarding the used works, indicating the right-holders, in order to distribute them; both users and their intermediaries are required to provide, in writing and electronic format, within 10 days of request, the requested information and docuements, signed by the legal representative and stamped;".

[9] A. Trăilescu. Administrative Law – Elementary Treaty, Ed. All- BecK 2002, pg. 193.

there is no other legal basis. The High Court of Cassation and Justice, by the decision no. 1153/2008 has noted: „***stating the grounds is decisive to make the delimitation between the adopted administrative act at the discretion conferred by the law to the public authorities and the one adopted by abuse of power, as that concept is defined in article 2 paragraph 1) letter n) of Law no. 554/2004"***.

Through the Civil Judgment no. 6185 dated October 29th, 2013 delivered by Arad Court of Justice in the case file no. 7108/108/2013, was established that: „*In fact, even in the Community case law is held that the explanatory statement should be appropriate for the issued document and it must provide in a clear and unequivocal manner the algorithm followed by the institution that adopted the contested measure, so as to allow the persons concerned to prepare the explanatory statement for such measures and also to allow the competent Community Courts to review the document (case C - 367/1995) and, as decided by the European Court of Justice, the dimension and details of the explanatory statement depend on the nature of the adopted document and the requirements which the reasoning must meet depend on the circumstances of each case, an insufficient or erroneous reasoning is considered to be equivalent to a lack of grounds for the acts and, moreover, the insufficient reasoning or lack of reasoning entail nullity or invalidity of Community documents (case C - 41/1969) and specifying in detail the reasons is necessary even when the issuing institution has a wide assessing discretion, because the explanatory statement gives transparency to the document, in this manner giving individuals the possibility to check if the document is properly grounded and, at the same time, allowing the Court to exercise the jurisdictional review (causa C - 509/1993)"*.

At European level, according to art. 41 paragraph 2 letter c of the Charter of Fundamental Rights of the European Union **the right to a good administration refers, among other things, also to the fact that administration obligation is to give reasons for the issued decisions**[10]. Also the European case law has held the same conclusion, namely the nullity of the administrative act for the lack of its reasoning in considering the principle of „equality of arms". It requires that **„*each party to such a trial should receive a reasonable opportunity to present their case to the Court under conditions that do not disadvantage them significantly in relation to the opposing party "(European Court of Human Rights, Dombo Beheer BV vs. the Netherlands, Judgment of October 27th, 1993, series A no. 274, p. 19; European Commission of Human Rights, Judgment of July 16th, 1968, Complaint no. 2804/66 Annuaire de la Convention, vol. XI, p. 381; European Court of Human Rights, Georgiadis vs. Greece, Judgment of May 29th, 1997).*

Likewise, the High Court of Cassation and Justice, Administrative and Fiscal Disputes Section, by the Judgment no. 1580/2008, delivered in the case file no. 70703/42/2006, during the public session of April 11th, 2008, noted: „*Therefore, the High Court held that any decision likely to have an effect on the rights and fundamental freedoms must be justified not only in terms of competence to issue that administrative act, but also in terms of the possibility of the person and society to assess the legality and merits of the measure or the compliance boundaries between discretion and arbitrariness. To accept the argument that the employer does not have to give reasons for decisions, is tantamount to rendering innocuous the essence of democracy, the rule of law based on the principle of legality*".

ORDA's interpretation that implementing the provisions of the Decision no. 114/2016 does not imply additional costs for the collecting collective management organizations is contradicted by the provisions of the arbitration award that set a maximum fee for covering the collection costs of 3% for the cable retransmission sourse or 9% for the public communication source *(i.e. the information at point A)* and fail to provide a management fee for covering the costs for processing the information required for distribution of the amounts payable to other collective management organizations, i.e. the information at point B). Thus, there will be additional costs for human resources that will be responsible for the preparation and communication of the information to the competing collective management organizations, costs that will be incurred by the members and non-members represented by CREDIDAM, whom are withheld an unlawfully higher fee than in previous years.

Referring to the ability to collect and distribute to its members of the collecting collective management organizations, does not justify for the supervisory body to decide that they have the financial resources to also achieve the task of the recipient collective management organizations. This situation causes damages to the collecting collective management organization which is bound by the Decision no. 114/2016 to incur additional costs that were not provided even by the Arbitrators or Courts.

3. Conclusions

There are a number of differences between the two procedures and the main cause is that for the "private copy" field the sole collector represents and collects for several categories of right-holders (authors, performers and producers of phonograms), a fact which

[10] Article 41 The right to good management (1) Every person has the right for its/his/her problems to be handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. 26.10.2012 the Official Journal of the European Union C 326/403 RO (2) This right mainly includes: (a) the right of every person to be heard before any individual measure which could prejudice it/him/her; (b) the right of every person to access its/his/her file, while meeting the legitimate interests of confidentiality and of professional and business secrecy; (c) ***the obligation of the management to give reasons for the decision****.; (...).*

also determines a special regime for the two procedures.

There is no legal basis to regulate beyond the provisions of Law no. 8/1996 on Copyright and Related Rights the contents of the transparency obligation incumbent upon the collective management organizations other than those designated for the private copying source.

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PROPERTY AND FREE INITIATIVE IN ECONOMY

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Abstract

The property is a subject that has been and it is studied by specialists from the economics, philosophy, law, history fields etc. It is natural to be a subject of attraction since the property is an essential precondition of the human economic activity, activity that provides the basis of his existence and creates the foundation for the other human activities. As between economics and law – how everybody knows – exists a close interdependence, it is necessary to explain this interdependence from the property perspective, as well as the relationship between property - economic liberty - free initiative. A clarification of ideas about these things and theoretical aspects, from economic and legal point of view, we believe that will have a benefic effect for the economical, legal and political practice etc.

Keywords: *property, economic liberty, types of property, free initiative, private property.*

1. Introduction

The property issue is one of the most important issues of the economical theory and practice, we can say not only economical but also political, legal, moral, etc. The human existence is linked to the property, the goods approximation by humans in order to meet their needs, initially in a pure form, dirrectly, and then through conventions and social norms, is determined by their interests, on one hand and of insufficient resources in relation to their needs, on the other hand.

In other words, it is a constant and a characteristic of a human and of the human society, a natural reality, acknowledged by the human, we can appreciate that it is both a social relationship and also a natural law. As we can not breathe without oxygen, in the same way we can not exist without the approximation and consumption of goods, processes which have as a prerequisite the property. It accompanies us all the time, from the appearance of human, at all stages of their development. They have acknowledged the property, since ancient times, as something you can not miss, as something that can not be denied. The property exists, is on the natural course of life to relate to her, and account for it. Paraphrasing the author Marin Preda, who said at one point in the „Morometii" novel, that „there is nothing if there isn't love", we can say also that „there is nothing if there isn't property". This is why from the earliest times it has been trying to explain what the property is, how it may be seen, both in terms of individual, as well as from the society point of view.

Ideas about property can be found in religious writings, such as „Old Testament", where ownership appears as being acknowledge by the human as a natural reality, in the writings of the thinkers from antiquity to our days, philosophers, historians, economists, lawyers, sociologists et. al. Plato, Aristotle and other antiquity philosophers made a lot of references about property in general and its role in society, on the property natural character, as well as on the justification of a type of property or another. Plato looked with critical eyes private property, while Aristotle claimed private property, seen as an instrument of existence considering that it refers at the goods approximation necessary to the existence. He further said, that everything beyond the first need mean wealth and not property, even if wealth led to a multiplicity of instruments[1].

Religious and philosophical ideas regarding ownership intertwined with the economical and legal ideas. Property approach from an economic perspective is, in our view, an objective necessity. Human must live, must satisfy their needs with goods from the nature, or with goods (services) created by him. This implies economic activity. Not accidentally the property is viewed in the economic sense, as the totality of relationships between people in connection with the acquisition of goods, as a historically defined form of ownership. It is natural then that economical ideas to be generated by the goods and property interests. If we look at the course of the economical ideas across the time, the way of the shape, of economic doctrines set up and development, we find that in the center of the preocupation is located the property, both as an theoretical reflection of natural and social reality and human position to goods, and also as a goods approximation, possession and use. Mercantilists were speaking about wealth and reflection (embodiment) of it through its precious metal, of enrichment through commerce, industry and especially currency. Physiocrats, focusing on agriculture, looked at the

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[1] Musceleanu, M., p.7.

property as a natural law, claiming property guarantee and, on this basis, of the economical freedom. On this idea went and go the liberalism representatives which considers that the individual is the only reality, according to natural law, as he is his own master, master of his own will and his own body, thus being the owner. Hence the idea that the property is natural, any individual owning a property, those self. In this context, the property is justified by the idea of work, human acting on the nature, inherently it has the right (natural) on the products of his labor. So, not only property exists naturally, but is also necessary.

The liberalism as a economical doctrine, known over time shades, some of them being outlined in the current independent thinking. For example, the neoclassical current which it flows from the classical thinkers from Adam Smith, David Ricardo, John Stuart Mill and others, it was divided into three schools of thought: English marginal school, Austrian school and Lausanne Swiss School. The view differences does not refer to the property, but to the interpretation manner of the economical concepts and facts and from here of the action directions. Ideological base is the same, no one denied and does not deny the property in the economical sense, not even K. Marx, which defines the property as „Appropriation of nature by an individual within and by means of a determined social forms."[2].

Although Marx criticizes capitalism and its foundations, the idea of ownership remains as prerequisite for production and social development. It is criticized capitalist private property and the way of creating, acquiring and developing them, given the fact that the real creators of the property, according to Marx, in the sense of wealth, are those who work (working class), who are exploited by those who own the means of production and, on this basis, economic strength.

The development of economic thought in the twentieth century and early twenty-first century by relevant thinking trends such as Keynesianism, monetarism, institutionalism, behaviorism, etc. is based - on our opinion - on the idea of the property which underlies the real economy and structuring economical behavior of people, communities and society as a whole.

In reality every economy is a mixed economy, and its working mechanism is the market mechanism, a mechanism which creates and distributes wealth (the subject of property). In conclusion, understanding wealth as a materialization of the property, all economic doctrines have focused, or on the creation of wealth (Adam Smith), or on the distribution of its (David Ricardo), or on the wealth increase (John Maynard Keynes) or on the explaining the human economical behavior.

2. Property at the intersection between economic and legal

As highlighted from the above, human existence is linked to the property. Between this and the economic interests of the people there is a biunique relationship. The property is manifested in society, mainly, in the form of economic interests, and these, in turn, drives the society members towards the development property (wealth).

An economic interest is always determined by the satisfaction of human needs. Just as the human needs know an evolving, the same thing happend with economic interests. They are constantly evolving, from primary phase imposed by the direct contact of human with the nature, at more complex and advanced forms like those of today.

Economic interest is causing the act of human awareness about its needs and therefore, his action for their satisfaction. People acquisition of conscience interests, transform these into action motivations, purposes and momentum of human activity. Human being involve, seeks to transform nature, to acquire goods from nature to produce more and to create wealth, from the awareness of the property existence, which gives a reason to the goods approximation to meet their needs. It is reported to goods, at the wealth, not only based on its needs, but also from the relationship between him and other members of the community in which he lives. Hence, it follows that in our consciousness, the property is represented on one hand, as a social relation between people in connection with obtaining and acquiring goods, on the other hand, as a material wealth, a quantity of goods that we are approaching and dispose of them whenever we like, according with our interests. This prompts us to point out that there is a separation between ownership seen from a theoretical point of view, as a stand-alone concept (social relation) and property object, goods of various kinds (wealth itself).

From economical point of view property – as I said – it is a social relationship, the property subject is recognized only within this relationship. So, the property outside human society does not exist, it does not make sense and content. The appearance of the human, of the human communities, has generated property recognition as a relationship and as a object. The members of the human communities to make a living, became aware that the proximity of goods for their own use can not be achieved if other members do not agree, do not recognize this right. In other words, appears objectively the idea of property for the purely purposes, untouched by any interpretation, respectively the power exercised by someone on his property, on his riches, shall be recognized by other members of the community, the property being essentially a way of achieving human powers over wealth.

The rules of coexistence of human societies includes also the one regarding ownership in the form

[2] Hanga V., 1971, p. 171, apud K. Marx, p. 661.

of customs, rules, regulations etc., which gradually, with the advent of state and law were transformed into legal norms, meaning a right distinct – right property. „There has not been and there can not be human society without the presence of property rules and therefore property rights, expressed or implied, of organizing the relationship between people in order to use things and goods. In this view, the thing that differentiates companies, which opposes is not the presence or absence of property rights, but how those legal rights enshrined combines and conjugates with each other."[3] In other words, property in the economic sense is metamorphosed in the ownership in a legal sense, namely in property right. So, the property besides de economical valence, embrace also a juridical valence, meaning that the goods proximity, acquisition and appropriation become a right, reinforced and sanctioned by the coercive power of the state.

Hegel said that the individual and property are inseparably linked. The property is a condition of life and human development; it is generated by the human nature and must be appreciated as an absolute and primitive law, which is not resulting from any outside act, as occupation, job or contract. Property right came from human nature itself. It is sufficient to prove that you are human to enjoy also from the right property[4].

Between the economical property approach and juridical approach, there is a clear interdependence. We consider that we can not talk about property only from the economical point of view, or only from the juridical point of view. The property is a unitary concept reflected both in its natural character, and also in his subjective character, given by its natural reglementation in society, respectively by its right property.

„Property rights are as fundamental as the rarity and rationality of resource allocation"[5].

In essence, property right is „that subjective law that gives expression to the approach of a thing, allowing to his owner to exercise the possession, to use and dispose of that thing, under its own power and self-interest, and in compliance with the legal provisions"[6].

„The guarantee and protection of the right property is a major attribute of the state, ensuring consistency and stability of economic actions, directing economic agents movements by creating the incentives, through economic agents empowerment for the results obtained and to partners by sanitizing economic life in general to ensure the normal operation of the market mechanism"[7].

So, we can appreciate that property right is a fundamental right, a fact accepted by the constitutions of democratic countries and international treaties. J.J. Rousseau said that „the right property, through the guarantees stipulated, will confer the natural status of development to all human communities and each of their members."[8].

Defining and defending the property rights is an increasingly important part of the rules that govern economic life, causing what economic movements must be made by creating the incentives, by empowering economic agents towards results and to partners, but also for general economical life cleaning in order to formulate and achieve a correct supply and demand based on the competition.

According to Professor Belli, property rights, as a whole mechanism of economic growth, rests on the following pillars of strength[9]:

a) access to the natural and human resources;
b) technological investments;
c) people's preferences;
d) development institutions.

„There are at least three major circumstances that circumscribe the content of property rights. First, there is the fact that these human rights gives social permission to access the resources of its existence. But he realizes this access, usually, not as a parasite, but as a creator of goods and services from the acquired resources. Property rights looks therefore before all the facts at the material production. Secondly, the same rights are a prerequisite of the goods exchange. The sale and purchase act, daily repeated a million times over, can not take place, if those engaged in this process do not owe (or authorized by him) the goods exchanged. Through the exchanges, however, property rights include not only production, but also material goods and services distribution. Third, property rights permit the appropriation of goods, not only as a result of production and distribution, but also of the redistribution process, as taxes on profit or wealth, inheritances, donations, etc."[10].

Romanian legal doctrine in interpreting 480 article from the old Civil Code, consider that the attributes which form the content of property right are: the right to use the asset (jus utendi), the right to collect the fruits (jus Fruend) and the right to dispose the good (jus abutendi). The new Civil code establishes (555 article) as property attributes: possession, use and disposal. Possession (jus possidendi) enables the owner to exercise actual dominion of the work in its materiality, directly and immediately, through its own power, its own interest or to consent that the possession should be exercised in the name and on behalf of, by another person[11].

[3] Berthu, G., Lepage, H., 1986, p. 53.
[4] Florian, M.,1938, p. 290).
[5] Ryan, A., 1987, p. 1029).
[6] Boroi, G., Anghelescu, C.A., Nazat, B., 2013, p.13.
[7] Iancu, A., 2000, p.200.
[8] Rouseau, J.J., 1957, pg. 24.
[9] Belli, N., 1996, pg.8.
[10] Belli, N., 1996, pg.8.
[11] Boroi, G. et al., anul 2013, pg. 15.

From a legal perspective, the property characters, as set out in the new Civil code (555 article) are: exclusive character, absolute character and perpetuity character. The exclusive character put in mind that the owner of the property is the only one entitled to exercise his right attributes, being the only one who can oppose of any disturbance whether they are caused by individuals or by the state. Perpetuity character highlights the fact that property right doesn't have a limited time, can not be lost through disuse by the holder. In other words, the right to private property is inalienable[12]. The absolute character is explained by some authors as a character which targets property rights of erga omnes, which means that all other law subjects are forced by law to respect the owner rights. Related to this character, E. Chelaru highlights the fact that its existence does not depend on any rights that would serve as the basis of the constitution. In other words, property right is defined by itself and not in relation to other rights. Property right is the only right that allows the holder to exercise all the prerogatives conferred on them, in the power and own interest.

Throughout the time, the property understood as a social relation clad two types:

A. common property, in a common sense (to all), the state being the holder, through central government (the public domain - the national interest) and/or administrative-territorial units (public domain of local interest: town, city, county), The attribute of all, in reality means that, nationwide, of the citizens of that country, at a local level, of the population who owes and live particular territorial area; B. Private property, seen as private-particular property and also as a private property of the State (state private domain) and of the administrative-territorial units (private domain of the administratively-territorial units). In the case of private-particular property, the property holders are individuals (private individual) and/or groups of individuals associated based on certain interests, with a common purpose (private property associations). When the property owner is a single person or entity, private property is exclusive, and if there is more than one person, it is common private property, in condominium or co-ownership. Private state domain and private domain of the administrative-territorial units have a distinct status from private property (particular), of individuals and groups associate. First, the owner is the state, on the one hand and administrative-territorial units, on the other hand, secondly, its management is performed centrally by the state or at a local level, in the interest of citizens. The difference between public and private domain of the state and of the administrative-territorial units, is not significant for the economic sense of public property, but how does it fit into the civil circuit. From a legal perspective, both sectors (public and private) have as a holder the state autorities (central or local), so the property is seen in the unity of the public, on one hand and the private sector, on the other hand.

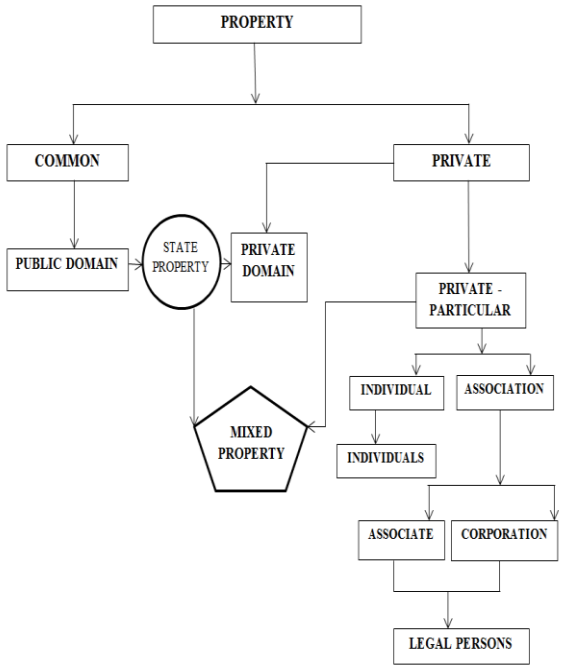
It is appropriate to make a statement. In the above classification of the property, we took into account the current legislation stipulations from Romania. Text of the law - in our opinion - does not always reflect accurately the social and economic reality. Is possible that some legal concepts to be nuanced, more or less, towards economic concepts. For example, the existing Constitution, as such as other laws, do not use the term state property, but public property, showing that its holders, as state through the central organs of administration and administratively-territorial units by local autorities administration. At the same time, in reality there are private domain of the state and administrative-territorial units, which as a type of property is private property, whose holder is the state, on one hand, through administrative central and administrative-territorial units, on the other hand, by the local administration.

From the economists perspective and not only, it is normal to use an integrating concept, **the state property**, as a unity between the two major areas (public and private domain of the state and public and private administrative-territorial units). This term of state property, we consider that defines property distinct which enter under the state umbrella (central and local government autorities), ensuring a net shootout by the private-particular property.

Based on these considerations and taking as a criterion the property holder, is apparent clear the existence in the society, in the current circumstances, from an economic perspective, of two major types of property, state property (public and private domain of the the state and administrative-territorial units) which reflects the content of public property (common) of all citizens at national and/or local level and the private - particular property, which reflects the content of private property (individual and associative), either as a exclusive form, or as a common private property (in condominium and co-ownership) - fig. no. 1. According to Romanian legislation, holders property rights are constituted on types and, within them, by forms of property.

[12] Baias, F.A. et al., anul 2012, pg. 608-609.

Figure no. 1



Considering that a market economy and a democratic society can not be constitute and developed only under the conditions in which have the basis on private-particular property, the constituent legislator enshrined, in several articles of the Constitution, the prominent character of this kind of private property. According to this principle, within the property system, private-particular property is the rule, and state property is the exception.

In order not to misinterpret the private property term, considering that the state holds the private sector, we will use in the following, private-particular property term, for what it represent the real meaning of private property across its owners.

If we refer to both types of property, we find the following general characteristics:

a) common property (common) manifests itself differently depending on the stage of society development, for example, in primitive societies it take the form of common property, today, the form of state property, which includes the private property of the state;
b) public property is broadly seen as the state property equivalent;
c) private property appears, on one hand as a private property of the state, on the other hand, as a private – particular property;
d) public domain can be of national interest, case in which, the property holder is the state, or other entity of local interest, so the property holder is the local authority, at commune level, city or county;
e) the double quality of the state and of the administrative-territorial units, by any legal person of public law and by any legal person of private law, gives them the right to be the property owner of the national public domain goods, or for interests or locally as appropriate, as well as of the private property goods;
f) goods which make up the private domain of the state and administrative-territorial units are not limited, the limited character is specific to the public domain;
g) all the movable or immovable assets under the civil circuit, can be the subject of the private property rights;

Private property (particular), occupies a central place in the property system from market economy countries. What defines the private property in a market economy, is not its presence in the manifesting forms, but the dominance of three essential legal principles:

a) any property right can only be an attribute of the persons, defined by individual and personal rights;
b) any law relating to the possession, resources use or transfer can not be the subject of several simultaneous and competing properties;
c) any legally established right of an individual constitutes a „private good", which can be freely assigned or transferred for the benefit of the others.

Private–particular property, from its appearance, has been particularly visible in the exclusive private property form, holder being a single person or entity and under the common private property form, which acts as a condominium ownership and/or co-ownership. In the case of individual property, in which the one who owes the production factors and uses them directly, by using their own labor (craft individual property, of the peasant, of the merchant, of the various services provider etc.). It manifests itself when an individual who owns the production factors, its uses in the goods or services production and marketing, by hiring factory non-owners salaried workers, but the owners of their own workforce. Exclusivist private property is put in value through the association process of several individuals in various forms. Private–particular property is also manifested through consumers broad category, who enteres into the possession of the consumer goods exercise their rights to use them. The fact is that, for the natural and upward course of the economy, very important is the private–associative property, organized or in the form of capital companies or individuals, where the owners uses non-owner employees, either in the form of cooperatives. An important role in the economic development it is also the individual property of those who initiates and organizes various businesses on their own (eg. Small entrepreneurs).

State property (public and private domain), present in different proportions, in all countries, is characterized by the fact that the goods, those from investments particularly, is owned by the state organizations, as property subject. The object use and

management of this property is the task of the various public administrations, central or local.

When talking about the state public property form we refer at the infrastructure constraints sectors such as energy, rail transportation, communications, "I assume normal social conditions and requires major capital investments; in the case of military-strategic businesses; in the social sector; in the social services delivery; in the fundamental scientific research realization. However, its proportions spread diminish the workers interest and initiative, which leads to the production efficiency decrease, causing a social indifference and thus lead to the real chance to live on the account of others."[13]

The Civil Code covering both property forms, and also the acquisition manner. According to it (Civil Code, 555 article), all the using goods or private interests belonging to individuals, legal persons of private law or public law, including the assets which make up the state private domain and territorial units, forms the private property. State assets (Civil Code, 554 article) and of the administrative-territorial units which, by its nature or by the law statement, are of use or public interest and forms the public property object, but only if they were legally acquired by them.

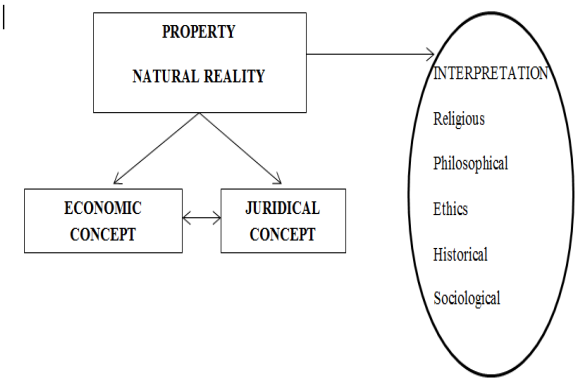
Private property, in other words, is the holder right to possess, use and dispose of property exclusively, absolute and perpetual, within the limits set by the law. It, through its components (individual private property and associative property) is presented as the only legitimate form of attaining wealth, established through native approach, production and exchange. In contrast, public property (comprised of both state public domain and also the public domain of administrative units), the so-called public sector, is established through coercive expropriation, public interest investment, through taxation and fiscality. The last one, often constituted to the detriment of private – particular property, acquires, under certain conditions, a parasitic character, which inhibits wealth creation. We can say that the private property form has a primary advantage that contributes to the development of personal initiative, and also of its entrepreneurial skills. Moreover it is the basis of the economic freedom and of the prosperity growth, as it ensures the production development according to social needs. Regarding the disadvantages of this form we can mention the risk of starting a business, and also the high pressure on the owner.

In the society, we meet, in the current period also the **mixed property**, the resultant of the public–privat property, benefit from a economical perspective, as the state efforts, in this context, is correlated with the efforts of private companies, for making investments that benefit all citizens and private organizations which are participating in the partnership. Mixed property consists of shapes combining and property different proportions whose owner is the state and/or administrative-territorial units and of property private–particular where the holder is a private investor, emphasizing that the general interest defies over the strict division of property.

Nowadays, as we noticed, coexist three forms of property: private- articular, of state and mixed. Private-particular property, occupies the central place in the property system from the market economy countries. Among these property forms exists, in the conditions of market economy, a permanent compatibility. Meaning that, in economic terms, they are subordinated, equally, to the universal economic principle of rationality and efficiency. Meanwhile, individual property - proven from work - liquidates the premises of the alienated property, regardless of the forms and of the historical conditions of alienation.14

In conclusion, the property, should be seen as a evident natural reality in which, in the unraveling process of its essence, of the society manifestation mode, of the types and forms that takes, of the role it plays etc. it can be given different interpretations. The most important are the economic and legal nature, along with religious philosophical interpretations, moral, etc. Between these two interpretations which we dealt in this article, economic and legal, there are no differences, do not oppose each other, but rather there is a close interdependence, we can say a unit of two sides of the same realities that complement one another (fig. no. 2).

Figure no. 2



Therefore the economic content of the property highlights the growth wealth sources and mechanism; the distribution principles of the material assets and income; the causes of differentiation in the wealth distribution process among the population, while, through legal characteristics we reflect the movement, patrimony "movement"; patrimony rights distribution and redistribution (for example, drafting legal purchase - sale acts of the apartment, car, etc.)"[15].

[13] Soroceanu, O., Filip, N., anul 2005, pg. 109.
[14] Dobrotă, N., anul 1997, pg. 64.
[15] Soroceanu, O., Filip, N., 2005, pg. 109.

3. Private property and free initiative manifestation

The property provides the economic freedom manifestation premise of the human, materialized in the decisions and actions of the production, proximity and goods consumption. Individual free initiative, as a way of expression of economic freedom is present only in certain conditions, namely when the property, better said its existing forms in the society, will permit this thing.

The first type of property known by the humanity was the common property, as common property, in primitive societies the lowest level of the technique and technology development led to a common work, as the only way of human survival. The individuals economic interests were the same, they started from the goods shortage, from the need for survival and of the individual and community. The economic freedom and, respectively free initiative, it could not occur under these conditions at the individual level, had no real basis, since all the members of society possessed in common material goods and production conditions. The economic freedom is manifested only at community level, which appears in the position of the property owner, on which can make economic decisions of initiation, organization, production development for a equal distribution of the obtained goods, for their consumption. It is noted with a great clarity, that the economic action, economic initiative, is closely linked to the property and it does not exist independently of it.

Exceeding the primitive stage, society beginner and thus of economic activity, due to the technical and technological progress, has generated a restriction of this type of property moving gradually to the private property. This fact meant the recognition by the society of the individuals right, to take possession and use and dispose of diverse nature goods, to satisfy their own personal interests. Private property, therefore, reflects the natural relations between society members (individuals) regarding their position on certain parts of social wealth, acquiring them individually, to meet their personal consumption needs.

Regardless the forms that existed over the time and exists today, private–particular property ensures the economic freedom of the individual, standing at the base of its free initiative. Thus, people, goods owners can manifest themselves as economic agents, by consuming how they consider to be more favorable, their goods. They may decide to maintain, collapse or develop their economic actions, can freely participate in sale and purchase acts, to all kinds of associations in order to produce and sale goods, to enter into agreements and contracts etc., all of which are generated by their personal economic interests. Of course, this freedom must be seen in the context of some economic objective laws and on the existence in the society of proper legal regulations.

So, in the society is created a supportive framework for private property expression and objective mechanisme for regulating the economic relations between individuals, through which ensures not only the self-interest promotion but also of the public interest (general).

The fact is that the economic interests of individuals are closely linked with thousands of wires of private–particular property, no matter of the concrete form of the manifestation. All economic operators follow through their actions a certain personal gain, think about all their past, present and future actions through the prism of maintaining and developing private property. Triggering free initiative, private–particular property put in work the people minds in order to find ways to increase efficiency, in order to respect the rationality principle from the economy, to use resources carefully. It stimulates scientific research, maintain its flame, forcing creativity triggering, introducing a new perspective, in drawing up viable solutions, even spectacular, of optimizing the economic life of society.

Ignoring private–particular property, taking measures of restriction or even constrictions, organizing and structuring economic life on other criteria and coordinated and also free initiative restriction, led and lead to lack of interest from individuals, apathy, temperance initiative of any kind, the manifestation of bureaucratic trends, not only in leadership but also in the actual pursuit of economic activity. The failure of socialist economies, as is known, was primarily due to the annihilation of private–particular property and to the socialist property establishment and "development", so-called property of all the people. This led, among other things, to the limitation up to liquidation of free economic initiative, to the abolition of free market economy and its mechanisms, to the establishment of the command economy.

By abolishing private property, people look at it from economic point of view, became simple automatism. The only economic agent, was the State, led by the Communist Party, which decide what's right and what's wrong, which are the laws that should govern economic life, how economic mechanism should look like and operate. Thereby acting, contrary to the natural course of the economy based on private property and free market mechanisms, have resulted serious errors in economic decisions, in all bearings economy. So, the economic failures of the communist government, were due, largely, to the destruction of private property and thereby, of the economic freedom and initiative freedom restriction.

Free initiative – founded on private–particular property – it is considered a natural human state from all times. Normally, it was required and requires no matter how it is reflected in the economical, political, legal doctrines etc.

It is objectively required, underpinning at the economic regulatory mechanisms, at the basis of the social economical progress. Private property provides not only the human expression freedom as an economic

agent, but the possibility of this manifestation, generated, primarily, by the economic support provided to the individual – his property and, secondly, by the awareness of this position that he has in society and the role they must fulfill. All of this impel him at action, because the purpose of the action is recognized and supported by society.

4. Conclusions

Economy society, is not only an important component of it, we can say that is the fundament which ensures the existence and operation of others society components, but it also presents a fascinating field, very often surprising us by the manner in which it manifests itself.

The humans has always endeavored to understand, to explain its mechanisms, to take action as much as possible, according to them, to correct his errors or ignoring the signals that it receives, to understand them, to shape their actions and behavior so that his interests can be met. Sometimes it succeeds to harmonize with the economic laws, with the economic mechanisms requirements and specifics, with its dynamism, sometimes not. The results are evident in one case to another.

Of course, in order to smooth the integration process of the human into the requirements and into the functional mechanism of economic life, it carefully observes, investigates and studies the real economy, in order to shape their actions and be able to action in line with the objective reality. This is why, any extra knowledge of one side or another, of one aspect or another, of economic life it is beneficial. This is reflected by the course of the economic ideas over the time, which provides the theoretical foundation of practical human actions. In this context, we consider that is very important and those some considerations that we have made in this article, regarding the property, at the interdependence between economic and legal for its explanation and its manifestation, at the relationship between economic freedom and property.

Certain the property is seen as a natural reality of humans, is beneath all its actions which aim to satisfy his needs, which allows the perpetuation of species and society as a whole. The human in order to exist first he has to secure their basic needs, and then has to be able to conduct other activities that define it as a superior human being. For this he must understand the property essence, its economic and legal perspective, which underlies and support economic freedom and his free initiative. In this article, we wanted to bring in the attention of those interested in the understanding and studying of the economic life and its mechanism, exactly these aspects which we mentioned above.

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ACCOUNTING HARMONIZATION AND HISTORICAL COST ACCOUNTING

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Abstract

There is a huge interest in accounting harmonization and historical costs accounting, in what they offer us. In this article, different valuation models are discussed. Although one notices the movement from historical cost accounting to fair value accounting, each one has its advantages.

Keywords: *Accounting harmonization, accounting regulation, historical cost accounting, revaluation model, IFRS, fair value accounting.*

1. Introduction

Major factor that affects a system of accounting regulation is legal system. Continental Europe is based on Rome Civil Law, where one can see a direct regulation of accounting throughout acts, decrees and various accounting standards. This direct regulation makes to exist a connection between accounting and taxes [1]-[6]. Accounting regulation is in such a case unified and cannot bring some additional effects for specific financial statement users. Anglo-Saxon manner is directed on common law.

Regulation is principle based on the requirements that are defined by professional institution in the shape of accounting standards. State plays the crucial role in direct system of accounting regulation. Above mentioned manner is intense for the training and education of professional accountants. This manner is constructive to accounting practices [7], [8].

Researchers and practitioners have discussed and have stated about measuring of balance sheet items. There are very important inadequacy and inconsistencies in presented information at the application of various measuring bases.

Accounting theory and practice has established quite a wide range of possible manners to the measuring in accounting. Accounting data must be based on reliability, clarity, and comparability manners to measuring in accounting a significant part of the regulation of accounting both at the national level and within international accounting harmonization. When it standardizes the output of accounting, which is characteristic for Anglo-Saxon area, or when it standardizes current accounting practices and the related regulation of financial reporting used in continental Europe, there are always specific rules set, adjusting the measuring used or accounting of transactions during the reporting period as well as the measuring for the preparation of financial statements[1] [10].

Accounting rules are theoretically based on the choice of setting a single measuring basis, which would be usualy used in measurings in all situations, or may use mixed measuring manners[2] [11].

Accounting practices used by International Financial Reporting Standards (IFRS) are characteristic the use of mixed measuring manners. Recently, there is an effort of the International Accounting Standard Board (IASB) to enhance a single measuring manner.

According to Dean[3] [12] there exists much concern about the current mixed measuring model, which uses fair value and cost within financial statements[4] that is not the most preferred or perhaps reliable basis of accounting. Choosing an suitable solution shows up difficult[5].

2.1. Measuring Manners

The starting point can be established for the purpose of measuring that (according to the standard setters) best satisfies the norms of the financial accounting and reporting measuring. These estimation bases are the following: historical cost, replacement cost, value in use or fair value.

The objective must measure the selected measuring basis, other bases being allowed only as proxies where direct measuring was impossible[6] [13].

The consistency of the estimation, comparability and meaningful assemblage of the accounting data are the advantages of this manner. The adoption of single

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measuring method is predicated on the belief that such a measuring will be always the most relevant and will be reliably estimation.

Researchers are searching on perfect measuring basis. Macve[7] [16] thinks that it is impossible to prove that any individual measuring manner is Pareto superior to others for external users ideally they require a range of alternative estimates in order to triangulate the information they obtain from various sources. IASB tests to get and protect such a base in its projects dealing with measurings[8] [17]. According to the IASB's projects the fair value measuring should be such a base, however, in our opinion in many cases not even fair value meets the norms, which a measuring in financial accounting should meet.

As mensionated above, virtually all systems of accounting regulation (without exception of IFRS) do not currently use a single measuring manner, required and preferred in all cases, but the mix of measuring manners. The convenience of this manner is that it is not necessary to use a single measuring manner for all situations, which, regarding the information demands of users, but also for example the reliability of establishing such measuring might not be suitable in a particular situation.

Different scales for different reasons is adequate for financial accounting [18]-[20]. Cost measures may provide useful margins on turnover for predicting operating cash flows in a going concern business, whereas fair value may be a more direct and reliable means of valuing a portfolio of marketable investments.

However, drawbacks of using mix measuring manners are obvious – it leads to assemblage of the data measured by different manners, the explanatory power of such assemblage is weak, plus the use of different measuring manners entails various risks. To report the items which are measured by different measuring manners separately is therefore a minimum requirement, which should be held. Separate reporting of items bound to various estimating risks enables the users of financial information their independent analysis and assessment.

Measuring manners are in practice differentiated according to both the moment at which the measuring is performed (e.g. initial recognition of the particular item or subsequent measuring) and according to nature of the subject of the measuring (e.g. long-term assets in terms of meeting the prerequisites of going concern, inventories and derivatives or securities held for trading are measured differently.)

By accepting this manner the measuring problem has been limited to the search of an suitable measuring base for the measuring of particular items in a particular situation. Only one method of measuring would be associated with a particular item, different item would, or could, be measured using different methods, if those methods best represented the economic properties of the particular item [13].

The norms for the choice of the measuring manner are determined by standard setters. The starting point should always be the information demands of the users of financial information. However, there are different groups of the accounting information users that have different benefits and different demands. The final selection of the norms is always dependent on the decision of the standard setters, who may and in fact must give priority to the benefits of certain groups of the accounting information users[9] [20].

If the accounting regulator is the state – a state institution (what is common in continental Europe) and if there is a close relation between accounting and taxation in the country given, the norms for the selection of the measuring manner may be strongly affected by the fiscal benefits of the state (accounting is then adjunct to the tax aspects) and other demands of the state administration (a crucial source of demand for accounting information is the state), and the benefits of other users of accounting information may not be adequately taken into account. This method of accounting regulation is often characterized by the usually not explicitly formulated basic objectives of financial reporting or conceptual framework.

Continental Europe is also characterized by the strong influence of the prudence principle in choosing the suitable measuring manner (manners). It was this principle together with the possibility to partly ignore the benefits of the users of accounting information (investors, etc.) which is given by the fact that accounting rules are set by a government organization, which significantly affected the norms for selecting measuring bases and blocked or hindered the penetration of the measuring in fair value to accounting (as an example we can mention accounting in Germany or France). Another situation arises in case that setting the accounting rules is carried out by a professional organization (typical of the Anglo-Saxon area). This organization begins from the benefits of different groups of users (who in fact create a demand for accounting information) and tries to meet them suitably when creating accounting policies (including the definitions of measuring manners). The standard setters are, however even in this case before the difficult task of deciding which demands and benefits of users of accounting information it is necessary to prefer and how they are optimally met.

The representative of the regulation (harmonization) of accounting, which is not adjunct to the state power, is IASB (as well as the Financial Accounting Standards Board - FASB, UK Accounting Standards Board). The conceptual framework of the IFRS, based on the fact that the financial statements are

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intended primarily to external users, analyzes the information demands of different groups and states:

While not all of the information demands of users can be met by financial statements, there are demands that are common to all users. As investors are providers of risk capital to the entity, the provision of financial statements that meet their demands will also meet most of the demands of other users that financial statements can satisfy[10] [21]. The measuring must be also adjunct to these goals.

In summary, the primary norms for evaluating possible measuring bases, derived from the conceptual frameworks, are:

1. Decision usefulness;
2. Qualitative characteristics of useful information;
   - Understandability;
   - Relevance — predictive value, feedback value, timeliness;
   - Reliability — representational faithfulness, neutrality, verifiability;
   - Comparability;
3. Concepts of assets and liabilities;
   - How the expected cash-equivalent flow attribute of assets and liabilities is measured;
4. Cost/benefit considerations.

2.2. Application

Within this application part we would try to analyze the implication of various measuring models: historical cost accounting, fair value accounting and revaluation model used for revaluation on selected financial ratios, concretely:

1. profitability ratios: ROA, ROE, ROS
2. liquidity ratios: current ratio
3. assets turnover ratios: assets turnover
4. debt ratios: debt ratio, Equity/Debts ratio, average, leverage, interest coverage, Assets/Debts ratio
5. capital markets ratio: EPS

A. Historical Costs Accounting

The most popular model in Western Europe is historical costs accounting. When applying this model, we have to satisfy the prudence principle perceptions and that's why we are unable to revaluate assets on higher values. When revaluating on lower values there is applied the computation of impairment.

Historical cost accounting provides us information about the effect of using historical cost model on profitability ratios, liquidity ratios and assets turnover ratio.

Historical costs accounting linearly behaves profitability and liquidity ratios. The inverse tendency is seen could be seen (however marginal) for assets turnover ratio.

Historical costs accounting, proportional tendency is visible within EPS analysis. All other ratios (with the exemption of debt ratio and financial leverage) show identical tendency, but less proportional. The inverse tendency of debt ratio and financial leverage could be explained by the fact that higher the value of these ratios, higher the debt exposure of the company.

B. Fair Value Accounting

Fair value accounting is currently used mainly for revaluation of selected financial instruments, investment properties and biological assets. Fair value accounting provides us information about profitability ratios, liquidity ratios and assets turnover ratio.

Fair value accounting behaves all profitability ratios in line with revaluation. Fair value model has marginal impact also on liquidity ratios and assets turnover, but these ratios show us inverse tendency.

Fair value accounting provides us information about the debt ratios and earnings per year.

Fair value accounting are the most sensitive ratios: EPS and interest coverage. Marginal influence of the revaluation is visible for Assets/Debts ratio and Equity/Debts ratio.

Debt ratio and financial leverage comport similarly and prove the inverse tendency against other financial measures. This inverse tendency is explicated by the fact that higher the value of these ratios, higher the debt exposure of the company.

C. Revaluation Model

Revaluation model is utilized for realizable financial instruments. When applying this model we also have to revaluate assets at fair value, however the revaluation does not have any impact on company's profit or loss, but onto other comprehensive income (being a part of equity).

Revaluation model provides us information about the profitability ratios, liquidity ratios and assets turnover ratio.

Revaluation model has any impact on ROS and current ratio. Revaluation model behaves ROE as well as other ratios (with less significant tendency) in inverse tendency.

Revaluation model provides us information about the debt ratios and earnings per year.

Revaluation model has any impact on ratios EPS and interest coverage. The linear tendency is visible for debt ratio and Equity/Debts ratios, however inverse tendency is visible for debt ratio and financial leverage. The inverse tendency is explicated by the fact that higher the value of these ratios, higher the debt exposure of the company.

[10] Bonaci C. G. and Strouhal, J.. Corporate governance lessons and traders' dilemma enhanced by the financial crisis, in *Proc. the 5th WSEAS International Conference on Business Administration*, WSEAS Press, 2011, pp. 66-69.

3. Conclusions

There is more visible the tendency of fair value accounting round-out-the world because of the increasing impact of harmonized accounting legislature (IFRS, US GAAP), but the historical cost accounting is very popular within continental European accounting systems. This tendency is explicated as a positive one, as one of the major premises for applying fair value or revaluation model is transparent active market. This cannot be claimed about emerging economies (e.g. in Central and Eastern Europe). Analysis of the impact of various models use for revaluation of assets on selected financial ratios proves us that these ratios are not very sensitive on revaluation model application, but on contrary, they are very sensitive on fair value accounting application.

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VALUATION FOR BIOLOGICAL ASSETS WITH HISTORICAL COST ACCOUNTING OR FAIR VALUE ACCOUNTING ?

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Abstract

The valuation for biological assets is regulated by IAS 41. Interesting debate is what valuation models it is better to use: historical cost accounting or fair value accounting? I will discuss advantages and disadvantages in this case.

Keywords: *Historical cost, fair value, biological assets, predictive earnings, valuation.*

1. Introduction

The reformation of the accounting standards regarding fair value accounting has generated an intense discussion in recent years. Many accounting groups and institutions around the world, such as The International Accounting Standards Board (IASB), the U.S.A. Financial Accounting Standards Board (FASB), and the Accounting Regulatory Committee and the European Financial Reporting Advisory Group in the European Union (EU) have enabled the convergence of international accounting regarding standards based on market prices. The FASB released many standards requesting appreciation or exposure of fair values estimates for assets and liabilities, mainly for financial instruments.

For example, affirmations of Financial Accounting Standards number 87 in 1985 on employer's accounting for pensions, number 105 in 1990 on exposure of information about financial instruments, number 107 in 1991 on exposures about financial instruments.

The International Accounting Standards Committee released International Accounting Standard (IAS) requesting measuring at fair value and value changes to be recognised in profit or loss. The very important document has been the IAS 32 on exposure and presentation of financial instruments and the IAS 41 on Agriculture, released in 2000. The EU admited the whole existing IAS in the form of Commission Regulation (EC) 1725/2003, with the exception of IAS 32 and 39, that were admited in 2004 under Commission Regulations (EC) 2086/2004 and (EC) 2237/2004.

Fair value is defined as the amount for which an asset could be exchanged, or a liability settled, between knowledgeable, willing parties in an arm's length transaction (e.g. IAS 39, IAS 41, SFAS 107). In 2006 the SFAS 157 redefined fair value as the price that would be received to sell the asset or paid to transfer a liability in an orderly transaction between market participants at the measuring date.

Notwithstanding this persistent trend regarding fair value, the reformation has induced controversy among practitioners, especially over financial instruments (Day, 2000; Economist, 2007).

There are sceptics (e.g. Joint Working Group of Banking Associations on Financial Instruments, 1999) and with enthusiastic supporters of fair valuation (e.g. Chartered Financial Analyst Institute, 2007). The European Central Bank (2004) summarizes the potential drawbacks and advantages of a fair value accounting framework from the point of view of financial institutions. André et al. (2009)[1] argued that, as long as the market has been growing, no one was shocked by fair value accounting. Then, it started to reflect the market downturn in banks' balance sheets and it began to be stigmatized.

Most tests performed reflect lower predictive earnings power for farms using historical cost with respect to those using fair value.

Our research question is: What valuation is useful for biological assets: historical cost accounting or fair value accounting?

2. Valuation for Biological Assets with Historical Cost or Fair Value

The main purpose of this article is to deliver empirical proof on the existing academic debate about the predictive capacity of historical cost versus fair value based accounting information. We execute an empirical research of the significance of fair value and historical cost of biological assets for forcasting future gains and cash flows.

The evolution regarding fair value considers the demands of users of financial accounting and the efforts of accounting standard-setting bodies to reverse the pattern of declining relevance of financial information (Barlev and Haddad, 2003). Relating the fair value of assets and liabilities in the balance sheet draws the

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[1] André, P., Cazavan-Jeny, A., Dick, W. Richard, Ch. and Walton, P. "Fair value accounting and the banking crisis in 2008: shooting the messenger", *Accounting in Europe*, 6(1-2), (2009) 3-24.

attention of shareholders to the value of their equity and to periodic changes in this value, as is considered by the market mechanism. Fair value describes changes in assets values that will be realized in subsequent operations. In this respect, Aboody et al. (1999) got that upward revaluations of fixed assets by UK firms are positively associated with future performance, share prices, and changes. Given the growing process of globalization and economic integration, as well as the growing importance of financial markets, shareholders and stakeholders must a better assessment of the true performance and management of the firm, than allowed through historical cost. Two primary criteria requested by accounting standards are relevance and reliability. Relevance of accounting information is given and estimated in accounting research as its degree of association with share prices or share changes. Equity market value is realized as the valuation benchmark to assess the utility of accounting information for shareholders and financial users. According to Barth et al (2001) and Landsman (2007), the existing research proves an overall conclusion that fair value based information is more relevant than historical cost based information.

Academic discussion is usually interested in financial instruments and framed within the agency theory, assuming information asymmetry between market participants and the existence of perfect versus imperfect market conditions. Barth and Landsman (1995) established that in perfect and complete markets a fair value accounting based balance sheet reflects all value-relevant information. But, in more realistic market settings management discretion applied to fair valuation reduce from balance sheet and income statement relevance. Watts (2003) states that fair valuation is subject to more manipulation and, accordingly, is a poorer measurement of worth and feat than historical cost. He states that any attempt to ban accounting conservatism is sure to fail and that accounting can not overrun with the market in valuing the firm (Watts, 2006). Ball (2006) proves that fair valuation does not necessarily make investors better off, and that its utility has not been showed. Rayman (2007) sets that fair value accounting is liable to produce nonsenses and baffling information, if it is based on expectations that turn out to be false. Ronen (2008) demonstrates that endures from a lack of reliability and can be subject to manipulation. In the same vein, Liang and Wen (2007) are critical of the beneficial repercurssions of moving to fair value because it follows more managerial manipulation and induces less competent investment decisions than cost valuations.

Plantin and Sapra (2008) deduct that, when there are imperfections in the market, there is the danger of the appearance of an additional source of volatility as a result of fair valuation, and thus a rapid shift to full mark-to-market regime may be detrimental to financial intermediation and therefore to economic growth. Bleck and Liu (2007) prove that accounting makes it easier to prevent bad investment projects, hindering their liquidation hence adding volatility to hit the market at a later date and producing a crash in the asset price, growing overall volatility and decreasing performance (i.e. reducing profitability). It is an important decision that it can get.Gigler et al. (2006) concluded that even in the case of a mixed attribute report (i.e., some items are valued at market while others are carried at), fair value performs better: it demonstrates stronger signals of financial distress. Finally, Choy (2006) proves that for fair value to be relevant, necessary and sufficient conditions must be satisfied.

Almost all existing empirical studies on fair value test is relevant when implemented to financial instruments, analyzing associations between accounting numbers and share prices. They prove conflicting findings; while Nelson (1996) does not find fair value relevance, Barth (1994), Barth et al. (1996) and Bernard et al. (1995) do. Ahmed and Takeda (1995), Carrol et al. (2003), Eccher et al. (1996) and Barth and Clinch (1998) do get relevance, but under certain conditions. A recent study of Hann et al. (2007) gets fair value pension accounting does not improve the informativeness of the financial assertions and even impairs it.

Laswad and Baskerville (2007) get no association between cash flow and unrealized earnings from revaluation of assets to fair value. Ahmed et al (2006) get that addmission of derivative financial instruments at fair value is relevant, while revelation is not. Danbolt and Rees (2008) get that fair value is consistently more significant value than historical cost, although this significant value can be expressed via asset values and need not be incorporated into income computations. They get proof consistent with gains manipulation under fair value.

The IAS 41 brings the discussion into the agricultural accounting domain. Most authors are critical with the claim of fair valuation for biological assets and value changes to be admited in the profit and loss statement. Penttinen et al. (2004) require that fair valuation would inflict unrealistic fluctuations in the net profits of forest enterprises. Herbohn and Herbohn (2006) and Dowling and Godfrey (2001) request the increased volatility, manipulation and subjectivity of reported earnings under this standard. Both studies are accomplished in the context of the Australian Accounting Standards Board 1037 (similar to IAS 41) and give empirical evidence of Australian entities preference for cost valuation or delaying the adoption of fair value. Specifically, Herbohn and Herbohn (2006) compute coefficients of variation of profits, and of gains and losses from timber assets, of eight public companies and five state and territory government departments. The authors state the volatility caused by the fair value measuring. Elad (2004) makes complaint that the IAS 41 is a major departure from historic cost accounting; this could signal the decease of the French *Plan Comptable Général Agricole* (PGCA) model,

involve the admission of unrealized gains and increase profit volatility. Argilés and Slof (2001) greet fair value measuring for biological assets because it avoids the complexity of computing their costs. The majority of small family farms in in the EU has no resources and skills to perform accounting procedures and valuations. The nature of farming makes historical cost valuation of biological assets inherently difficult because they are affected by procreation, growth and death, as well as joint-cost situations. Allocation of indirect costs is another source of complexity for cost calculation in farms. This is an especially acute problem for small family households. The American Institute of Certified Public Accountants (1996) and the Canadian Institute of Chartered Accountants (1986) advise historical cost, considering the possibility of realizable value as an alternative. The 1986 French PGCA accedes to the historical cost principle. Kroll (1987) states that the complexity in asset valuation and accounts is an significant barrier to its use in the French PGCA. Elad (2004) explains that where there is not an active market for a biological asset, simplicity is not a merit of fair value.

Argilés and Slof (2001) state that the IAS 41 conceptual framework has already been widely and successfully implemented in the EU through the Farm Accountancy Data Network (FADN). The latter has been satisfying the role of a quasi-standard-setting body in the absence of previous statements on agricultural standards from other authorities (Poppe and Beers, 1996).

Hence, an evaluation of the convenience of fair value for agriculture should balance its benefits and drawbacks. Simpleness is the main benefit of using for biological assets with respect to historical cost. But there is no unanimous accord in previous literature with regard to if volatility in return and gains, relevance, return smoothing and profitability are improved or worsened with fair value. This article concurs to this discussion giving empirical evidence in valuation of biological assets in agriculture. The predictive power of fair value versus historical cost valuation with respect to return and cash flow comparing two samples of firms each one using different valuation criteria. Comparing data from two samples of farms based on historical cost and the other fair value for biological assets, we get no significant differences in future cash flow predictive power.

In-depth interviews maintained with agricultural accountants assist to explicate these results, as generalized flawed accounting practices are got. The real setting in which agricultural accounting is produced, precise and certain cost computations cannot be looked for.

Choy (2006) states that the predictive power of fair value has never been tested, in spite of the fact that both the Statement of Financial Accounting Concepts (SFAC) No. 2 and the current project of the IASB (2006b) stress the demand for predictive value of financial information. FASB Concepts Statement No. 1 also states that one of the three objectives of financial reporting is to help users to assess future cash flows. SFAC No. 5 emphasizes that to be significant information must have predictive value.

Forseeable gains and cash flows may help managers to anticipate financial problems, adjust lists, negotiate funding, adjust resources, exercise judgement in financial reporting, growing or decrease production. Improved accuracy may also lessen agency problems, because managers are considered to be more accountable. Empirical research has established that firms with lower forecast errors have lower implied costs of capital (Gebhardt et al., 2001) and assessments in the stock market (Lang et al., 2003).

Financial affirmations are utilized as a basis for measuring future performance and assessing future cash flows prospects (SFAC No. 5). Firm managers, as well as any other user of accounting information, may benefit from more predictable accounting information.

The comparative predictive power of fair value and historical cost accounting valuation methods has not been previously analyzed. To our knowledge, only Chen et al. (2006) analyze the predictive power of fair value, obtaining that it reduces the capacity to forecast future cash flows.

They studied this relation indirectly, comparing the association between accounting numbers and future cash flows over time, assuming that accounting has been developing to fair value. Kim and Kross (2005) obtain a growing relationship between gains and one-year-ahead operating cash flows over time, but they attribute it to the growing conservatism in accounting rather than to the influence of fair valuation.

Slightly related to these issues, Beaver et al. (2005) get a small decline in the ability of financial ratios to forecast bankruptcy from 1962 to 2002, and an incremental explanatory power of market-related variables over this period. They explicate the deterioration in predictive ability of financial ratios in terms of an inadequate amelioration of FASB standards.

For this purpose we use two samples of farms, one using fair value and the other applying historical cost. As we found no conclusive theoretical support with respect to this issue in the studied research, we do not formulate a defined hypothesis on the higher/lower predictive power of historical cost with respect to fair value.

Watts (2006) states that fair value is irrelevant because it lacks verifiability, but relevant historical cost accounting request precise and certain cost computations.

Different estimation methods have been used by Carnes et al. (2003), Kim and Kross (2005), Dechow et al. (1998) and Chen et al. (2006) to assess predicting gains.

3. Conclusions

We conclude that the discussion is moving from historical cost to the fair value principle. There is a lack of accord about the benefits and drawbacks of this movement.

We conclude as Watts (2006) that fair value is irrelevant because it lacks verifiability, but relevant historical cost accounting request precise and certain cost computations.

A request against the requirement of IAS 41 of fair valuation for biological assets exceeds in the existing literature. Most authors argue that it is a major departure from the convenient valuation method required and will entail serious drawbacks for the agricultural sector.

Analyzes showed in this disclose that farm cash flows are not less predictable with fair valuation than with historical cost.

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LOCAL ECONOMIC DEVELOPMENT (LED) PLANNING IN THE FACE OF GLOBALISATION

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Abstract

Local economic development and workforce initiative are continually evolving. There are no hard and fast rules or long-proven experiences upon which to draw. The job of the economic development planner and the work of the community in achieving sustainable economic development have become much harder because of the national and global crisis.

Keywords: *local economic development, sustainability, globalization, LED, private public partnership, natural environment.*

Introduction

In the last years local development has undeniably became one of the dominant elements for productivity growth strategy employment, human welfare, entrepreneurship promotion, obtaining human capital and income increase. Assuring sustainable development for a specific region is a complex process in the measure in which this process is subjected to some factors which cannot be controlee by a local, regional, or national administration. The entire post-revolution and post-accession experience, cumulate with good policy making transferred by Romania to European Union, proves that private public partnership is a viable solution for successfully solving some commentary problems, public interests starting with social services and complex social-economic development projects including infrastructure projects. The experience of some different governments and international organizations cumulated in more than 20 years demonstrates that PPP are a solution in solving social economic problems. Current policies cannot anymore focus mainly on their short - term impact but they have also to be more forward looking as well as more consistent between each others. Economical development is a must in the terms of a powerful and accelerated process of globalization which has surrounded the entire world. Therefore local authorities must find good strategies in order to improve the production of goods and services. In the process of sustainable development management effectiveness of protected areas is an important indicator of how well protected areas are conserving biodiversity. This is critical as most nations use protected areas as a cornerstone of biodiversity conservation.

1. All around the world, local governments, the private sector and civil society are demanding better ways to achieve local economic development, a cornerstone of sustainable development. This is due to the fact that local governments face increased democratic reforms and greater decentralization at the same time as massive transformations are taking place in the global economy resulting from trade liberalization, privatization, and enhanced telecommunications. The significance of these changes is that citizens and local governments now face formidable challenges, greater opportunity, and growing responsibility to work together to address the economic health of municipalities and the livelihood of their local citizens, many of whom may be under- or unemployed and living in poverty.

The long term impact of globalization, associated with demographic growth and the advanced aging of population, technology evolution and climate changing have enlarged the action of local economy in condition of a registered success in regional, national or multinational structure level. Although it has became more and more clear that the only national politics which haven't been confronted with major difficulties in repairing economic disparities between regions and towns are part of EOCD (Economic Organization from Cooperation and Development) states for which sustainable development is vital. The difficulty in the local development process consists in identification of the solutions in order to attract and involve in the "game" all necessary factors, a balanced utilization of resources so that these can be improved in the next 30-50 years. The knowledge economy has gained new valences and has more importance ahead industrial economy. This type of investment is definitely profitable but a great number of towns don't have the necessary financial resources. Local communities must fulfill necessary competences in order to stipulate the occasion to realize a new investment, share the risks and costs through realizing public private partnerships. The investments are in fact a fuel of local development that's why local communities are trying more and more to attract this type of action with the purpose of increasing entrepreneurship, innovation, human capital, exchange of good politics, creating new workplaces. Public and private branches lose their

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efficiency if used separately, because they are two interdependent realities deriving one from another and permanently sustaining each other.

In the actual economic context, the fact that project management for local community's development is based on European financing like a sure financial source for sustaining the process of implementation of sustainable development strategies formulated at national, regional, county level. The results for finalized projects or those of projects in implementation will positively affect the life quality of county communities contributing to developing some areas set as proprietary: truism, transport, infrastructures, water, waste managing, and social assistance. The implementation of project using pre-adoration funds have been a point of departure in the process of economic and social development and in managing projects financed from unsalable funds. Thereby public authorities involved directly like beneficiaries of financing, or through partnerships have gamed necessary expertise in domain with a real advantage in accessing European structural and cohesion funds through Operational Programs. The private sector must be nearby local authorities in scanning this road of challenges of economic and social developments of a region to European standards. It's not necessary for towns and villages to have perform an infrastructure if there are no people to valuing them, initiate and maintain business creating new work places, turning advantage from local peculiar and building a proper space for economic and social development. The local development strategies have been sensitively modified in the last two decades. Nowadays the economic development of cities and regions is less oriented towards roads, bridges and factories and more towards communication, industrial reconversion, and spaces assigned to high class concerns, mutual actions of promoting and local development. It stands for these elements to attract tangibles contractual partners and production taxes for reinvested capital. Local powers must be reorganized for attracting investments. Because at this time beside budget regions imposed public administrations must face globalization that is why the solution cannot came only from public financing because local development has been successfully "crowned" and has proved itself viable on long term therefore private sector must bring contribution. This last one has often manifested the interest for local development, but in order to attract them and use them efficiently local administration must have the necessary financial resources. Local development has chances of succeeding if it's the fruit of a private public partnership in collaboration with international financial institution. Within this partnership two major roles are hold by public sector: assuring the improvement of public services, mostly in what regards education, development projects, infrastructure and favorisation of collaboration between public and private actors with the purpose of realize development projects in a professional manner. A great number of local economic strategies are never taken to a good end because those who have concaved it haven't identified at first the necessary resources for the feedback investments and haven't regarded the involving of private sector as a rule. The progress key in financing local economy development consists in reorganization of relations with the private sector. This last one supports collectivizes in obtaining financial resources. There are several devices which allow to public and private sectors to share risks and costs related to local development projects because PPP, credits and private financing mechanisms are sustaining local efforts made by public sector. Important changing's exposed in financing local development financing. The perspectives offered by globalization to cities and other towns have launched a dynamic development through new financial investments. All these evolutions are more and more indurate by realizing the fact that facilitation of local and regional investments doesn't depend only by the volume of absorbed funds. Local sustainable development depends entirely of the investment quality, a good management and the efficiency that can be offered by local and private paymasters. Therefore the key principles that must be followed in elaboration of a financing strategy for local community's development are:

1. Smart financing for towns and regions through improvement of budgetary relations with superior administration levels.
2. Encouraging private sector by involving it in financing investments al local level.
3. Financing with the purpose of metropolitan area development through sharing costs and advantages.
4. The exploitation of economic growth advantages at local level.
5. Forming PPP.
6. The approach of a new vision in what implies public gestation at local level with the purpose of finance fluidization.
7. Encouraging entrepreneurship in private and public sectors at local level.
8. Encouraging private sector towards market investments which lead to long term results.
9. Laying emphasis on the quality of local investments projects and not financing offers.
10. Skilled officials in local and superior administration.

However PPP is not a wonder solution for solving the problem of necessity of great investments. In Romania the most often problem in public and private area is dedicatory legislation who doesn't officially sustain the fundamentation of PPP. Another fundamental proposal in what regards local development aims the establishment of an interior relent at local level. In the organization and function of all Institution that leads to good preparation activity and local development implementation projects. Most of the times projects are blocked in their way of

organizing as financing application leading to limit situation like: a heavy analysis of documentation to send for note, transmitting in useful time some essential information. In conclusion we can synthesize two directions for development local communities. The first one is writing financing European and national projects and the second is creating necessary important elements like: local development strategies well elaborated structurated and prioritized, qualified staff for writing project implementation and elaborating development strategies.

For Romania, as European Union member, sustainable development is not one of the possible options but the only rational perspective of national becoming having as a result the establishment of a new development paradigm through the fusion of economic, social and environmental parameters. Sustainable development is a very complex concept which started from preoccupation of conserving protected areas. Over the year's economical and social dimension were added to this first concept of sustainable development. The concept of sustainable development involves an amount of shapes and methods for social and economic development, having as instance foundation assuring a balance between this two mentioned dimensions and the elements of natural capital. The most known definition of sustainable development is undoubted the one that was given by the World Committee for Environment and Development (WCED) in "Our common future" report, also known as the Brunt land report: "sustainable development pursues the satisfaction of present needs". Starting with 1997 when it was included in the Maastricht treaty the term of sustainable development became a European Committee objective and assigned an increase of environment respect measures. This decision was included in "Towards sustainability" document.

In this manner European Union is reaffirming the objective of succeeding a life quality environment and welfare of present and future generations. This would lead to sustainable communities capable of putting good use and exploited their own resources with the purpose of social cohesion and environment protection. There are four serried principles for local administration that should support al international systems efforts, as well as states and local authorities in their efforts to eradicate poverty and building a fair, long lasting society: the primordial principle of "sustainable development" is involving economic, social, cultural, environmental dimensions. An effective democratic decentralization includes all key competences and proper financial resources. The principle of a good policy-making involves an effective leadership, transparence, responsibility, a good management, the improvement of public services and equal access to it, forming partnerships and straightening institutional capacity. The fourth principle of cooperation and solidarity implies forming partnerships in exchange of good-making policy and mutual support. These four principles must be promoted through drawing near international community, national governments and civil society in order to increase capacities and skills. Applying a model of sustainable development is a must for international communities. It has been introduced the principle of total administration of resources that aims environmental protection, life standard improvement, social cohesion, economic fluency. A policy based on the four objectives of sustainable development is a challenge for cities which are trying to find a balance between the processes of urban development and preserving green spaces, rural areas and natural resources. In this case local authorities are promoters of urban and social diversity. For Romania, as European Union member, sustainable development is not one of the possible options but the only rational perspective of national becoming having as a result the establishment of a new development paradigm through the fusion of economic, social and environmental parameters. The resigned reaction concerning some global issues like global warming or poverty is in most cases resumed by the stereotype line: "What can I do?" Every one of us must understand that sustainability does not involve only the global and local levels but most of all the individual level. Without the participation of every citizen nothing can be changed, a sustainable development cannot be accomplished. The principle of sustainable development resumes the mixture of three dimensions – ecology, economy and social dimension. Combined with consumer's behavior the ecological dimension of sustainability becomes the most important. On long term sustainable economy and social welfare are possible only in a well managed framework regarding nature as a vital element. Otherwise economic and social aspects mark their role in the attempt of making ecology "profitable": production and ecology consumption can be used only if the consumer affords it and of the consumption and production are realized under acceptable social terms. A sustainable living means a good, healthy, tolerant partnership appreciating the resources. It also means valuating quality of life without become a "fashion victim". To consummate in a sustainable manner means to be aware that "better" is the enemy of good, not "cheaper"; it means to remember that community and individualism are parts of a whole the same as partnership and autonomy. Living in a sustainable manner is the art of having the Wright behavior in a wrong structure. That's why we need both top politics and our base actions. Only from our correlated actions we can made sustainable economic structures. Sustainability or sustainable development it's a central target of European Union politics and Romania as a member has automatically adopted the objective. But the quality of member does not bring with it an "automatic pilot" for sustainable development. The government mission for sustainable development can be supported only by using adequate tools adapted to reality. After a far more thoroughgoing study we can underline the fact that sustainable development is a

basic objective in all operational programs, through which Romania sets its own priority investments in fields like: regional development, environmental transport, human resources, administrative capacity, economic competitively. If we want to obtain European funds from operational programs we must have strong arguments that our project, either is "hard" and "soft", fulfills the objective of sustainable development. The affiliation to European Union energetic community politics is extremely important for Romania. Our country must set priorities according to European Union politics and objectives. These are: energetic security, sustainable level, competitively. Relying on national politics and some regional energetic strategies modernization of cogeneration systems and urban warming will be promoted through high efficiency technologies. This strategy will ensure important energy savings, reduce carbon dioxide emissions and make payment of energetic bills more suitable. Pauper communities will receive assistance in managing local natural resources. These poor communities have less subsistence resources and a limited capacity in facing natural disasters. In Romania were identified potential negative causes caused by climate change. Recommendation and adaptation measures were taken after a primal evaluation, without seminary studies and actions like law and politics changing, budget reevaluation and adapting national programs in order to assure local level implementation measures. Important decisions which influences directly or indirectly the adaptation to climate changing's taken at local administrative level. Society and communities changing behavior depend in a large measure from the knowledge problem degree. Studies have proved that sustainable development involves working together institutions of state, companies, nongovernmental organizations and after all every actor of modern society. We are interacting with environment, consummating resources and we are part of different organizations. All initiatives made by local authorities contribute to community's welfare and sustainable development through economic and social dimension. In time these actions will spread at national level and why not at entire European Community level. Welfare is a concept which can extract its defamatory qualities from the concept of sustainable development. We actually can say that these two concepts complete each other.

Global poverty and the challenges of sustainable development Overall Objective of the EU SDS: To promote sustainable development globally, and to insure the coordination of the internal and foreign policies of the European Union with the principles of sustainable development and its related engagements.

Horizon 2013. National Objective: To implement the required legislative and institutional instruments pertaining to Romania's status as a donor of development aid according to its obligations as an EU Member State; to establish the priorities and means of action and to allocate for this purpose approximately 0.25% of the gross national income (GNI) by 2013 and 0.33% by 2015, with the intermediary target of 0.17% of GNI by 2010.

Horizon 2020. National Objective: To define the specific areas in which the expertise and resources available in Romania can serve the aims of development assistance, and to allocate for this purpose around 0.5% of gross national income.

Horizon 2030. National Objective: To fully align Romania with the policies of the European Union in the sphere of development cooperation also in terms of budget allocations as a percentage of gross national income.

2. Socioeconomic development. Overall, most trends were positive starting with the year 2000 in the socioeconomic development theme. However, the picture is mixed and some areas showed slow, or even no, progress. Economic growth continued throughout the period, while regional disparities grew and households were saving less. Most of the employment indicators progressed in line with the Lisbon targets, but the overall employment rate was lacking in impetus. Labor productivity increased and energy intensity decreased in line with EU objectives. More spending on research and development is needed if the target is to be reached. If it were possible to take the recent economic and financial crisis into account, however, the picture would be radically different. Starting with 2008 and forecasts for the coming years indicate a sharp decline of economic growth. Regional disparities of economic prosperity remain a challenge for the EU and are still rising in most Member States. Within-country dispersion of regional GDP (gross domestic product) is highest in eastern European countries, where the rapid transition into market economies has led to high income inequality.. Differences across Member States remain significant. Improving socioeconomic conditions has been one of the fundamental drivers for the vision of a united Europe and is, therefore, non-surprisingly a vital component of a number of high-level Community policies. Two of those important policies are the Lisbon Strategy for growth and jobs and the European Union's Sustainable Development Strategy. Both aim at achieving a more sustainable socioeconomic development and thus outline important strategic development trajectories. Overarching objectives of socioeconomic development aim for the creation of a knowledgebase economy, technology transfer, promotion of employment and enhancement of human and social capital as well as reducing social exclusion. Those objectives depict the most important aspects of socioeconomic development, and are measured in terms of economic growth and competitiveness, technology and innovation potential, creation of jobs and social wellbeing as well as environmental sustainability. Considering those objectives, the renewed Community Lisbon Programmed has created a direct connection to the EU SDS (European Union's

Sustainable Development Strategy) and the socioeconomic indicators outlined in this report. Considering the challenges of the current economic crisis and the need for cushioning the European Union from more and longer lasting negative effects on socioeconomic development, the Council adopted the European Economic Recovery Plan. Moreover, confidence in the ability of the EU to tackle the financial and economic crisis was expressed during the European Council. In fact, the current crisis shows how deeply social and economic issues are interconnected. An important challenge for socioeconomic development arises from the ageing of the population, reflected in a growing old-age-dependency ratio. This means that a continuously shrinking proportion of the population of working age needs to generate the economic resources for society as a whole. Accordingly, the employment rate, labor productivity or average annual working time need to be increased in order to maintain a constant level of economic prosperity.

The analysis presented in the previous chapters has emphasized Romania stage of development at regional and local level, the local government implemented projects and the future development directions. The sustainable development of the local communities is a present and future option of the national policy that seeks economic growth and quality of life's improvement. As a member state of the European Union, Romania must cope with new challenges and objectives. One of these objectives is the sustainable development of our local communities. This objective can be achieved by local governments because they represent powerful actors in their local economies. They must build and maintain infrastructure that is essential for economic activity. They must set standards, regulations, taxes, and fees that determine the parameters for economic development. In essence, one can say that the use of European Union Funds is an opportunity for economic development in Romania, in the context in which their use can generate sustainable economic and social development.

Conclusions

Ideally, the development of a Local Economic Development (LED) strategy will be an integral part of a broader strategic planning process for a sub national region, city, town or rural area. Effective strategic planning ensures that priority issues are addressed and limited resources are well targeted. The five-step planning process shown below should be tailored to complement, and correspond with, other local planning processes. The process is not prescriptive and should be adapted to meet the needs of the individual community. Current developments are in many aspects not sustainable because limits on the carrying capacity of the earth are being exceeded and social and economic capital is under pressure. Although it has been stated repeatedly that change is necessary, results are limited. The recent progress regarding climate policy shows that states are capable of converting the necessary political will into rigorous policy interventions, which combine leadership, vision and concrete measures. The Sustainable development strategy should contribute to further change to avoid irreparable damage and to create a future of prosperity, equity and well-being.

The Sustainable Development Strategy deals in an integrated way with economic, environmental and social issues and lists the following seven key challenges:

- Climate change and clean energy
- Sustainable transport
- Sustainable consumption and production
- Conservation and management of natural resources
- Public health
- Social inclusion, demography and migration
- Global poverty

Local authorities must elaborate overarching strategy in order to set out how we can meet the needs of present generations without compromising the ability of future generations to meet their needs. The next programming step should be to develop a strategy, to examine the country context, various stakeholders and their interests, and, among other factors, the nature of potential interventions. To help ensure that resources dedicated to the program achieve the missions stated objectives. Defining a strategy involves developing an approach that can maximize impact on democratic development. The Sustainable Development Strategy constitutes a long-term vision and an overarching policy framework providing guidance for all members of EU policies and including a global dimension, with a time frame of up to 2050. By tackling long-term trends it serves as an early warning instrument and a policy driver to bring about necessary reform and short-term policy action. There should make full use of balanced Impact Assessments in policy making at national level. The four focus areas relating to long-term goals in some crucial areas like: shift to a low-carbon and low-input economy; protection of biodiversity, air, water and other natural resources; strengthening the social dimension; and the international responsibility dimension of the SDS are broadly welcomed.

The local authority must give higher priority to tackling current unsustainable trends in the use of natural resources and the loss of biodiversity. Better integration of biodiversity considerations into other policy areas such as climate change, transport, agriculture and fishery is crucial, as well as considering better the value of ecosystem services. Also, climate financing is central to combating climate change, and a significant increase in additional public and financial flows is needed in order to assist developing process.

The social dimension should be better highlighted through improving labor market policies, social and education systems. The economic crisis has

exacerbated inequalities and risks. With current and expected job losses, unemployment is clearly one of the biggest concerns. The hardest hits are young people, low-skilled workers and those who have been unemployed for a long time. A balanced approach to combining flexibility and security together with comprehensive active inclusion strategies and integration activities is not only crucial to support all those affected by the crisis, including the most vulnerable, but also to limit losses in human capital and to preserve future growth potential. It is vital to carry on improving the labor market policies, to review social system and further develop the education system to meet the challenges in all regions. Job creation efforts should strengthen the ability of workers to adapt to changing market conditions and prepare workers to benefit from new investments in the areas of green technology and green jobs.

Sustainable development should be seen in a global context. Many of the challenges can only be solved in international cooperation. The people of the developing world are hardest hit by the effects of climate change and land degradation. The loss of biodiversity will affect both the developing and developed world, the poorest being the most severely affected. Sustainably managing ecosystems and strengthening biodiversity policies is a basis for food security and an integral part of the fight against poverty and hunger. The global demand for natural resources is increasing, and this affects the developing countries even more than the developed world.

The strategy of local communities for sustainable development could focus on the European Union's long-term goals in the following areas in coordination with other cross-cutting strategies:

- contributing to a rapid shift to a safe and sustainable low-carbon and low-input economy. Based on energy and resource-efficient technologies and shifts towards sustainable consumption behavior, including sustainable food patterns, and fostering energy security and adaptation to climate change.
- Intensifying efforts for the protection of biodiversity, air, water and other natural resources and food security, and more focus on integration of biodiversity concerns into policy areas.
- With potential negative impact on biodiversity such as parts of the common agricultural policy, the common fisheries policy and transport policy.
- promoting social inclusion and integration, including demographic and migration aspects, and improving protection against health threats.
- Strengthening the international dimension and intensifying efforts to combat global poverty, including through fair and green growth, and addressing population growth and its impact in terms of increased pressure on natural resources.

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ANALYSIS OF INDUSTRY BASED ON RESOURCES AND INSTITUTIONS. NATIONAL DESAZOLVES CASE

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Abstract

This work aims to identify the elements necessary for the operation of enterprises engaged in waste management, especially in the company called Desazolves Nacionales; as well as the importance of formal institutions to arrive to conduct their activities legally without polluting the environment. an analysis of the industry and the resources with which account, in order to take advantage of the best way to strengthen the company looking to create jobs always looking for social responsibility is made.

Keywords: *Strategy, institutions, industry, SMEs, resources.*

1. Introduction

The aim of the research is to determine how resources, industry and institutions affect the operation of the National Desazolves Company, located in the State of Jalisco. First, we talk about the background it has about pollution, the importance of MSMEs and what companies defined sector of waste management. After the problem is delimited on the question how do institutions affect industry and resources for company operation within the State of Jalisco? A review of the theoretical and empirical literature on the theories studied is made. It is contextualized about where the company was born, the services performed are mentioned; the methodology to be used, the analysis of the results, and finally, are given the conclusions and recommendations on the research.

2. Background of the problem

Companies are defined as an economic unit of production and decisions by organizing and coordinating a series of productive factors, such as labor and capital, aims to make a profit either producing and selling products or providing services in market (Andersen, 1999). The importance of small and medium (MSMEs) economics units in the global economic context is a well proven fact, not only because they represent 95% of all enterprises in most countries of the Organization for Economic Cooperation and Development (OECD), but also because they generate a high volume of employment, which exceeds more than half of private sector employment (OECD, 2000).

Latin American countries generally rank companies according to various parameters such as employees, investment in fixed assets and / or sales. In Mexico, these businesses contribute about 64% of the total gross production, but employ only 2 out of 10 jobs, according to the National Institute of Statistics and Geography (INEGI, 2015); the growing importance of MSMEs especially in developing countries is due to their contribution to the employment and economic welfare; integrated into the enterprise, as part of the value chain, contribute to the diversification of the economy (Agyapong, 2010).

In Mexico, major obstacles and problems related to starting a business, among them are liquidity, the delegation of power, leadership of managers, finance and business continuity which can potentially cause failure of MSMEs during the first years of life (Castro, 2006). Companies dedicated to waste management and remediation services are those economic units that are dedicated to the collection, treatment and disposal of waste material both hazardous and non-hazardous waste; the operation of facilities for recovery of material; remediation and rehabilitation of contaminated sites; rental of portable toilets, and cleaning septic tanks (INEGI, 2015).

The importance of these companies is that according to the World Health Organization (WHO, 2014) reported that in 2012 about 7 million people died as a result of exposure to pollution because it is the health environmental risk the world's most important. If it is taken into account that has a rapid urbanization, cities face a growing demand for water and sanitation services for both households and industries.

The United Nations (ONU, 2010) mentions that they have the necessary knowledge, experience and technology to combat pollution and waste management, but it is essential to include these issues on national, regional and international agendas requiring coordination between sectors and between different local authorities and governance changes that lead to a more sustainable and equitable use of urban water resources.

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3. Defining the problem and research question

In 2015 the INEGI reported that the habits of consumption of natural resources and environmental degradation came close to generating 5.7% environmental costs of gross domestic product (GDP). Mention that the amount of public sector expenditures for environmental protection was about 149 billion pesos which represented about 1.0% of GDP. In contrast, total costs consist of depletion and environmental degradation they approached the 910 billion pesos, which gave an environmental deficit of 761 billion pesos.

Companies dedicated to service waste management and waste and remediation services are vital, both in Mexico and in the State of Jalisco, as they help to fight pollution seeking to balance the effects that have in the process of industrial, agricultural and domestic activities. So, this research attempts to answer how do institutions affect industry and company resources for operation within the State of Jalisco?

4. Review of the theoretical and empirical literature

A. Theory of resources

Wernerfelt (1984) defines resources as the assets, both tangible and intangible, that are linked to the company semi-permanently as brands, own technological knowledge, the use of personal skills, business contacts, efficient procedures, the capital, etc. Business enterprise is defined as an administrative organization and a collection of productive resources. The overall purpose of the business enterprise is to organize the use of their "own" resources, along with other resources acquired from outside the company for the production and sale of goods and services at a profit (Mahoney, 2012); Penrose also argues that own resources are never entering the production process, but only the services that the resource can perform.

The resources lie in a set of potential services defined regardless of use, while services cannot be so defined, the service involves a function or activity; It is largely in this distinction that can be found the source of the uniqueness of each individual company. The company can be seen as a collection of productive resources where the choice of the different uses of these resources over time is determined by administrative decision. Physical resources of a company consist of material things as facilities, equipment, land and natural resources, raw materials, intermediate products, waste products and byproducts, and even stocks of finished unsold products. There are also intangible resources available in a company like unskilled and skilled, clerical, administrative, financial, legal, technical and management personnel work.

B. Industry-based theory

The industry-based theory can be defined as a group of firms producing similar goods or services together (Peng, 2012). A popular and effective in reviewing the performance of the industrial environment, the model is based on Porter's five forces (Daft, 2010) strategy.

1) The threat of new competitors

In a sector can create pressure for the establishment of organizations, which might need to hold down prices or increase their level of investment, the entry of new competitors. Also it depends largely on the amount and extent of possible obstacles, as is the cost (Daft, 2010).

2) The bargaining power of suppliers

It refers to the ability they have to raise prices and / or reduce the amount of goods and services; if the supplier industry is dominated by a few firms they may have the advantage when negotiating (Peng, 2012).

3) The bargaining power of buyers

It can influence when having a small number of buyers leading to a strong bargaining power. They can force down prices, demand better quality or service, and increase costs for provider organization (Daft, 2010).

4) The rivalry between competitors

It refers to the intensity that has the competence. To study this area must be known if it has many competitors or are balanced, slow growth of the industry, which are storage costs and fixed costs, which is the differentiation or cost to change, the bet to the strategy and barriers to exit (Peng, 2012).

5) The threat of substitute products

It is known as the power of alternative or substitute for the services or products of the company that may be affected in costs, new technology, social trends that they affect the customer loyalty as well as other changes environmental (Daft, 2010).

Porter added in 1990 to related industries and support as affecting the competitiveness of the industry, some call them complementary defined as that firm which sells products that add value to products of the industry focal (Peng, 2012).

C. Theory of institutions

Institutions can be defined as humanly planned constraints that structure human interaction; the institutional framework is made of both formal and informal organizations that seek to govern individual behavior and of the firm. Formal institutions are those that include laws, regulations and rules, as the regulatory and coercive pillar of governments. Informal institutions include norms, culture and ethics; It gives support with training pillar referred as values, beliefs and actions of other relevant players that have influence

on the behavior of individuals or focal firms; They are also supported by the cognitive pillar referring to the values and inner beliefs that assume and which also guide the behavior of individuals and firms (Peng, 2012).

The interactions between institutions and companies that reduce transaction costs are those that give way to economic activity, as institutions are not static so they are adapting and changing as will be necessary for this purpose require transitions institutions defined by Peng (2012) as those great and fundamental changes that are introduced to both formal and informal rules of the game that affect organizations as players spread around the world, but especially in emerging economies.

5. Contextual framework

The state of Jalisco has an area of 80.137 square kilometers, is located in western Mexico which borders the states of Nayarit, Zacatecas, Aguascalientes, Guanajuato, San Luis Potosi, Michoacán and Colima. In addition, a considerable portion of its territory is bordering the Pacific Ocean. Jalisco´s capital is Guadalajara, but today is a great metropolis, together with the municipalities of Zapopan, San Pedro Tlaquepaque, Tonalá, Tlajomulco de Zuniga, El Salto, Ixtlahuacán de los Membrillos and Juanacatlán which integrate a large conglomerate that makes Guadalajara Metropolitan Area is the most important in Mexico.

The company called National Desazolves is a micro company that has 5 years of life. It is located in the city of Zapopan, Jalisco primarily serving the metropolitan area of the state and nearby municipalities. This company has a wide range of services offered by builders and land developers, maquiladoras and food industries, shopping malls, city halls and state secretaries, as well as dwellings; between commercial activities carried out they can be listed as follows:

a) Silt removal of septic tanks, sumps absorption wells, storm drains.
b) Suction heavy mud.
c) Uncover commercial and industrial drains.
d) Preventive survey pipes.
e) Video robotized inspection.
f) Income vactor trucks and vacuum to industries and fractionators.
g) Rent of portable toilets.
h) Service hookah

6. Research methods

For this work a descriptive research on how institutions come to influence the operation of these businesses is used in the study of the case of National Desazolves for how both formal and informal institutions and industry influence the operation of these companies in the State of Jalisco, in addition to the resources that accounts.

7. Analysis of results

The company has financial resources; human, organizational, physical and technological capital reputation and innovation (see Table. 1).

Table 1. Physical and intangible resources

Type of resources	**Resources with** which accounts
Financial	Has a good financial situation with bank accounts. Uses bank loans for investment in technological equipment.
Human capital	Director and operational staff are considered intangible resources because of the knowledge they have to perform activities. The operating staff is demonstrating good execution on tasks. They do not hire employees without experience in the field to avoid training time.
Organizational architecture	The main partnership with suppliers is the shop that repairs and checks the computer constantly to not incur on higher expenses in addition to make repairs quickly.
Organizational	There is no formal organizational structure; however, operators know who to report the results of services, and technical problems.
Physical	The geographical area where is located help and support making faster tasks, the proximity of offices and the pension with Treatment Plant White River Río Blanco allows the company to discharge early without investing too much time.
Technology	Its vehicle fleet is broad for the various services it offers, besides its own. Plans to renovate the team are giving according to the needs that are on the market.
Innovation	Innovation of tangible resources is not currently performed due to the degree

	of investment involved. On the side of intangible resources, the application is very low because the technical knowledge gained through some training invested in the search for troubleshooting technical-operational nature.
Reputation	The company has a good reputation in the market that works through human capital that has; It is working on positioning a brand image and status in the market because it is a newly established company.

Source: Own elaboration.

Most of the resources are physical and human capital; innovation in technology is almost nil because the equipment needed to perform the services is imported from the United States, as manufacturers are located in that country and try to imitate manufacturing equipment investment of both money is needed as strong capital for a company like this micro or small size is difficult to achieve, so the bargaining power of technology providers is high.

Formal institutions have broad power over these businesses, first, recourse to the Constitution of the United Mexican States, in Article 4 is established as an individual guarantee and fundamental right of everyone, enjoying an environment suitable for development and welfare thus determining the State's obligation and the powers that make it, to create the mechanisms and legal instruments that lead to the guarantee. For National Desazolves can operate needs to comply with the Regulations of the Law on Waste Management of the State of Jalisco, where the requirements that must be met before the Ministry of Roads and Transport, Ministry of Environment and Territorial Development mentioned, Intermunicipal Water system and Sewerage (see Table. 2).

Table 2. Institutions

Institution	Granting permit	Time it takes
Secretary of Roads and Transport Jalisco State (Secretaria de Vialidad y Transporte del Estado de Jalisco)	Permit to allow circulation of transporting waste collection services special driving.	The resolution of the permit is 15 business days.
Secretary of Environment and Territorial Development (SEMADET) (Secretaria de Medio Ambiente y Desarrollo Territorial (SEMADET))	Environmental License for the State of Jalisco and Municipalities, for the collection.	Resolution permit are 45 working days.
Intermunicipal Water System and Sewerage (SIAPA) (Sistema Intermunicipal de Agua Potable y Alcantarillado (SIAPA))	Permission to download non-hazardous waste treatment plant.	The resolution of the permit is 3 months.

Source: Own elaboration

Informal institutions that are present in the company are the values of teamwork, respect, care and protection of the environment; it is committed to do the job that customers want in a timely manner agreed. It should always speak the truth to consumers when they cannot perform the activity to lie and not be able to maintain the customer loyalty. Actions are being implemented to create a culture of accountability and timeliness employees. Diamond analysis of Porter manages to define what the importance of the industry is and as what happens around them influences the decisions to be taken (See table 3, below).

8. Conclusions and recommendations

After analyzing the results, it can be concluded that it is necessary to have the equipment and qualified personnel. This is decisive for the company to operate efficiently and effectively, so if it is missed one of them, is missing the services provided would be deficient. The lack of experience of the operators may lead them to incur expenses for repair of equipment if it is damaged. The investment needed to a company of this type is about 1.5 million pesos and approximately 6 months that takes for granted the permits.

Table 3. Porter´s Diamond analysis

Force	Conditions	Actions to combat
Threat of new entrants	High entry barriers	Are not necessary
Rivalry between competitors.	Differentiation in price and quality of service.	Improve services, advertising and price and cost improvement.
Threat of substitute products	Are practically nonexistent for cleaning tanks, treatment plants. The survey of	They are not necessary, since the cost for homes is high compared to that

	housing can be performed by plumber's drainage.	accorded the plumber.
Bargaining power of customers	Customers decide based on price, quality and implementation time of services.	Training in continuous improvement.
Bargaining power of suppliers	Technology providers have great bargaining power; which they provide the supplies	They are not necessary.
	have very little bargaining power.	

Source: Own elaboration.

Being a service that cannot be considered as a valuable, rare or difficult to imitate resource, companies seek to excel in competition based on giving a lower price and better quality service. National Desazolves intends to position itself as a separate company on quality, best performing services each time they are performed so that continuous improvement works to correct errors that have. Must work in positioning the brand to achieve to have a large market and become a larger, benefiting the community with better jobs and especially helping to fight pollution that occurs in the region on water resources.

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IMPACT OF GLOBALIZATION ON RETAILING IN CROATIA

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Abstract

Trade is one of the leading sectors of the Croatian economy, which has undergone significant changes under the influence of globalization over the last decade. According to Central Bureau of Statistics in Croatia about 16 % of all employees work in trade business, and more than a quarter of business entities are registered in this sector. Therefore the trade has a significant share in Croatian GDP creation.

Globalization is considered an important factor of economic development around the world. Through development of communication technology the world has become integrated into the "global village" and a business contact itself can be accomplished in a matter of minutes. The effects of globalization on retailing in Croatia are mostly reflected in the introduction of new retailing forms, development of e-commerce, consumer protection, the introduction of space management, changes in consumer habits and the arrival of multinational trading companies on the market of Croatia. In this way, the Croatian market has become a part of a single system. Globalization has a negative effect on trade in the Republic of Croatia too, because the domestic production and retail sales of small neighborhood stores are threatened in this way.

Retailing in Croatia should make an attempt to adapt to the global trends in the world and to new changes taking into account the domestic production by the principle of comparative advantage.

Keywords: *globalization, retailing, Republic of Croatia, e-commerce, new retailing forms*

1. Introduction

With the development of information and communications technology, the world has become a single system, and the connection between two subjects in different parts of the world can be achieved in minutes. There is a cause and effect relation between the creation of economic and political integration and the process of globalization, where globalization can be seen as one of the stages of the development of civilization.

A large increase in trade as an element of globalization has resulted in a rapid reduction of transport costs and transport acceleration. In recent decades, there have been some revolutionary changes in the trade business, which were the result of a rapid development of consumption and production. The requirements of consumers have become more diverse and less predictable. With the emergence of new brands, new retail forms and legislations, a visible and noticeable impact of globalization can be seen in the retail sales in Croatia.

In the Republic of Croatia, trade is one of the most important industries that employs about 22% of the total number of employees, and in the trade domain operates approximately 28% of all companies.

In this paper is provided with a theoretical approach to the concept of globalization and also includes positive and negative effects of globalization, the trade analysis in the Republic of Croatia as an economy branch. The effects of globalization on the emergence of the new forms of retail in the Republic of Croatia are also cited; we analyzed the e - commerce in the Republic of Croatia as one of the consequences of globalization, and herewith list the consumer's rights pursuant to the Consumer Protection Act.

This study may have significant importance, because it exposes the changes in retail in the Republic of Croatia and their causes, as the reflection of the hidden consequences of globalization. For these changes entrepreneurs can take advantage when initiating an entrepreneurial venture, or for the already existing entrepreneurs for the purpose of their work improvement.

By analyzing the data that have been referred to the trade in the Republic of Croatia there is a link with the impact of globalization. Other papers with regard on this subject have analyzed globalization, but the correlation of globalization and the trade in the Republic of Croatia have not been so far related. The works of other authors have been written on the topic of globalization and philosophy, the relationship of globalization and Christianity, and the relationship of globalization and national sovereignty.

2. The concept of globalization

"The term globalization is derived from the word "global", meaning totality, while globalism is a way of looking at events in general. Thus, globalization would

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imply a social process that strives to universality and unity of the world"[1].

The conventional definition of globalization signifies the process of opening and liberalization of national financial markets and their entry into the global capital market. However, today this term more often implies the "international integration" of goods, technology, labor and capital, therefore we can talk about globalization in a broad sense[2].

GATT (General Agreement on Tariffs and Trade) had a major impact on the emergence of globalization. GATT was founded in 1947 and was based on the clause of the greatest benefits from which the three fundamental principles arise: the principle of reciprocity, the principle of liberalization and the principle of non-discrimination. On December 8th 1994 GATT was renamed WTO (World Trade Organization), which is financed by contributions from the signatories according to their share in the trade among the member states. WTO comprises 161 member states.

There are many aspects of globalization. The three most important are: the economic aspect, the political and legal aspects and the cultural aspect of globalization.

Among many economic factors that drive globalization the role of transnational corporations is of great importance. These are corporations that produce goods or services in more than one country. Some of the largest transnational companies known all over the world are: Coca Cola, General Motors, Colgate, Palmolive, Kodak and many others. In the late 1980s and 1990s, transnational companies have widely spread, establishing three strong markets: European, Asian-Pacific and North American[3].

Most social scientists agree that today there are three characteristic processes that affect the formation of life in modern society and its perspective. These are: individualization (of life), fragmentation (of society) and globalization (of the world). The first implies strengthening of the role of the individual, his personality, political and other rights and freedoms. The second is about an increase in dividing the rich and the poor, so that there is a growing number of the poor on one side and a decreasing number of the rich on the other side. Finally, the third implies a discordant and contradictory process of creating the new world order and a world society based on a new system of values that is built on the ruins of the old, especially the nation and the state and all other traditional values and identities[4].

Various disciplines of social science emphasize different elements of globalization. For economists, globalization is primarily seen as openness to other countries - there are no limits when it comes to investments, financial transactions, trade and labour, and foreign investments are less regulated. Silbert and Klodt have defined globalization as the process of converting separate national economies into an integrated world economy. This change is primarily carried out through international trade, international movement of factors of production (capital and labour) and the international spread of technology[5].

Thanks to globalization, relations between people and countries are becoming more intense, and people are starting to think globally and to understand the world differently. Globalization has certain requirements: continuous investment in knowledge, technology, research and development. One who begins to fall behind in the globalization process or does not join the contemporary processes in time is severely lagging behind. Today, the world is continuosly opening and closing. Hence, a well-known saying was created, describing the world as a "global village"[6].

Unfortunately, the number of global, regional and local dangers have been growing to the same extent, thus being the very reason why the modern man and his society cannot be tranquil and enjoy the fruits of the all around progress. In fact, warnings of intellectual potential are coming from all sides about the undesirable direction the contemporary society is taking. Therefore, the concern with current threats is widespread and real, because, over the long term, they could become even greater[7].

One of the criticisms of globalization is its identification with the term "Americanisation". Greg Dyke (former Director-General of the BBC) gave a speech in 2000, where he said: "We were told that the world is globalizing. This is not true: it is Americanizing. "

3. Trade as an economic sector in Croatia

Commerce is one of the most important economic sectors in Croatia. According to the criterion of the total number of registered legal entities, 28% of business entities operate in trade[8].

In Croatia, more than a quarter of business entities are registered in trade, thus constantly making it as one of the leading sectors of the Croatian economy. In recent years, this sector is burdened with the problems of payment, problems of insolvency, bankruptcies... In the last few years, its share in GDP, which was 11%,

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[2] Dujšin, U. "Globalization, economics integrations and Croatia", *Anthology of Faculty of Low in Zagreb* 2 (1999). page 183.
[3] Giddens, A. Sociology. Zagreb: Globus. 2007. page 57.
[4] Žepić, B. Sociology. Zagreb: Croatian University. 2007. page 412.
[5] Šporer, Ž. Globalization and her reflections in Croatia. Zagreb: Ekonomski institute. 2001. page 7.
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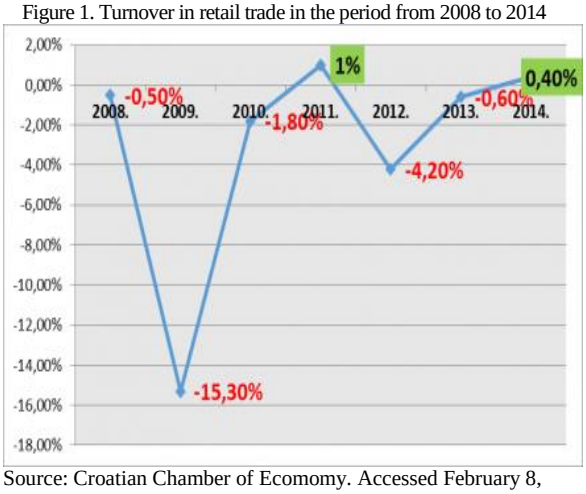
[7] Žepić, B. op.cit., page 402.
[8] Ministry of Economy, Entrepreneurship and Craft. Accessed February 10, 2017. http://www.mingo.hr/page/kategorija/trgovina-i-strateske-robe.

has decreased by two percentage points. At EU level, the trade's average share in GDP is 10%.

The data from 2012 for the 19 countries of the EU show that Croatia had 20 200 stores in the retail sector. In Croatia, the average number of inhabitants per shop is 211. Commerce is the mirror image of macroeconomic trends, which is seen in shifts in trade, since it is in direct contact with consumers, and detects all changes in relation to their buying habits. Under the influence of the global crisis of 2008, a stabilization of consumption followed, and these trends have continued throughout these past few years as well, with the exception of 2001, when the turnover in the retail business was growing at an annual level of 1%. After a mild recovery, it has come to a stabilization of consummption and a drop in turnover at an annual level of -4.2% in 2012, that is, -0.6% in 2013. Due to the slight recovery during 2014, there was a 0.4% increase in revenue at an annual level in 2013[9].

Figure 1. Turnover in retail trade in the period from 2008 to 2014



Source: Croatian Chamber of Ecomomy. Accessed February 8, 2017. http://www.hgk.hr/sektor-centar/sektor-trgovina/hrvatska-maloprodaja-u-skladu-s-europskim-i-svjetskim-trendovima?category=68.

4. Impact of globalization on the incidence of new retail forms

Next time you go to a supermarket, pay attention to various products you can on the shelves. If your shopping starts in the produce department, it is very likely that you will find pineapple from Hawaii, grapefruit from Israel, apples from South Africa and avocados from Spain. On the next shelf you might find a variety of curry sauces and spices for Indian food, a fine selection of ingredients for Arabian meals like couscous or falafel, as well as canned coconut milk for preparing Thai dishes. As you continue your shopping, you notice coffee from Kenya, Indonesia and Colombia, lamb from New Zealand and wine from Argentina and Chile[10].

M. Horeni has vividly described this in the Internation Herald Tribune: "whether you are in the downtown area of Rio de Janeiro, Bruxelles, London or Mexico City, the best locations in the city are always held by the same companies." The impact of globalization in Croatia is reflected in the emergence of new brands and global corporations. Every major Croatian city, just like other European cities, has shops of brands such as Zara, C&A, Tom Tailor, Benetton, Diesel, Mustang, Camel.

The development of retail led by major international retailers in the transition countries of Central and Southeastern Europe can contribute to consumption growth in these countries, but may slow down their overall economic development due to excessive import. On the other hand, the development of retail forms, based on new technologies, extends the possibilities of supplying the consumers, and, as such, contributes to the improvement of the overall economic process[11].

In recent years, there has been an increase in the number of shopping centers and hypermarkets in Croatia with a tendecy of growth. With their business plans, major retailers have shown great interest in investing in the Croatian market due to geographic, demographic and legal advantages it offers. Foreign firms have access to cheap sources of financing, lower purchase prices, high bargaining power with the suppliers, as well as modern and refined business technology, which facilitates their entry into foreign markets. With numerous shopping hypermarkets entering the Croatian market, along with the announced arrival of others, both the Croatian trade and the buying habits of consumers have changed.

The key issues and unknowns when entering a foreign market are:

- regulation of products and services,
- the importance and the potential size of the selected foreign market,
- the importance of political and socio-cultural environment of the state,
- the importance of potential competitors and market entry strategies,
- the expected sales potential on the selected market,
- requirements of international logistics,
- the compatibility of the selected markets with the expected goals of the company and its competitors.

Before the 1990s Croatian retail was dominated by smaller shops located in city centers and

Neighborhood shops with mostly food products. The first shopping center in Croatia, opened in 1994 in Zagreb, was Importanne Centar. The first shopping center on the city outskirts was Italian Mercatone, opened in 1999 in Zagreb. The first shopping centers

[9] Croatian Chamber of Ecomomy. Accessed February 8, 2017. http://www.hgk.hr/sektor-centar/sektor-trgovina/hrvatska-maloprodaja-u-skladu-s-europskim-i-svjetskim-trendovima?category=68.

[10] Giddens, A., op.cit. page 50.

[11] Segetlija, Z., Dujak, D. "Are international retail chains drivers of Croatia and other transition countries?". (paper presented at the ICEI 2011., Faculty of Economisc, Tuzla, Bosnia and Hercegovina, December 9-10, 2011). page 460.

were opened in the United States, the first in Baltimore in 1907, followed by the one in Kansas City in 1923. Intensive construction continued after the Second World War, and in the 1960s it underwent a major expansion. Outside of America, the construction of shopping malls began much later. In Europe and Australia, they began opening in the 1960s, mostly in Germany, France and the UK.

A shopping center is a planned commercial center built on a larger area, intended for retail trade and other services with a large parking lot for personal vehicles[12]. Today, malls are postmodern places of consumption in which trade and entertainment are closely intertwined[13].

With the appearance of shopping centers, the urban space of Croatian cities has changed. Shopping malls are mainly located on the outskirts, which has an impact on the road infrastructure. Every time a shopping center is being opened to the public, there is a traffic jam, which is one of the reasons why they are built close to entrances to the city.

Besides the fact that their main function is to make shopping easier, shopping malls have become public gathering places, thus changing not only our buying habits, but the way we spend our free time as well. Most of them are intended for family purchases. There are, of course, economic, technological, social, national geographical and many other features that have been taken into account when planning the center. Hence, the opening of shopping centers changes both the image and the spatial plan of the city, that is, cities. Customers go to various shopping malls due to the difference in prices, offers, availability and so on, while they visit newly opened centers out of curiosity and thanks to sales promotions. The goal of each shopping center is to be different and special, whether by content or appearance, since they are becoming an attraction - a brand. Precisely due to an increasing number of people visiting malls and the variety of products shopping centers offer, stores from the centers of major Croatian cities have moved to shopping centers, thus creating changes in our lifestyle and buying habits, as well as in the image of the city. Today, malls are not only places where we do our shopping; they have become public gathering places, "cities within a city".

According to Eurostat data, Croatia is slightly above the EU average when it comes to the number of stores in the retail industry. For example, Croatia has more stores than Germany, Denmark and the United Kingdom, which all have a much higher standard of living than Croatia.

5. E-commerce in Croatia

E-commerce, heavily influenced by globalization, has developed in Croatia as well. Electronic commerce is becoming more and more common as a way of doing business using information technology, since it is simple to use and costs less when compared to conventional retail. With today's fast-paced lifestyle, online shopping is much more comfortable, it is not time-consuming, and can be accessed at any time of day or night.

"Electronic commerce is the process of purchase, sale or exchange of products, services or information through publicly accessible computer network, the Internet, and offers a great reduction in cost and time of transactions"[14]. The online retailer is an intermediary between the original manufacturer and the end customer, therefore its place is somewhere in the middle of the value chain which is usually formed by the retailer himself[15].

The concept of e-commerce can be defined from four perspectives[16]:

1. communication perspective; electronic commerce enables the delivery of information, products/services or means of payment through public telephone networks, publicly accessible computer networks or some other electronic means of communication,
2. perspective of business processes; electronic commerce represents the application of new technologies towards automation of business transactions and improvement of business operations,
3. perspective of service delivery; electronic commerce is the means by which the company, customers and management are trying to reduce the cost of service delivery while increasing the level of quality of goods and the speed of the delivery,
4. virtual perspective; electronic commerce offers the possibility of buying and selling of products, services and information via the Internet and their services.

E-commerce can be divided into two main areas[17] (Ružić et al., 262):

- Trade between businesses entities - Business-to-business (B2B);
- Trade-oriented towards the market of end consumers of daily consumption - Business-to-Consumer (B2C).

Electronic commerce offers many opportunities to save. One way is the already mentioned increased amount of information that reduces the amount of stock, thus reducing the maintenance costs of storage and the handling of goods. With the establishment of

[12] Vresk, M. City and urbanization. Zagreb: Školska knjiga. 2002. page 73.
[13] Holbrook, B., Jackson, P. The social milieux of two north London shopping centres. London: Geoforum. 1996. page 193.
[14] Panian, Ž. E-commerce. Zagreb: Sinergija. 2000.
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[16] Spremić, M. Management and e-bussiness. Zagreb: Narodne novine. 2004.
[17] Ružić D. et al. *e- marketing. Osijek:* University J.J. Strossmayera u Osijeku. 2009. page 262.

online stores, a store that works 24/7 was created, and the best thing about it is that the extended working hours do not bring additional costs. The advantages for consumers are that they are better informed, have a larger choice of products, and it is flexible and convenient. Many companies have benefited from the consumer's ignorance, but with the appearance of electronic commerce, consumers have become more informed. On the Internet, there are no local monopolies; the competition is on a global scale. The consumer is able to choose from thousands of sellers and an even greater number of products. Each customer can personalize the e-shop according to their own wishes, they can determine which products, information and news they want. Customers do not have to leave their house or office in order to have access to thousands of products, since online stores exist. At this stage of development of electronic commerce, merchants are willing to lower the prices, because they have figured that the most important thing here is growth[18] The course of the business process of e-commerce is almost identical to the conventional course of the sales process, and is divided into phases: initiative, operational performance, the conclusion of the sales transaction, payment and the delivery of goods.

With the Croatian accession to the EU, the market has expanded and new business opportunities have appeared where e-commerce and e-sales have great potential. Statistics, which follows the growing trend of e-commerce, shows that Croatian consumers have adopted this way of trade and realized all benefits of e-commerce.

The data show that e-commerce in Croatia is on the rise; in 2012, 16% of shoppers bought online, in 2013 19% and in 2014 22%. An important trend is that online trading is growing as well. Online stores have potential and could be a great opportunity, especially for small and medium-sized enterprises. On the other hand, it should be noted that in 2013 only 63% of Croatian citizens regularly used the Internet, which was below the EU average (72%)[19].

According to the data from the Ministry of Economy of the Republic of Croatia, 27% of enterprises buy online, while 25% of enterprises sell online, and 72% of companies have their own Internet site. Wholesale and retail take up 26% of online trade. An average consumption of six months per online customer is 227 euros.

Due to all this, it is illusory to expect that an increase in retail capacity would immediately lead to higher employment, because by technological modernization greater productivity is achieved as well. On the other hand, since the goods from domestic sources are too expensive, domestic retailers have started to import more[20].

6. The Consumer Protection Act in the Republic of Croatia

The development of trade, the increasingly demanding needs of customers and consumers, and the emergence of a large number of various products on the market led to the need for legal regulation of consumer protection.

It was not until late 1997 that the first Croatian Association for Consumer Protection was established. In early 2000 Potrošač (Consumer - Society for Consumer Protection of Croatia) was founded as well. The Consumer Protection Act of the Republic of Croatian was adopted on 29 May 2003. The Act regulates the protection of basic rights of consumers when buying products and services, as well as in other forms of acquisition of goods and services, and oversees marketing communications and the protection of children. The National Consumer Protection Programme determines the foundations of the consumer protection policy in a given period. In February 2005, the Croatian Parliament has adopted the first Croatian National Consumer Protection Programme for 2005 and 2006.

The Consumer Protection Act of the Republic of Croatian was adopted on 29 May 2003. The Act regulates the protection of basic rights of consumers when buying products and services, as well as in other forms of acquisition of goods and services, and oversees marketing communications and the protection of children. All protections are based on the consumers' fundamental rights[21]:

- the right to protect the economic interests of consumers
- the right to protection against risks to life, health and property
- the right to legal protection of consumer
- the right to information and education of consumers
- the right of association of consumers to protect their interests
- the right to consumer representation and participation of consumers in the work of bodies that deal with issues of their interest

Some of the areas of law are covered in details by the statute:

- sale of products and services provision. Most of the text is devoted to retail sales: the terms of sale and service delivery; the way of displaying prices when advertising and the payment of financial obligations of consumers, the obligations of the dealer when issuing bills; means of selling defective products; packaging regulations and the

[18] Ružić, D. et al. op.cit. page 263.

[19] Croatian Chamber of Ecomomy. Accessed February 8, 2017. http://www.hgk.hr/sektor-centar/sektor-trgovina/hrvatska-maloprodaja-u-skladu-s-europskim-i-svjetskim-trendovima?category=68.

[20] Segetlija, Z. "Distributive trades and economic development", *Suvremena trgovina 4* (2013). page 17.

[21] Kesić, T. Consumer behaviour, Zagreb: Opinio. 2006.

like.

- the labeling and sale of products. The law clearly states what the label should contain. For the first time, it is explicitly required that genetically modified products be labelled. This is a partial concession to consumers, since they wanted a total ban on imports of genetically modified products, which had not passed in the Parliament due to great power of foreign lobbies.
- public Services. In the area of public services, the principles of the directives of the European Union are partially applied. They require that all regulations be non-discriminatory, as well as the full transparency of prices and delivery methods. According to the law, in other monopolistic public services (water, gas, and electricity) only what is ordered and delivered is paid.
- advance payment, contracts concluded at a distance and outside of the business premises of the traders. With more expensive products (furniture, car, real estate), traders are asking for a down payment. This Act defines the relationship (interest rate, method of returning etc.) and the time during which the down payment is valid. Distance selling is specially regulated as it is becoming more and more common as a form of sales. The law regulates the return period, as well as the return merchandise authorization and refunds. Distance selling is not permitted for medicine, veterinary products and explosives.
- advertising of products and services. Defining the forms of advertising, along with their usage, are valuable regulations of this part of the Act. A significant novelty is the ban on misleading or false advertising. Specific parts of the law protect children from the false advertising or advertising maladjusted to children.
- holders of consumer protection. In addition to laws that protect consumers to a great extent, the National programme made a significant contribution as well. The programme was adopted by the Croatian Parliament at the government's proposal, for a period of two years. The law contains points on financing associations, the system of permanent supervision by the National Consumer Protection Council, and the informing of consumers.

The main goal of the society Potrošač (Consumer) is the protection of the rights of individual consumers and their families, to transform the passive consumer into an active one, conscious of their rights, guaranteed by the laws, to the high quality of goods and services, to a polite and decent relationship between the manufacturer and the service provider, and to the law-based protection from bribery, corruption, bureaucratic and monopolistic self-will[22].

Consumer complaints on a daily basis indicate a high level of violations of "good business practices", thus distorting the legal framework that is governing the protection of consumers in the Republic of Croatia. The fact that only about 20% of citizens-consumers are sufficiently aware of their legal rights, and the situation is similar with the retailers, service providers and manufacturers as well, is one of the reasons for frequent violations of basic consumer rights and laws, which regulate the consumer protection in Croatia.

7. Conclusion

One of the answers to the meaning of globalization in Croatia is provided by dr.sc. Petar Vučić: "politically, it is a process of Croatian integration into the EU; militarily, it is a process of Croatian integration into the NATO. Economically, it does not have to be explained, because Croatia does not have its autonomous and independent national-oriented economic policy. This is done by IMF and the World Bank, by foreign banks, located abroad and in Croatia, and other business entities that have completely destroyed the economic sovereignty."

Globalization is a process that has started and cannot be stopped. It is supported by the growing interaction between the participants of international trade, the global networking of financial markets and the growing power of multinational corporations. We are witnessing the permanent information and communication development as well, the development of a global culture and polycentric world politics. The supporters of globalization emphasize the fact that it has promoted the exchange of information, connected different cultures, enabled the growth of democracy, and the trade development through globalization has led to greater consumption and increased the standards of living. Criticism of globalization refers to the advantage and superiority of developed countries in relation to the underdeveloped, the vulnerability of national cultures and identities, and the great power of multinational companies.

Effective consumer protection and regulation of trade is necessary to ensure the proper functioning of the market economy, and this protection will depend on the development of the administrative infrastructure in order to secure market surveillance and law enforcement in this area. To this end, and in their common interest, the parties will encourage and ensure the harmonization of law and adjustment of consumer protection in Croatia to that in force in the European Union.

For the small traders in the Republic of Croatia to withstand some of the negative effects of globalization, such as a decrease in the sales of domestic products, and to increase their sales, they should specialize, and follow the trends in connecting and mutual appearance. In addition, it is necessary to further arouse the awareness of consumers in Croatia for the purchase of domestic products in order to increase the domestic production and the number of jobs in Croatia.

Croatian trade is turning towards today's dynamic society and the increasingly demanding requirements of consumers who, apart from the very products, are looking for experience as well.

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ASPECTS REGARDING THE ROLE AND FUNCTIONS OF THE STATE, IN ECONOMY*

Florina POPA**

Abstract

Public Sector Economics - branch of economic science – has, as main object of study, the state policies, the role and importance of its actions in the economic and social life.
State involvement in the economic life is relevant through its activities, whereby are occured legal regulations concerning the development of social and economic life, interventions in the market mechanisms, with measures designed to increase economic performance.
The implications of the public sector in economy are exhibited in the context of links that they provide between the production and consumption sphere , in the development of flows among economic agents.
The actions of the state, respectively of government, both as an economic agent and as regulator of economy, relevant to the role of the public sector, have as main objective, the optimum of resource allocation, so that to obtain a better fulfillment of citizen needs.
The study highlights issues referring to the public sector role and implications in economy, market failure and state functions, through which it aims to promote economic and social wellbeing.

Keywords: *state, the role of public sector, market failure, functions, public goods*

JEL Classification: H11, H41, P43.

1. Introduction

Public sector economy is a branch of economics the main object of study of which is the policies of the state, the role and importance of its actions in economic and social life.

Human existence is indestructibly linked to the presence of the state, as the area of manifestation of the activities developed by it comprises multiple levels of economic and social life, the political decisions taken by the state causing a system of rules by which society operates, namely, the political, economic, legal institutions, determinant for the life and actions of individuals.

State's interventions, as an economic actor, take the form of benefits provided for community in areas that cannot be covered by the private sector; concerned, first of all, to satisfy the needs of citizens, the public sector has a monopoly in the provision of public goods and services provided to them, the manner of resource allocation being subordinated to this goal. Meanwhile, private sector involvement in providing public goods and services causes the occurrence of competition and thus of performance in public administration, an improved public sector, through the instrument of public administration, constituting a support for strengthening democracy and good governance.

Performance in the public sector requires a set of conditions on competence, organization, accountability, government transparency, citizen participation in decision-making in certain common issues of public interest, efficient allocation of public resources, democratic governance.

2. The role and importance of public sector

The role of the public sector in economy is relevant by means of the state's actions, respectively, of the government, both as an economic actor and as well as regulator of the economy so that, through an optimal management of resources, to achieve the objective of meeting the needs of citizens.

The implications of the public sector are manifested in the context of the links it provides between the production and consumption and the carrying out of economic flows between operators.

Thus, the public sector:

- Provides its resources through the channel of fees and taxes levied from the economic producers and consumers;
- Participates in capital market transactions, entering into relationship with other economic participants, which is another source of income;
- It is a direct participant in the exchange on the market, using the financial resources it has, as ***producer*** - stance in which it acquires the resources (production factors) from the production factors (inputs) market - and as ***beneficiary*** – a situation in which it purchases

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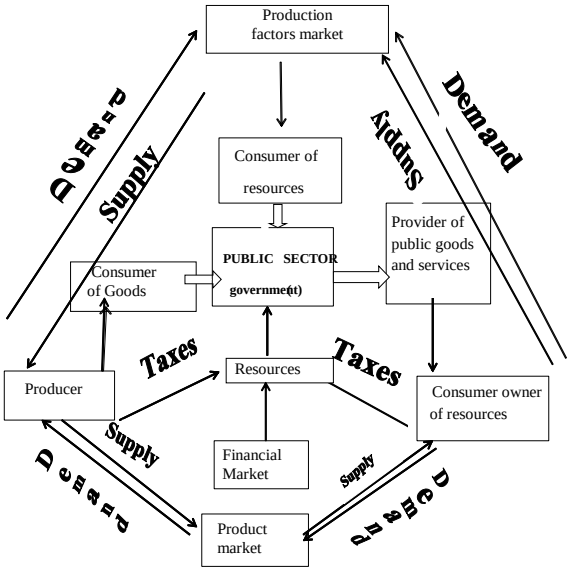
goods and services from private operators;

- It is a provider of goods and services on which it has an exclusivity (defense, justice etc.) and of other goods and services that can be delivered by means of both the public sector and the private sector (health, education etc.).

These forms of participation of the public sector in economic activities can be represented schematically in the figure below (Fig. no. 1):

Figure no. 1 The implications of the public sector



Source: adaptation from Cosmin, Marinescu, "Economia sectorului public", http://www.cse.uaic.ro/_fisiere/Documentare/Suporturi_curs/III_Economia_sectorului_public.pdf; Bom, Ready, Chapitre 2 "L'Allocation des Ressources", https://www.scribd.com/document/249295987/Chapitre-2-L-Allocation-Des-Ressources

By means of the flows created between the public sector and private operators, the State influences and regulates the economic activity, affecting resource allocation as a result of its interventions through the level of taxation applied, or of the decisions of price and production, when they act as producers.

Also:

- On the products market: the demand of consumer goods meets the supply of producers;
- On the market of production factors: demand for production factors (resources) of producers, meets the holders' area.

3. Market failure

The State is a public organization, the system of government being the one which sets the basic rules according to which economic activity takes place; the institutions of the economic system are linked to the form of manifestation of political power, the political government authority being the one holding monopoly in exercising power in the society.

In the context of modern economies, the public sector operates alongside the private one in the form of mixed economy.

The market and price balance is achieved based on the supply-demand relation, in competition conditions, the efficiency being contingent upon the orientation of markets towards a pure and perfect competition. Failure to comply with these criteria can cause imbalances in market mechanisms and in ensuring an optimal allocation within the meaning of the Pareto criterion, situations considered market failures.

They identified a number of causes that prevent the efficient allocation of resources and lead to the need for the State intervention in order to remedy and maximize social utility.

The most significant of these relate to the particularities of public goods and externalities, to which, the failure of competition, the costs of transfer can be added.

➢ Particularities of public goods

Public goods are those categories of goods that cannot be achieved by the market or the production of which is not covering, which causes government intervention, by ensuring resources for their production through compulsory taxation system.

It is identified by means of two characteristics:

- Are not excluded - a public good produced is affordable for any potential consumer;
- Not rival - for a public good produced when adding any new consumer to the original, no new costs are added, utilities are not diminished; each person can benefit from the amount available to another person.

These two properties provide to the public goods the quality of **pure public goods**; in case of pure private goods these two traits do not manifest.

In the market system, private producers are not interested in supplying these types of goods, the allocation of resources to this end, being done by the public sector, the result of a political decision. Government can contract the achievement of these goods with private companies, the funding being made from public resources.

The following data show the characteristics of public goods versus those of private goods (Table no. 1):

Table no. 1 Comparative elements between public goods and private goods

Features	***Pure public goods***	***Pure private goods***
Exclusion	Are not excluded	Are excluded
Rivalry	Non-rival	Rival
Exclusion costs	Great	Insignificant

Producer	Public organizations or private actors on the basis of the contract with government.	Private actors
Allocation	Through public budget	Through market
Resources of financing	Public budget charged by taxation	Incomes from capitalization on market

Source: adaptation from Dorel Ailenei, Tudor Grosu, "Economia sectorului public", http://www.biblioteca-digitala.ase.ro/biblioteca/carte2.asp?id=389&idb

The above shows that the particularities of the two categories of goods are in opposition, being relevant for the involvement in resource allocation.

As such, they have an impact on the market mechanism generating failures:

particularities of public goods: the reverse of **non-exclusivity** is the disinterest of private companies in achieving public goods because those who do not pay consumption cannot be eliminated; **non-rivalry** – it does not lead to profit maximization (zero marginal cost on the emergence of a new consumer), so that the goods are not supplied.

Not covering the market at the level of demand means inefficiency in the sense of Pareto.

Along with the two categories of pure public and pure private goods, there is the category of mixed private-public goods, which there are in every contemporary economy.

Externalities. This category includes certain activities of production or consumption of goods, which can affect positively or negatively, the activity of other agents than those which have generated it; benefits or costs, in addition, resulted from these processes are not reflected in market prices (are external).

In the case of water or air pollution by a producing unit, the price of those products does not include an additional cost.

Externalities can be:

- **Positive** - the private advantages (of the manufacturer) are lower than the social benefit achieved also by other community members;
- **Negative** - social costs (borne by other subjects external to those from the producing units) are higher than those of private establishments;
- **Externalities** generate costs or benefits that are not reflected in market prices - these do not reflect appropriately the allocation of resources used.

The government measures consist of economic policies able to stimulate activities that generate positive externalities (through subsidies), respectively, to compensate those who suffer the consequences of negative externalities.

- **Competition failure** occurs when the subjects that provide or those who consume have a monopoly on the demand or supply. The consequence is manifested in prices higher than trade balance or unsatisfactory supply.
- **The costs** involved in transferring the use of goods make the exchanges and the development of market processes difficult, with negative effects on the efficiency of resource allocation.

4. The functions of the state

In direct relation and consequence of market failure, the State functions carry out, categories through which the State seeks to promote economic and social wellbeing.

Richard Musgrave identified the areas that require government intervention in economy, by exercising three functions[1]:

- function of resource allocation;
- function of distribution;
- organizing (stabilization) function"

- **The function of resource allocation** occurs when there are obstacles in the efficient allocation of resources as a result of weak competition, externalities, particularities of public goods, causing disruptions in market mechanisms.

Public intervention is exercised by the production activity of the State for the achievement of certain categories of goods (which cannot be achieved through the market system) in areas such as national security and defense, justice, public utilities, infrastructure, education, health, which implies the existence of appropriate resources.

- **The function of distribution** of wealth consists of a process of redistribution of income and wealth among members of society, by transferring from owners to persons who do not have such resources, based on considerations of social justice, which obliges one to find suitable methods leading to a fair distribution.

In exercising this function, the State applied a income tax, the State, thus, obtaining financial resources needed for the supply of public goods and services. Thus, the function of redistribution is related to the public production activity which uses the resources resulted from taxation to finance the assets.

- **Organizing function (macroeconomic stabilization)** The imbalances that manifest as a result of the spontaneous market game aim at issues of growth, inflation, unemployment, a

[1] Jaques Genereux (2003) quotes Richard Musgrave (1959), "The theory of Public Finance: a study in public economy" ed. Mc. Grow Hill, New York, 1959, in the article "Les trois fonctions de l'Etat, selon Richard Musgrave", 01/11/2003, *Alternatives Economiques*, N 219, 2003, http://www.alternatives-economiques.fr/trois-fonctions-de-letat-selon-richard-musgrave/00027793.

situation which causes the need for public intervention.

The exercise of the stabilization function is consistent with the state's objectives in the economic field regarding the full use of production factors. The state develops policies to stimulate economic growth, control of inflation, increase employment with effect in reducing unemployment, social protection actions.

In the state intervention may occur activity risks relating to the effectiveness of public actions and correction of market errors considered as failures of government, such as:

- Difficulty of control of the economic policy instruments implementation systems, of certain negotiations that may fail;
- High costs posed by a bureaucratic apparatus, significant as size, required by government intervention, difficulties that may arise in the operation thereof.

As such, attention should be paid to the delimitation of government actions, to ensure the most advantageous alternative to the degree of public sector intervention in the market economy.

5. Conclusions

The State is a public organization, the system of government being the one which sets the basic rules according to which economic activity takes place; institutions of the economic system are linked to the manifestation form of political power, political government authority being the one holding the monopoly of exercising power in the society.

The role of the public sector is relevant through the actions of the state or government, both as an economic actor as well as regulator of the economy so that, through optimal management of resources in can achieve the objective of serving citizens' needs.

The implications of the public sector in the economy are manifested in the context of the links it provides between the production and consumption areas and of carrying out of economic flows between economic operators.

By means of the flow created between the public sector and private economic operators, the state influences and regulates the economic activity affecting resource allocation as a result of its interventions through the level of taxation applied, or of the price and production decisions, when they have the capacity of producers.

In the context of modern economies, the public sector operates alongside the private one in the form of mixed economy, the market balance and prices being achieved based on the supply-demand relation under competition conditions.

The existence of market failures leads to the need for state intervention manifested through the exercise of its functions - categories by means of which it aims at remedying and maximizing social utility.

Production of goods by the public sector, their destination are related to income redistribution, which makes the government considering the resources available, based on the tax system, and as well as the nature of the goods to be produced.

If the efficiency and effectiveness is the cornerstone of good governance, the public sector has the responsibility to find the best ways to use the resources (human, material, financial, etc.) in order to ensure in the best conditions, the coverage of the needs of the population.

The increase of the public sector efficiency must comply with the increasingly larger and more diverse demands of citizens, as an essential purpose of public administration's actions; for this purpose, the evaluation of the efficiency of the public sector in various fields can provide an opportunity for guidance in formulating some public funds management strategies appropriate to achieve the objectives.

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AUDIT OF MUNICIPALITIES AND LOCAL GOVERNMENT UNITS - THE CASE STUDY OF THE CZECH REPUBLIC

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Abstract

Public economics examines the influence of the state on economic equality and efficiency, and on conduction of business entities in connection with the various tax systems and individual behavior in private consumption. To manage the public economy is thorough knowledge of the real decision-making and allocation mechanisms. From a budgetary perspective, the public economy in the Czech Republic is characterized mainly by the state budget, 6,249 municipal budgets and 14 budgets of local government units. These all units are together subject to annual statutory audit, which mainly represents the analysis of the system of the Audit informative and monitoring indicators (ASIMI). The paper analyzes the outcome of the audit with the use of absolute and relative indicators and suggests possible changes and consolidation of municipal and local government budgets in the Czech Republic.

Keywords: *municipality, local government unit, public budget, debt, GDP*

1. Introduction

The public sector is part of the national economy, whose main area of interest is to carry out a public service, who are funded from public funds as well as are managed and administered in public administration. Decisions within public sector are made on public option and are subject to public control[1]. From a material standpoint, the issue of control of public administration is more difficult than controlling the business sector of the national economy, and moreover, is subject to the principles of publicity, the principles associated with the obligation to give public entities the requesting information[2]. Public sector represents one of the hallmarks of public administration and its name is derived from the fact that it is implemented in the public interest[3].

By the end of 2016 there is a total of 6,249 municipalities and 14 Local Government Units (LGU) in the Czech Republic. The task of each municipality is to allocate sufficient funds to finance the activities that the municipality has in its scope and activities, as well as those which are transmitted by the state[4]. Municipalities and LGU seek comprehensive development of its territory and ensure the needs of its citizens through public goods and services.

On July 1st 2004 came into effect law No. 420/2004 Call., on the Act on the audit of municipalities and LGU, where articles 1-9 of § 4 oblige the rule to provide (till 30th June of current year) the audit management for the past year. The audit shall be conducted in accordance with law No. 93/2009 Coll., on Auditors and the International Auditing Standards and related application clauses of the Czech Chamber of Auditors.

2. Objectives and methods

For the preparation and fair presentation of financial statements in accordance with accounting standards of the entity, there are data sources obtained from the Czech Statistical Institute and the Czech Ministry of Finance. These data were analyzed using both the absolute and relative methods of managerial accounting. Based on these data and analysis the main objective of the paper is to evaluate the main results of audit of municipalities and LGU in the Czech Republic and determine possible directions of its future reform. Part of this responsibility is designing, implementing and maintaining internal control relevant to the preparation and fair presentation of financial statements that are free from material misstatement, whether due to fraud or error, selecting and applying appropriate accounting policies and making reasonable accounting estimates[5].

3. Principles of budget survey

An audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the financial statements. The procedures selected depend on the auditor's judgment, including the assessment of the risks that the financial statements contain material misstatements due to fraud or error[6].

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[1] VOLEK, T. (2005) Audit of cooperatives and municipalities, Prague, p. 4.

[2] BECKER, G., S., MURPHY, K., M., WERNING, I. (2005) *The Equilibrium Distribution of Income and the Market for Status*, p. 290.

[3] BARRO, R., J. (2014) *Human Capital and Growth*, p. 380.

[4] REKTORIK, J., SELESOVSKY, J. (1999) Strategy of development od municipalities and local government units and their organizations, p. 37.

[5] POSPISIL, R. (2013) Public economics – present and perspective, p. 148.

[6] KRUGMAN, P., EGGERTSSON, G., B. (2012) Debt, Deleveraging, and the Liquidity Trap: A Fisher-Minsky-Koo Approach, p. 55.

When assessing these risks, the auditor considers internal control relevant to the preparation and fair presentation of the financial statements. The aim of the assessment of internal controls is to propose appropriate auditing procedures, not to comment on the effectiveness of internal controls. An audit also includes evaluating the appropriateness of accounting policies used and the reasonableness of accounting estimates made by management as well as evaluating the overall financial statement presentation.

The auditor shall, in accordance with these regulations, to comply with ethical requirements and plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement[7].

The role of the auditor is to issue the audit opinion on the financial statements.

Data review on the annual management of municipalities and LGU, which forms part of the final account are based on law No. 420/2004 Call, § 2, article 1-2:

a) the income and expenditure of the budget, including cash transactions relating to budget funds,
b) financial transactions related to the creation and use of monetary funds,
c) the costs and benefits of business,
d) cash transactions related to pooled funds expended under an agreement between two or more municipalities or LGU or under contract with other legal entities or individuals,
e) financial transactions related to foreign sources within the meaning of the legislation on accounting,
f) management and disposal of funds provided from the National Fund and other funds from abroad provided under international treaties,
g) the billing and settlement of financial transactions to the state budget, the municipality and LGU budgets other budgets, state funds and of other persons.

The further audit and examination include:

a) the trading and management of property owned by territorial unit,
b) the trading and management of state assets under the management of a territorial unit,
c) placing and execution of public contracts,
d) the status of obligations and claims and their trading,
e) liability for the obligations of individuals and legal entities,
f) pledging of movable and immovable assets in favor of third parties,
g) the establishment of easements on the property of a territorial unit,
h) accounting of municipalities and LGU.

Subject of the review referred to in § 2 are audited in terms of:

a) the compliance with obligations under special regulations, especially regulations on financial management of municipalities and LGU on the management of their assets, accounting and on remuneration,
b) the compliance of the management of funds in comparison with the budget,
c) the compliance with the purpose of a received grant or a refundable financial assistance and the conditions of their use,
d) substantive and formal correctness of documents examined transactions.

Financial management in the context of this paper is characterized by basic financial indicators and the relationships between them as the following (including the types of financial documents where the indicators can be found). Table 1 shows the list of used and analyzed indicators of municipal and LGU budgets in the Czech Republic at present.

Table 1: Analyzed indicators of municipalities and LGU

Municipality profile	**Balance sheet**	**Budget**
Identification number	Fixed assets	Tax revenues
Number of inhabitants	Current assets	Non-tax revenues
Performs state administration or not	Total assets	Capital revenues
	Total current accounts	Accepted transfers
	Own sources	Total revenues
	External sources	Current expenditures
	Total liabilities	Capital expenditures
		Total expenditures
		Annual budget balance

Source: own processing

For analyzing the financial management of municipalities, auditors use basic financial analysis ratios, such as the following balance sheet indicators:

Fixed assets / Total assets;
Current assets / Total assets;
Own sources / Total liabilities;
External sources / Total liabilities;

[7] LUCAS, R. E., MOLL, B. (2014) Knowledge Growth and the Allocation of Time, p. 17.

Total current accounts / Total liabilities.

4. Results

The Ministry of Finance of the Czech Republic calculates the debt service ratio for each municipality and in case the ratio overruns 30 % than the minister of finance sends a letter to the municipality. The debt service ratio was first calculated in April 2004 from the 2003 data. Table 2 shows current indebtedness of municipalities in the Czech Republic in 2015 divided in different size group.

Table 2: Indebtedness of municipalities in 2015

Size group	Number of municipalities	Distribution of debt to assets ratio (%)			Distribution of debt to income ratio (%)		
		Median	75th percentile	95th percentile	Median	75th percentile	95th percentile
200	1456	1	4	19	7	22	110
01-500	1998	3	8	27	14	45	130
01-1000	1361	4	10	30	25	57	149
001-5000	1161	6	10	24	32	61	134
001-10000	141	6	11	21	35	52	104
10000	132	7	11	17	41	57	96

Source: own processing

The municipality is required to explain within three months the reasons for this overrun and suggest measures to improve the situation[8]. At the same time the municipality submits the audit report and the multi-annual budget outlook. Then the ministry evaluates these documents together with the total debt, debt per capita, tax revenues per capita, debt in the past years, size of the municipality and its overall financial situation[9]. In case of overrun of the debt service ratio in the next year the Ministry of Finance will put the municipality on a list, which will be passed on to the grant providers (ministries or state funds). The grant providers should consider this list when providing new grants. There is no absolute prohibition of grant provision to these municipalities, but it may be a factor of grant rejection.

The described procedure is effective only for a short time, however several problems arose[10]. The debt service ratio does not say much about the total indebtedness and about the ability to pay off the debt[11]. The ministry did not inform the municipalities sufficiently about the whole procedure and its goals. In our understanding the procedure should have alert both the Ministry of Finance and the particular municipality, that the debt is too high and that some measures should by applied. However many municipalities, which regularly pay off their debt, felt unfairly accused. At the same time the "debt service ratio" is not very concrete and is therefore often confused with "indebtedness".

Audit system of informative and monitoring indicators **(ASIMI)**

The Ministry of Finance of the Czech Republic, on the basis of Government Resolution dated November 12, 2008 no. 1395 on audit of the management of municipalities and repealing Government Resolution of 14 April 2004 no. 346 on the regulation of indebtedness of municipalities and counties through the debt service, annually performs Audit system of informative and monitoring indicators (ASIMI) for all municipalities and contributory organizations established by them and evaluate the results of the calculation, building always on data 31.12. relevant year (after final enrollment). ASIMI indicators are divided into two separated parts and are audited and evaluated all together:

Informative indicators:

a) population of the municipality,
b) total income (after consolidation),
c) interest,
d) payment of installments for bond and borrowed funds,
e) total debt service,
f) debt service indicator (%),
g) total assets,
h) liabilities,
i) balance at bank accounts in total,
j) loans and municipal bonds,
k) received repayable financial assistance and other debts,
l) total debt,
m) the debt to foreign sources (%),
n) 8-year balance,
o) current assets,
p) current liabilities.

Monitoring indicators:

a) share of foreign sources to total assets (%),
b) total current liquidity,
c) 5-year development if indebtedness,
d) annual change of indebtedness.

The Ministry of Finance of the Czech Republic performs annually - from the submitted financial and accounting statements - calculation of ASIMI for all municipalities and evaluates the results of the calculation. Municipalities whose indicator of overall liquidity will be by 31.12. of the current year in interval <0; 1>, while the share of foreign sources to total assets will be greater than 25 %, will receive a letter from the

[8] MAAYTOVA, A., PAVEL, J., OCHRANA, F. (2015) Public finance in theory and practice, p. 233.
[9] BARRO, R. J. (2013) Inflation and Economic Growth, p. 122.
[10] LUCAS, R., E., Jr. (2003) Macroeconomic Priorities, p. 7.
[11] LUCAS, R. E., MOLL, B. (2014) Knowledge Growth and the Allocation of Time, p. 18.

Minister of Finance and asked for an explanation of this state and the opinion of the council of the municipality. The Ministry of Finance will, upon receipt of the municipalities concerned, inform the government of the Czech Republic on results of monitoring of municipal finances for the current year.

The Ministry of Finance also evaluates the operations of other municipalities (including their subordinate governmental organizations), with the indicator of the overall liquidity in the interval <0; 1> using the above indicators, paying attention especially to municipalities that are in this interval occurred repeatedly. Municipalities who were identified with serious problems with their solvency, will be offered assistance focused on analyzing problems arising with the draft recommendations on possible solutions. Auditing of municipal management does not require additional administrative or financial demands on budgets and run municipalities. Municipalities are required to currently send to the Ministry of Finance of the Czech Republic completed ASIMI table.

Timetable of ASIMI audit:

a) calculation of Audit system of informative and monitoring indicators (March),
b) distribution of letters of Ministry of Finance of the Czech Republic (April),
c) justification unsatisfactory status (June),
d) information for members of the government (3rd. Quarter).

In 2016 Audit of ASIMI included all 6,249 municipalities and 14 LGU. By the 31. 12. 2015 there were 176 municipalities with the indicator of the overall liquidity in the interval <0; 1> and also 226 municipalities with the share of foreign sources to total assets higher than 25%. These two indicators all together exceeded the 28 municipalities. It is an annual fall of 2 municipalities, while 12 municipalities had exceeded those values in some previous years. The resulting values of the indicators are only indicative of the potential risk of economic problems, but it does not necessarily mean that the municipality is in a difficult financial situation. This can be assessed only after a thorough audit of the financial and accounting reports, and especially the additional documents provided by the municipalities themselves.

Based on the provided analysis, it is possible to state that:

- from the point of terms of solvency the most vulnerable municipalities are those, which were mandated contribution for breach of budgetary discipline and municipalities and those, that have made the wrong investment decisions[12],
- the greatest risks to the economic situation of municipalities is seen in non-compliance with the conditions of grant projects supported by EU funds and also from national programs. These risks arise both from errors in the preparatory and implementation phases,
- most municipalities with exceeding the given values of ASIMI, should not get into serious trouble with their solvency, because these identified risk proved only temporary,
- high insolvency risk was identified just in 2 municipalities of 6,249 total: Prameny and Turovice.

Municipalities (including their subordinate governmental organizations) reported at the end of 2015 the total debt of EUR 3,10 billion. Compared to the previous year with a decrease of 2.3 %, in absolute terms, the debt declined by EUR 71,4 million. The total volume of municipal debt includes bank loans from financial institutions, issued municipal bonds, repayable financial assistance received and other debts, incl. loans from state funds. Table 3 shows summary data on indebtedness of municipalities in the Czech Republic in 2010-2015.

Table 3: Summary indebtedness of municipalities in the Czech Republic (billion EUR)

Variable/Year	2010	2011	2012	2013	2014	2015
Loans	2,14	2,18	2,44	2,46	2,42	2,36
Municipal bonds	0,56	0,50	0,49	0,54	0,42	0,38
Received repayable financial assistance and other debt	0,27	0,27	0,28	0,30	0,34	0,36
Total	2,97	2,95	3,21	3,30	3,18	3,10

Source: Czech Statistical Office; own processing

In the structure of the debt of municipalities have the greatest weight the long term loans, whose share during 2015 decreased by 0,1 percentage points to 76,1 %, the share of municipal bonds issued decreased by 1,0 percentage points to 12,3 % and the remaining part of the debt of municipalities (11,6 %) were consisted of repayable financial assistance and other debts. Total debt of municipalities in 2015 contributed 4 largest city of the Czech Republic by 50,4 %, the value of their debt amounted to EUR 1,55 billion.

Loans that municipalities have adopted from financial institutions, similarly to previous years, chiefly aimed at reconstruction and construction of technical infrastructure for pre-investment projects co-financed from EU funds and the regeneration and construction of housing[13]. Municipalities also used these funds for reconstruction, insulation and expansion of educational facilities, sports arenas and other public facilities[14]. These loans are characterized by relatively low interest rate and very long maturities.

[12] ROGOFF, K., S., REINHART, C., M., REINHART, V., R. (2012) *Public Debt Overhangs: Advanced-Economy Episodes since 1800*, p.29.
[13] REINHART, C., M., ROGOFF, K. (2010) *Growth in a Time of Debt*, p. 575.
[14] STIGLITZ, J., E. (2015) *Devolution, independence, and the optimal provision of public goods*, p. 90.

Debt itself cannot be evaluated negatively[15]. Without a loan or credit, many municipalities cannot fund its development (gasification, local roads, sewers, water mains, sewage, preschool and school facilities, etc.). So it depends on what municipalities can borrow, whether the loans are repaid seamlessly and how well the project is ready.

Indebtedness in 2015 was showed in 3,255 municipalities out of a total of 6,249 municipalities (52,1%). Number of municipalities that have shown indebtedness in recent years remains broadly stabilized, although in the last year there has been a slight increase (by 20 municipalities).

According to the applicable laws governing budgetary responsibility meets the 92 % of municipalities the rule on budgetary responsibility for municipalities and LGU (ie. debt to average income in last 4 years shall not exceed 60 %). According to the monitoring of municipal management for the year 2015 - which among other things monitors the level of debt and liquidity municipalities - operate with a higher degree of risk only 28 municipalities.

LGU (counties) including contributory organizations established by them, reported at the end of 2015 total debt EUR 0,943 billion. From 2014 to 2015 the value of debt fell by EUR 42 million (4,4 %). On the line of credit was recorded decrease debt by EUR 20 million. The share of loans in total debt reached up to 92,0 %. LGU did not issued any bonds in 2015. Table 4 shows summary data on indebtedness of LGU in the Czech Republic in 2010-2015.

Table 4: Summary indebtedness of LGU in the Czech Republic (million EUR)

Variable/Year	2010	2011	2012	2013	2014	2015
Loans	593	700	793	839	871	868
LGU bonds	9	14	7	26	24	5
Received repayable financial assistance and other debt	80	82	75	91	90	70
Total	682	796	875	956	985	943

Source: Czech Statistical Office; own processing

Some LGU continued drawdown of loans granted by the European Investment Bank, which pre-finance and co-finance massive investments in regional infrastructure. These loans are generally disbursed in several tranches with different maturities, typically in excess of 10 years. Other LGUs have taken loans mainly from the biggest Czech banks like Czech Savings Bank, Inc., which belongs to Erste Group, or Commercial Bank, Inc., which belongs to Societe Generale Group for the purpose of pre-investment of projects for the repair of roads or flood damage.

5. Conclusion

Municipal and LGU regional budgets in aggregate by the end of 2015 showed indebtedness of EUR 4,043 billion, which is by 3,0 % (EUR 122 million) more than in the previous year. The total volume of loans taken by the territorial budgets was increasing in 2015 as well (non governmental organizations) amounted to EUR 3,228 billion.(increase of 1,9 % over the previous year).

In the institutional area of public finance, the Czech Republic has been criticized for a weak budgetary framework for several years although it has always met its obligations in terms of general government sector performance over the last years. Since the termination of the excessive deficit procedure with the Czech Republic in June 2014, the medium-term budgetary objective has been met every year. A set of proposals for regulations on budgetary responsibility (a draft constitutional law on fiscal responsibility, a draft law on rules for fiscal responsibility and a draft law amending certain laws in connection with adoption of fiscal responsibility regulations) was approved by the Czech government already in February 2015, and after then it was under consideration in the Chamber of Deputies of the Parliament of the Czech Republic until October 2016.

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THE IMPORTANCE OF PERFORMANCE INDICATORS IN ANALYZING BUSINESS ENVIRONMENT AND BUSINESS EVOLUTION

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Abstract

The analysis of economic environment brings into attention of the ones interest important trends and important evolutions that can bring into surface new strategies and new ways of obtaining profit. This is to say that staying in connection with all the changes and analyzing the trends in business performance, analyzing performance indicators helps managers to know not only their firm but the environment, the opponents, stakeholders and the opportunities that can be optimized and used as advantages in a turbulent economic area. In general, performance is associated with two key processes: performance management and its measurement. Performance management is a holistic process which embodies the subject of performance and reflects the connection between the economic entity and performance, including processes such as definition of strategy, implementation of strategy and training and performance measurement. Performance measurement appears as a low performance management that focuses mainly on the identification, tracking and communicating performance that results through the use of performance. Key performance indicators help quantify the formation of a result, providing visibility in relation to the performance of individuals, teams, departments and organizations, allowing decision makers to take action in order to achieve the objectives desired. These indicators can be appreciated based upon the trends in the company or benchmarking - comparisons with standard industry values or reference companies.

Keywords: *indicators, financial analysis, business, economics, profit*

1. Introduction

The first step in analyzing financial performance is the overall analysis of financial performance in which we highlight the progress of the performance at different levels of activity and then we follow the evolution and mutations that were produced based on categories of incomes, expenditures and results that were based upon the financial situations. The augmentation of an analysis of this value recquires investigating the financial situation of severel years. In this sense the analysis faces four levels:

- Level of exploitation;
- Financial level;
- The current level;
- Extraordinary level;
- Global level.

In the one that follows, we will see which are the indicators that are used for every level and how are they structured in order to give a clear idea upon the financial situation of the firm and the main performance levels. But until then let see which are the main indicators that can be used and how are they related with the business environment.

Strategy indicators provides information for the management of a company: profits from invested capital, risk versus opportunity, return on assets employed, turnover, market share, stock price, employee satisfaction and the customer's. Managerial indicators provide information like management - resource availability, versus planning effort, cost income versus budget, operational indicators provide information on individual performance – related to processes, activities, products, specifications, procedures, efficiency. Among the most used and recommended performance indicators for companies, depending on the strategy and strategic goals are:

− Marginal net profit recommended indicator for benchmarking industry level.

− Delivery on time and in accordance with customer expectations, as stipulated in the contract of service / delivery is an index of operational performance.

This indicator is suitable for both companies producing or selling goods, and in case of service offerings.

− -Profitable customers-can provide essential prerequisites for making strategic decisions in relation to the portfolio and customer segments.

− Projects on schedule, within budget and according to specifications.

− The commitment of staff in relation to work activities and responsibilities, defined by the enthusiasm, dedication and personal effort. In order to choose relevant performance indicators, a company must take into account many factors:

- strategic objectives (turnover, profit, cost - intensive or extensive development)
- timing activity (long-term orientation or immediate profit)
- company profile (services, manufacturing, distribution)
- the current situation on the company's

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development curve (growth, maturity, decline), including the style of management.

According to a study made by James Henderson, professor of Strategic Management at IMD Laussane, " firms that are in development follow the key performance indicators that are trelated with turnover, the penetration degree on new markets, the number of active clients, the development of distribution channels and human resources development. The companies that are in the process of development will orientate the main performance indicators in the area of profit obtained on invested capital, of operational and marginal profit, of economic added value. But the organization that are already mature will concentrate upon the indicators linked with the cash-flow, capacity of payment, investemnts versus non-investments and the degree of organic growth."

From another point of view indicators can and should be set on the following levels:

company: turnover, market share, profitability, stock price, employee satisfaction, etc .;

- function / department: sales quota, the fluctuation of personnel, budget implementation, etc .;
- process: for example, generic – development of a product related with time and new product launch; marketing & sales - percentage accepted deals on promotions to increase sales, customer profitability, customer retention, customer satisfaction; stocks and acquisitions - stock rotation, percentage of orders delivered on time provider, the average response time to urgent orders; Recruitment - duration and costs etc;

- Individual: net sales per salesperson number of interruptions of the IT system, average number of items processed per day, percentage of savings in expenditure, supported training hours per year, etc. The performance indicators have impact upon the business environment and, on the other side, the business environment plays a crucial role in the development of the company. That is why the interconnection between the micro and macro environment should be of great interest among managers. There are several factors that influence the business environment.

2. Content

The *operating level*- in this performance review is outlined the volume of the main activity, that is, the activity indicators operation used a specific calculation based on profit or loss account.

Indicators calculated based upon profit and loss account

- *Net turnover* demonstrates the breadth of business portfolio made by a company in connection with various partners. As an indicator volume, net turnover reflects both the commercial side of a company producing (by sold production) and the volume of work done by a firm focused on sales By sales mărfuri- VM) and operating subsidies related to net turnover (SE).

$$CAN = VM + Qv + SE\text{-}V$$

- VM is the volume of goods sold is taken from turnover creditor707 account; Qv is the production sold, the indicator will be calculated in those follows;
- SE is operating subsidies which are taken from the creditor turnover 7411 account.

Net turnover related to sales can be increased either by an increased volume of goods sold, either by increasing prices, or both.

Entity's ability to change one or both of these factors will depend on the demand for entity's products, the company's position in the competition and the economic conditions offered to the entrepreneur.

Production of the year (QE) demonstrates the breadth of business activity production companies both in relation to third parties (customers) by variation of the production and production sold stored (Qs), on the one hand, and in relation to the production of the property itself (Qi), on the other hand.

$$QE + QS + Qi = QV$$

- Sold production is calculated from turnover creditor group accounts 70 least 707 account
- Variation stored output (Qs) comprises as change in stock finished product (SPF) and the variation of the production in progress (SPCE) from end and beginning of the year under review.

$$QS = \Delta\, SPCE + \Delta\, SPF$$

Production is once stored account balance 711, if it has a credit balance it is summed up, if in debit and it is lowed;

- Production of property includes all costs incurred for obtaining tangible and intangible assets necessary for investments. Immobilized production is calculated from account credit turnover 711.

In terms of analysis, the "production year" is heterogeneous due to different measurement bases used. Since the production sold is evaluated in selling prices and production and production assets stored in production costs. Therefore factors that modify the state of these components are grouped into:

- physical volume;
- structure of production and sales;
- sale price;
- cost of production

Trading margin (CM) is the new value created in trade of specialized companies and the companies that operate trade through its own stores. The indicator is calculated as the difference between the proceeds from sale of goods (SG) and expenditure on goods (GE):

$$MC = SG - GE$$

Industrial margin (MI) is the new value created in production activity held by a company over a period of time that is the financial year. Industrial margin is calculated as the difference between production year

(QE) on the one hand, and the costs of raw materials, equipment, energy (CM) and the work and the third parties (Lt) on the other hand, as follows:

$$MI = QE - [\, CM + Lt \,]$$

- expenditure on raw materials and consumables is

calculated from debiting the accounts of group 60, less 607 account;

- work and services performed by third parties is calculated from the debtor turnovers of the groups 61 and 62 accounts.

The added value (VA) represents the value of a company newly created by a company over a period of time, usually during the financial exercise. The added value is determined by summing the commercial margin and the industrial margin:

$$VA = MC + MI$$

The added value is the resulting synthetic indicator expressing the amount a business activity and unlike other indicators of volume forth above has the advantage of reflecting only the volume of what has actually occurred in the entity, apart from inputs from outside. The importance of the added value resulting from analysis the following considerations:

a) added value is the main source of self-financing of the operating result and the net result for the year;
b) the added value is the main source of financing the activity of operators;
c) added value expresses the degree of economic integration of a commercial company;
d) the added value of the is the source compensation of personnel;
e) added value is the source of financing of budgetary obligations;
f) value added is the source of increasing company reserves;
g) the value added measure the firm's contribution to obtain the internal gross income of a country.

The added value obtained by an entity are generally divided between the five participating parties as follows:

a) staff person who is remunerated by wages and social protection related (including payroll taxes)
b) state that charge taxes (including income tax)
c) lenders who charge interest
d) owners and managers of the entity entitled to a hoped remuneration (dividends, profit-sharing)
e) eligible sources of self-financing (retained earnings and amortization).

Analyzing the way of repartization of the value added is important in order to outline the participation degree of every category in creating the added value, and also to appreciate the level of retribution regarding the the effort made. For appreciating the way the added value is distributed several raports can be used:

Personal	Personal expenditures/ VA
Stat	Taxes/ VA
Group and associates	Dividends and distributions/ VA
Lenders	Interest expenditures/ VA
Entity	Self financing/ VA

The operating result (RE) differs from gross result of exploitation that takes into account depreciation and provisions policy promoted by the entity so it a net of depreciation and provisions.

RE = RBE + Other operating income + operating income of depreciation and provisions – Other operating expenses - Operating expenses of depreciation and provisions

The *financial level* illustrates through indicators like "gross financial result"and "outcome financial result", the financial cah-flows of a commercial society.

The gross financial result (GF) is the intermediate result obtained bya company which is not influenced influence the financial provisions and amortization:

$$GF = FVB - FEB$$

GFB- financial venues

FEB- financial expeditures

Financial result (RF) is determined as the difference between financial income (FI) and financial charges (FF). If the financial result (RF) is a profit situation can be:

Favorable because available funds were placed effectively in financial activities obtaining income exceeding costs.

Unfavorable when the positive result is due for lack of credit operations thus losing various investment opportunities.

If the financial result represents a loss, situation can be:

Favorable when negative financial result is compensated by the effects that lending has caused to the operation activity.

Unfavorable when return on investment is purchased through credit below the costs incurred in lending. In other words it is obtained a negative leverage effect lending prejudicing the operating results.

The *extraordinary level* puts into light through its indicators the financial flows of the extraordinary operations. This type of operation has a random character, it cannot be considered to assess the future performance of an enterprise, because of the lack of regularity in appearance and because of a very alternating direction (Profit / loss).

Exceptional activity, although characterize random operations such as: disposal of assets, fines and donations received or offered these activities were closely related to the operating activities of the entity reason why new regulations include them in the extraordinary activity.

2. The extraordinary activity includes income and costs related to extraordinary events like the extraordinary disasters or other events.

Gross outstanding indicator is a partial indicator showing volume results from extraordinary activity

influenced by depreciation and specific provisions of these financial flows.

The extraordinary result is calculated as the difference between exceptional revenues and exceptional expenses. The extraordinary result is an indicator that shows profitability of the companies in extraordinary flows.

The *global level* of activity highlights using a system of indicators the preliminary results and the final results of the economic activity. In this are distinguished:

- current result;
- total gross result;
- gross profit before deducting interest and income taxes;
- net result for the year;
- self-financing capacity;
- net cash flow capacity.

Example:

Indicators Society A	N-1	N
Turnover	114.520	142.700
Gross margin	25.080	22.550
Total assets	111.417	114.921
Personal capital	744.350	868.201
Total revenue	821.007	1.178.202
Net profit	59.749	113.278
Sold production	10000	20000
Production of the exercise	42000	43000
Selling price	100	100
Variable costs	6000	5300
Fix costs	400	400
Maximum production	45000	45000
Financial venues	120.000	123.000
Financial expenditures	56.000	73.000
Taxes	12.300	11.200
Personal	120	105

As it can be seen the turnover rises from N-1 to N with 28.180 u.m which represents a favorable situation, that is reflected also by the total revenue which rises as well. This is registered having in consideration that the number of working people is falling down but this means that the technological capacity of the society is rising and the productivity is not affected. So, the productivity can be calculated as Turnover/Number of personal so in N-1 we obtain the value 954,3 u.m., respectively 1359,04 u.m.

The added value that represents a performance indicator can be calculated as Total production of the exercise- Third-parties costs, so having into consideration our indicators we can reffer as third parties costs, registered taxes so the results will be for VA N-1= 29.700 and VA N= 31.800, so in the current year the value added registered greater values, so the performance is growing referring to the operating level. The VA Index is 107% and the Total Exercise production is 102%, so IVA > IPE so in which concerns the commercialization and production activity the society has a favorable situation, this is to say that grows working productivity, grows the level of valorification of the material resources and diminishes the third parties costs.

To analyse the way of repartization is important see how repartization of added value is made by the firm, in this situation we choose to report VA to state and entity so: Taxes/ VA N-1 = 0.41, Taxes/ VA N= 0.35,

Referring to the entity the repartization of added value is calculated: Self financing/ VA N-1= 25.06 and Self financing/ VA N= 27.3.

The gross margin, another indicator of the operating level shows a depreciation of 2530 u.m., maybe because of stagnation of the selling price in connection with the changes of the market (market request or inflation) or another reasons.

In which concerns the level of reaching productivity or as it is said the break even point it can be calculated as: $\frac{\mathrm{CF}}{1-\frac{CV}{FV}}$, so in N-1= 421.05 u.m. and in N= 416.6 u.m. This is the point from which the society begins to register profit.

At the exceptional level, it can not be made a concrete analysis having into consideration the lack of information but the trend of the society is good reflected by an increasing net profit from 59.749 to 113.278, so the conclusion that at the extraordinary level the society has a positive position it can be drawn.

The global analysis can be done using indicators as: current result, total gross result, net result for the year, self-financing capacity. So, in this case the turnover is positive, the net profit grows from N-1 to N with 53.529 u.m and the total revenue from 821.007 to 1.178.202, this is to say an augmentation of 357.195 u.m. The financial rate can be calculated by reporting the net profit/ personal capital*100, in N-1 the financial rate is 8.03% and in N is 13.05 %, this representing an important increase. This is to say that the rotation speed of assets increases calculated as TA/ TV, in N-1 is 13.57 % and in N is 9.75 %.

The financial leverage can be calculated as TA/ Kp, in N-1= 14,96% and in N= 13,24. And, at last the Net return on revenue as NP/TR N-1= 7.27% and NP/TR= 9,61%.

3. Conclusions

Performance indicators can show you can help you understand if your company is on the right track for success—and if it's not, where to focus your attention.

The business environment is in a continous change and it is important for a society to be flexible and to have power of adaptation so its financial results shall not be affected.

The environment in which business organizations operate is a complex, multi-focus dynamic and has a far reaching effect on such organization. The environment tends, shape the outlook, and goal of the

organization by placing constraints on them. These constraints in the environment of organizations goal could be in the form of competition, this sets a limit on the goals specify by the organization.

Organizations survival and success depend on the appropriate adoptions to a complex and over changing environment. It is pertinent for top management of organization to identify opportunities and threats in the external environment. Internal environment, it should focus on strengths and weakness, potential and existing ones.In this paper, the attention was focused upon the financial opportunities and analysis, so the weak points of an economic society can be viewed through a financial telescop. The other parts concerning the performance of a business environment such as human resources, competition, stakeholders, resources can represent the basis of another research.

But with the amount of data that today's businesses and organizations generate, it is important to choose the right metrics and indicators.

Indicators give executives the chance to communicate the mission and focus of the organization to investors, team members, and other stakeholders. As performance indicators filter through the organization, they must grab employees' attention to make sure that everyone is moving together in the right direction and delivering value to the business.

In addition, performance indicators can create a type of benchmarking within one's business. A person can see the present quality of their business and with the use of these indicators, they can envision the business they want to become; they help companies become what they deem the epitome of success through the process of managing, monitoring and analysis.

In the case of the analysis of financial performance the information is provided for the most part by

The Profit and Loss Account using the techniques and tools whose procedure is based upon the fact that the result and other components of the Profit and Loss Account are comparable in time and space.

By using methods specific to the financial analysis it can be put into light the way in which the conditioning factors and the financial performances from different levels influenced the value of that financial performance.

Key performance indicators lead to performance management.

Performance management is about increasing performance. As you know, we have been steadily improving our performance management system lately but there is more to be done. Successful use of our performance management system will enable us to improve our program delivery, increase our employee engagement and productivity, and make us better stewards of the taxpayer's money.

A good performance management system works towards the improvement of the overall organizational performance by managing the performances of teams and individuals for ensuring the achievement of the overall organizational ambitions and goals.

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FOREIGN CURRENCY RISK HEDGING

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Abstract

This paper presents the traditional types of exchange rate risk faced by firms and some of principal methods of exchange risk management that a company which make foreign currency operations can use. Foreign currency risk management involves both assessing the risk faced by the companies and adopting measures for the risk hedging or reduce the damage it may cause. The damages result from the company's unfavorable difference between the exchange rates of the currencies in which the transactions are made.

Keywords: *currency, exchange rate, derivative contracts, currency risk, risk hedging*

1. Introduction

Currency risk is defined like the probability to register loss in economic and financial transactions as a result of unfavorable movements of the contract currency, in the period of time between the date when was sign the contract and the maturity date. The exchange rate is the rate at which the foreign exchange market converts one currency into another. One of the functions of foreign exchange market is to provide some insurance against foreign exchange risk, which could be translate into adverse consequence of unpredictable changes in exchange rates[1].

The currency risk of a company is the result of foreign currency transactions or foreign currency borrowed funds in case of the exchange rate of these currencies relative to the national currency fluctuates (to the detriment of the company). Exchange rate risk management is an integral part in every firm's decision about foreign currency exposure[2].

The main methods of measuring exposure to currency risk are:

- currency risk assessment through transactions
- by converting balance sheet items denominated in foreign currency into national currency
- measuring the current value of the company according to the unanticipated exchange rate fluctuation

The currency risk approach can be done from two perspectives:

- Passive method - which supposes only accepting and bearing currency risk
- The active method - which involves the management of foreign exchange risk, either by operations on the spot market or by transactions on the futures market, through which the manager's purpose is to obtain some gains from currency exchange differences or interest rate differences for the currencies in which the transactions are made.

Thus, the management of foreign exchange risk involves operations made in the domestic currency or foreign currencies, depending on the fluctuations of currencies exchange rates, in which the transactions are made Foreign exchange risk management can be achieved through international diversification of investments and fundings, which refers to actions on the gap between receivables and payments in foreign currencies.This actions will generate some profit for the companies, provided by the exchange rate developments, or will help the companies to hedge the currency exchange risk. But, the debtor's request must meet the creditor's offer, because the influence of lending activity is directly proportional to the degree of the risk involved[3].

2. Classification of foreign exchange risk

Foreign currency risk may result from various transactions and operations made by companies or from the manner in which the financial results of the company are expressed as a result of exchange rate fluctuation. Thus, foreign exchange risk can be classified into four categories: sovereign risk, currency risk, translation risk and transaction risk[4].

The risk of sovereignty results from political changes in a country. These changes may affect the country's economic activity, as well as the results of

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[4] Georgescu – Golosoiu Ligia – „Mecanisme valutare", Editia a II-a, Bucuresti, ASE Publishing House, 2006.

companies from other countries if they record their operations in the currency of that country.

Currency risk may result from the setting of exchange rate fixes (fixed, free floating, managed free floating) and from existing currency restrictions on the currency market on which transactions are conducted.

Translation Exposure[5] is the risk that foreign exchange rate fluctuations will adversely affect the translation of the subsidiary's assets and liabilities – denominated in foreign currency – into the home currency of the parent company when consolidating financial statements

Transaction risk is the probability of recording losses in a foreign currency transaction that has unfavorably evolved. As a result, such a loss can result from both receivables and payment obligations, depending on the evolution of the currency in which the operations are denominated.

It also results from this classification that the currency risk can occur at any time in the activity of a company which performs foreign currency operations. Even an activity considered to be profitable may generate losses if:

- the exchange rate recorded unfavorable developments and impacts on the company's performance;
- the company has foreign subsidiaries in a country whose currency weakens;
- the company make international trade and the exchange rate moves unfavorable.

Foreign exchange risk management involves protection, risk measurement and proper management. Protecting, limiting or covering foreign exchange risk involves both diversifying the portfolio of foreign currency assets and liabilities and using risk mitigation techniques[6].

3. The main financial techniques for foreign exchange risk management

Measuring and managing exchange rate risk exposure is important for reducing a firm's vulnerabilities from major exchange rate movements, which could adversely affect profit margins and the value of assets[7].

A method by which could be avoid the undesirable effects of foreign exchange risk is to enclose a currency clause or a price review clause in the contract[8]. Applying different non-contractual measures can relieve exporters and importers of negative effects. These measures consist of contracting parallel loans, recourse to futures operations, foreign exchange hedging and derivative operations on hedging market.

The main financial techniques for currency risk management are:

1. Hedging operations - that are conducted on the interbank market or on the foreign currency futures market. The interbank market is a market for direct negotiation between parties, where the transactions are not standardized. Instead, futures markets are organized markets where contracts are standardized.
2. Foreign currency options (FX Options) - on the interbank market or on an organized market
3. Currency swaps - traded on the banking market.

Financial instruments used to hedge currency risk have been developed since the 80s and consist, especially in derivative contracts having as underlying assets a currency. Such contracts may be concluded by direct agreement between two trading partners or may be negotiated freely in an organized market. Derivatives are financial instruments used by investors as speculative, and also for risk reduction on financial markets. Currency speculation is happening on foreign exchange markets and involves the short-term movement of funds from one currency to another, for the profit from shifts in exchange rates.

Currency risk management involves three steps:

1. identifying and quantifying the risk to be managed
2. identifying the instruments that can be used to cover foreign exchange risk; Thus, the type of financial instrument (call option, put option, forward contract, etc.) and the meaning of the transaction (purchase or sale) must be identified.
3. valuation of the amount, expressed in the currency of the contract and the maturity of the cover.

Hedging is a way for a company to minimize or eliminate foreign exchange risk. The transaction with forward contract for currency risk hedging means that, the buyer make the commitment to pay a foreign currency amount at a certain time, and on the other hand, he borrows the same amount in the same currency at the same repayment term. Thus, the buyer of the foreign currency is covering from the risk of currency weakens, because at the future term, the potential loss from the currency purchase will be covered by the equal gain generated by the loan[9].

The exchange risk hedging involve the use of derivatives, like: forward contracts, currency futures, options and currency swaps[10].

a) Forward contracts

The companies can use forward contracts to sell or purchase foreign currency amounts at a future time

[5] https://strategiccfo.com/translation-exposure/.

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[10] https://www.bancpost.ro/Corporate-Banking/Global-markets.

and a given exchange rate. The settlement takes place at the time and the exchange rate mentioned in the contract, regardless of any fluctuations of the exchange rate on the foreign exchange market.

This kind of derivatives contracts offers some benefits, like:

- It mitigates the risk of exchange rate fluctuations
- It increases the management's control over the company's cash-flows and profitability
- The exchange rate used in budgeting is fixed ex ante

This product is suitable for companies which make businesses in foreign currencies, if:

- Their incomings are denominated in one currency and their payments are denominated in another currency
- The companies register a time gap between incomings and the corresponding payments
- The companies use a certain level of the exchange rate when they pricing their products

b) Flexible forward transactions

A flexible forward transaction has the same characteristics as a forward transaction with only one specific difference, which is that the settlement of the transaction can take place at any time until the maturity of the contract. The client may choose to make partial settlements for his transaction at any time until the maturity of the contract, having the only obligation to exchange the entire notional amount until maturity.

This product can help the company in the event of future collection or future payments in foreign currencies, if it wishes to protect itself from potential unfavorable fluctuations of the exchange rate. In the same time, a forward contract offers:

- Flexible tenor for the foreign exchange transactions as the settlement may take place at any time until the maturity date, at the same pre-established exchange rate
- Better liquidity management
- Better coordination between incomings and payments

This product is suitable for the companies which make businesses in foreign currencies and have incomings denominated in one currency and their payments are denominated in another currency. In the same time, a flexible forward transaction is the right financial instrument for the companies which have a time gap between incomings and the corresponding payments and they can anticipate the total volume of their payments but they cannot be certain in what regards the exact moment of the currency incomings.

c) Currency Futures contracts

Futures contracts[11] are advance orders to buy or sell a currency. An investor expecting to receive cash flows denominated in a foreign currency on some future date can lock in the current exchange rate by entering into an offsetting currency futures position.

The standardization of the Futures contract means that the currency that is the underlying asset of the contract always has the same volume (eg 1000 euro / contract) and delivery will be made at predetermined maturities (eg, quarterly).

In the currency markets, speculators buy and sell foreign exchange futures to take advantage of changes in exchange rates. Investors can take long or short positions in their currency of choice, depending on how they believe that currency will perform.

The buyer of Futures contracts will win if the price of the contracts he has bought will increase and he will lose if the price drops. On the other hand, the seller of Futures contracts will win when prices fall and will lose when prices rise.

Currency Futures contracts are mainly used for speculation and foreign currency risk hedging. Compared to other financial instruments, these contracts have several disadvantages: they are standardized in terms of settlement value and liquidation month, and investors have to accept conditions imposed by stock exchange regulations. But these contracts also have advantages. The advantages of Currency Futures contracts are the speed of sign and close the contract and the low guarantee (reserve deposit) from the investor.

The Foreign Currency hedging using foreign currency Futures contracts involves the existence of an open foreign currency position in a currency that has been acquired outside the Futures market. To eliminate or minimize the currency risk involved by this position, the currency hedging, in its classical form, requires that the operator to initiate an opposite and equal position on the Futures contracts, that have as underlying asset the same currency of the open position outside Futures market ,and the second currency - the national currency of the operator. Thus, the hedger transfers the risk to the Futures market.

d) Option contract

Options give companies the right, but not the obligation, to sell or buy a specific amount of a currency at a pre-agreed exchange rate for a specified time period. In order to have this right, the client pays a premium.

An option contract has the same functionality as an insurance contract. The client pays a premium, (which could be quite costly), in order to be able to take advantage of its right in case a certain event occurs. Options protect companies from unfavorable currency movements. To mitigate the cost of purchased options, companies can utilize options strategies that combine purchased and written options. As a result of the volatile foreign currency environment, more companies are turning to options for their increased flexibility.

The benefits offered by option contracts are:

- Complete foreign exchange risk hedging
- Better cash-flow and profit management

[11] http://www.investopedia.com/articles/forex/08/invest-forex.asp.

- Establishing a level for the exchange rate that will be used for constituting the budget of the company
- The possibility to benefit of a favorable exchange rate movement

This kind of derivative contract is suitable for companies which:

- Have Incomings, which are denominated in one currency and the payments are denominated in another currency
- Have a time gap between incomings and the corresponding payments
- Use a certain level of the exchange rate when pricing their products
- Want to be able to drop the contract and take advantage of a favorable exchange rate movement if this happens.

The buyer of an option contract has a Long position and the option contract's seller acquires a Short position. The transaction is made with two types of contracts: Foreign currency options - CALL and Foreign currency options – PUT.

The CALL option gives its buyer the right, but not the obligation, to buy a specific amount of currency at a pre-established rate in exchange of a premium paid (the cost of the option).

The PUT option gives its buyer the right and not the obligation to sell a specific amount of currency at a pre-established rate in exchange of a premium paid (the cost of the option).

A large series of complex products can be obtained on the basis of these two types of vanilla options in order to build-up a product that is most suitable for the company's foreign exchange risk hedging needs.

e) Currency Swaps

Swaps are a financial instrument that allows the buyer to exchange one set of each flows for another, making periodic payments based upon some financial price and in return receiving periodic payments based upon some other financial price[12]. Swaps could be transacted between companies with international business and their banks or between banks, for transforming a currency into another for a limited period without incurring foreign exchange risk.

A currency swap transaction represent an agreement to exchange one currency for another at an agreed upon exchange rate. There are two simultaneous transactions, one of buying and one of selling the same amount at two different value dates (usually SPOT and FORWARD) and at exchange rates (SPOT and FORWARD) that are pre-agreed at the moment when the transaction is closed.

In a currency swap, the holder of an unwanted currency exchanges that currency for an equivalent amount of another currency. Thus, the client exchanges his interest and currency rate exposures from one currency to another or benefits of bank financing at a lower rate.

Thus, a currency swap helps the company[13] to have a better management of financial resources, while also protecting it from potential unfavorable trends in the market.

Conclusions

In managing currency risk, multinational firms utilize different hedging strategies depending on the specific type of currency risk.

Foreign currency risk is provided by transaction, economic and translation risk and could affect especially the companies with foreign subsidiaries. In a country whose currency is weakens, the subsidiary's assets will be less valuable and this situation will affect the company's cash-flow and the profit. In the same time, the transaction risk will affect the companies which make import and export activities.

In conclusion, the foreign currency hedging is important for companies, such time as eliminate risk over the long time and protect the investors against a large currency's declines. The foreign currency hedging could be done using the money market instruments or the financial market, in wich instruments like treasury bills and commercial papers are traded.

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CONCEPTUAL AND REGULATORY DELIMITATIONS OF THE PROFESSIONAL JUDGMENT WITHIN AN ECONOMIC ENVIRONMENT

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Abstract

The professional judgment is a base concept "sine-qua-non" within a company because it displays the intrinsic attribute for performing the activity.
In our accepting, bringing together the determinant factors of the professional judgment and also the universality of the component parts and the influences oriented on the professional judgment we obtain an ample professional characterial result for which we propose the title of "spectral value of the professional judgment". Through this paper we aim to describe the classical component of the professional judgment and also the secondary elements that we have built at a conceptual and original level starting from the base notions presented.

Keywords: *professional judgment, the spectral value of the professional judgment, determining factors of the professional judgment, eufunction, professionalism.*

1. Introduction

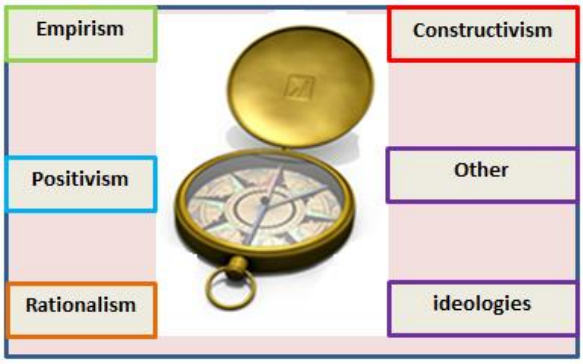
The axiological defragmentation of the content of the professional judgment imposes the conditioning to thoroughly explain the determining factors, the composing elements and also the modulatory purpose in issuing and forming the decisions.

This ample action integrates the core of the research of descriptive phenomena and starts a mechanism of conceptual fission that results in a process of examination, identification and a study over the elements within the exposed concept.

2. The conceptual development of the expression "professional judgment"

The spectral value of the professional judgment is to convergence point of the directions given by the factual delimitations of the historical rationalist values with the flexible and multi-shaped directions of the approaches extended under the form of fluxes of ideas that came from the positivist, rationalist, empiric, constructivist etc ideologies and also, to ensure the character of non-deniability and continuity in the progressive development of the professional judgment. The flows of ideas are substantiated on the meanings of the professional processes that are determined by „judgment" as a notion that transcends all the ideological frameworks stated earlier, the judgment meaning „the ability to think"[1].

Fig. 1. The spectral value of the professional judgment



Source: created by the author

In the history of the human reasoning a number of philosophers were interested in producing knowledge, among we mention a few step up: *René Descartes*, *Immanuel Kant*, *Baruch Spinoza*, *Georg Hegel*, etc.

The judgment marked by the Cartesian side is presenting *René Descartes* in the kaleidoscopic activating posture of the judgment. The informational load of the ideas transmitted by him has removed the patterns of the current judgment by substantiating a new method of thinking that excludes the knowledge marked by the impact of the affective unfiltered influences through the spectral judgment and has introduced the initiative of an analytical thinking through a clear decompose of phases and parts of the judgment.

René Descartes states that he does not know „higher appropriation than those that serve to the spiritual fulfillment! The ration or faculty to judge appropriately, because it is the only one that heightens

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[1] L. Şăineanu, „Dicţionar universal al limbii române", Ed. a VI-a, Ed. „Scrisul românesc" S.A., 1929.

and differentiate us from animal, it thing is whole within each of us"[2].

The philosopher therefore projects the judgment to the state of true absolutions enhancing the personal demarche that guides the judgment through the knowledge brought together in spiritual biographies meant to lead to the perfection of the spirit and according to the concept used by him: „la perfection de l`esprit".

Immanuel Kant places in his work of reference the postulates regarding the construction of a solid judgment by claiming that „the human judgment has in some kind of knowledge its particular faith because it is overwhelmed by questions that cannot be avoided because its imposed by the nature of judgment itself, to which it cannot respond because it exceeds the whole capacity of the human judgment"[3].

Kant integrates into his philosophy *Descartes's* conceptions over the judgment and develops a classification of judgments into analytical judgments (the truth results from the analysis of concepts excluding the need of experimental testing and sensorial perfections) and synthetic judgments (gained by experience).

Appling the meanings of „integronic theories" on an adaptive verticality we observe that in *Kant's* case there is a quantification of pure judgment through the prism of practical judgment by „the consideration of judgment a distinct faculty of thinking and then of reason, as a faculty of judgment" [4].

The correlation between the notions Kant presented show us that „pure judgment must be solely practical for itself, meaning that it must determine the will by the simple form of practical ruling"[5].

Baruch Spinoza brings an addition to the informational load of today's notion of the judgment stating that „all efforts that we make after reason, do not tend towards anything but knowledge, and the soul, using the reason, does not consider anything more useful than what provides judgment."

The philosopher points the unshattered preveilance of the substantial truth emanating by the fact that „reason truly understands all thing, meaning as they are, by other meaning it considers them necessary but not randomly."[6].

The judgment, through *Hegel*'s projections has as vector the reasoning that „tries to find an order in the chaos of singular subjectivities" [7]

„Within *„The phenomenology of the spirit"* reasoning represents the unity of conscience and of self conscience (or the unity of self-interpretations and understanding of the world), meaning that it is a spiritual attitude that, at least in principle, is bases on this unity"[8].

Reasoning will always represent and infallible edru of the universal dimensions but also a state of michurinism for humanity. The ability to reason has crossed stages loaded with ideologies reshaped by existing currents.

Consisting of linked judgments based on reasoning, *the judgment* is that concept that finds itself also at a particular level, constrained by conceptual components fixed upon domains but also at an extended level through professional deviation by fitting in multiparty sections of the social reality and through the association with „*economies - universe*" [9], reflections of the human collectivity.

The professional judgment is not „a simple matter of applying general rules by particular cases and not the least a simple matter based only on intuition but more likely a process that gives a note of coherence to the conflictual values within the general rules and treats with sensibility the actions and circumstances that are extremely contextualized"[10].

3. The determining factors of the professional judgment.

The problematic of the professional judgments draws trajectories of potential figuring on all existing domains and keeps its direct corollary status within the decision making process.

Through the demarches carried within our research it is aimed at explaining the professional judgment and the formative elements in the ideological exposing framework. The determining factors of the professional judgment standardizes the characteristics that lead through their existence to the induced causality by the association of logical processes over the defining concept found under the form of the professional judgment.

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[2] R. Descartes, „Discurs asupra metodei de a călăuzi bine rațiunea și de a căuta adevărul în științe", translated by George Iancu Ghidu, Ed. Mondero, București, 1999, pg. 8.

[3] I. Kant, „Critica rațiunii pure", translated by Nicolae Bagdasar and Elena Moisuc, Ediția a III-a îngrijită de Ilie Pârvu, Ed. IRI, București, 1998, pg. 9.

[4] N. Matăsaru, coord., „Actualitatea filosofiei lui Immanuel Kant", Cuvânt inainte – Al. Surdu – „Dialectica speculativă în Critica rațiunii pure", Ed. Aius PrintEd, Craiova, 2007, pg. 15.

[5] I. Kant, „Critica rațiunii practice", translated by T. Brăileanu, „Colectia cărților de seamă", Ed. Paideia, București, 2003, pg. 44.

[6] Dr. I Brucăr, „Filosofia lui Spinoza", Revista de Filosofie, Vol. 12, Ed. Tipografia „Bucovina" I. E. Torouțiu, București, 1930, pg .73.

[7] B. Balogh, „Libertate și recunoaștere în Fenomenologia spiritului: modelul hegelian al libertății" within the paperwork "Alexander Baumgarten – Adela Cîmpean (eds.): Studii de istoria filosofiei dedicate profesorului Vasile Muscă", Ed. Eikon, Cluj-Napoca, 2009, pg. 322.

[8] Ibidem.

[9] Concept used by Fernard Braudel in the paperwork „Timpul lumii" representing „a fragment from the Universe, a part of the planet, economical autonom, capable to satisfy all its needs, having an unity in internal exchanges and connections", Vol. I, translated by A. Riza, Ed. Meridiane, București, 1989, pg. 14.

[10] G. J. Postema, „Moral responsibility in professional ethics", quote by K.R. Kruse in „Professional role and professional judgment: theory and practice in legal ethics", University of St.Thomas Law Journal ,Vol. 9, Issue. 2, Article 2, 2011, pg. 250.

3.1. Professional training

A potential determinism transferred in the factorial system of the professional judgment is provided by the professional training. The accumulation of experience is considered a premise of a good use of the professional judgment.

By gaining a factual culture from carrying out specific activities, the employee develops its capacity to use the professional judgment in optimal conditions, with the effects aimed at.

The professional training is provided a temporarily classifications that highlights, on one side a general professional training, and on the other side a specialized training.

The general professional training brings into discussion the stages of the intellectual formation of the employee. From this category we name: profile high school studies, professional certificates, the international experience, scholarships, practice and internships in big companies, university studies etc.

The professional training based on carrying and passing national and international studies brings detailed construction optics of the informational system formalized by the accumulation of knowledge needed in the use of the professional judgment.

The specialty training is referring to the knowledge accumulated by working on a certain job within the company, by fulfilling all the obligations stated in the job description, by overcoming all obstacles and recession or decline periods and also by setting the rich knowledge into the growth of the company.

The accumulation of knowledge leads to an optical use of the judgment and the caption of a highly wanted „know-how". Within this category, the employee seeks an experience formalized on the working place through advance courses in the field and solved circumstantial instances and through the deep understanding of the causing elements generated by the particularized interactions on the company. Within the specialized training we also find master studies that have as purpose the enhancement of knowledge and specialization on the aimed field, optimized studies on the desired job etc.

The professional judgment under its two aspects, general and specialized represent a qualification factor in the determination of the professional judgment and it is found in all the important stages of its development.

3.2. Deontological factors

Fitting a judgment in an organizational environment brings by itself written and unwritten rules of the professional circuit.

Referring to the written rules through a deontological vision of the professional judgment we name the existence of a set of documents that guide the decisional mechanism and implicitly the professional judgment. Within these we name some ethical codes of conduct, work procedures, standards, regulations, instructions, internal policies, manuals etc.

The professional judgment has a complex guiding mechanism on both the flexible side that is related to the behavior and on the fixed side of the whole process – current documentation.

4. The purpose and the valences of the professional judgment

The separation between the professional judgment and the actual activity of the company is impossible. The professional judgment is a background sub-horizon of the professional judgment and is always linked to a poli-temathical compulsion with a continuity character.

The role of the professional judgment transcends the axiomatic importance provided by the decisional process and represents in fact a **eufunction**[11] at a company level that enhances both the decisional process and the remaining of related processes that lead to a progressive organizational mechanins of the macro-environment.

The purpose of the professional judgment is to provide a rigurous delimited placement of the activities performance in the organizational environment and to aid a polyvalent professional reasoning system. The lack of professional judgment can be named as a high-lighting of its importance within a pro-economical society.

Within a company professionals are required to get involved in activities that do not always have predictible trajectories. The specificity of their work imposes taking responsbilities provided in the job description and also responsibilities that are forming as the situations gain a particular note. In this point, the professionals are being required to act with professional judgment that is rigorously formulated by and invariable quality: professionalism.

Professionalism (the professional consciousness) is complex, discretionary, requires theoretical and practical knowledge, qualification and also the acceptation that humans without experience cannot understand and pass through whole and evaluate a high level of the carried work[12].

The professional practice, without a strong judgment that can substantiate it cannot be cataloged more than a technical work[13].

Professionals use the professional judgment as a fundamental logical form consisting of a correlated stream of arguments.

[11] „Functions that maintains or increases the adaptation of a given unity at its social" – definition from the dictionary named Dicționarul explicativ al limbii române (ediția a II-a revăzută și adăugită, 2012.

[12] E. Freidson, „Professionalism reborn: Theory, prophecy, and policy", University of Chicago Press, 1994, pg. 200.

[13] C. Coles, D. Fish, „Developing professional judgment", Journal of Continuing Education in the Health Professions , Vol. 22, Issue 1, 2002, pg 5.

The judgment, as stated by prof. *Herb Miller* appears because the interaction between education and experience[14].

According to prof. *David Tripp* the professional judgment takes 4 shapes[15]:

- Practical (formulated almost instantly);
- Diagnostics (generalized within professional judgment);
- Reflective (the evolutionary and justificative nature judgment that reflects deeply on its own actions and effects by weighting all the alternative strategies) for example „to describe how accountants can promote their activity and, in the same time, to respect the ethical rules"[16].
- Critical (accumulates both a critical and reflexive stance and also the diagnostics process of professional practices).

Prof. *Della Fish* and prof. *Colin Coles* are proposing the following classification the professional judgment[17]:

- intuitive
  - appears in situations that need an immediate reaction and imposes a quick establishment of working instruments and needed abilities in order to solve the issue. It does not imply a pre-existent judgment, this type of reasoning being labeled more as technical or „instrumental"[18].
- strategical
  - has an imperative character that implies a wide range of possibilities[19]. It is based on practices highlighted in well-defined procedures. For example „the harmonization of stakeholder's interest has become in the past years the base objective of the company[20], being necessary to have a common strategic professional judgment.
- reflective
  - refers to the situations that appear in practice along with a high level of uncertainty. This category implies in the solving process a deep thinking, a cumulus of personal thinking filter, of own abilities.
- deliberative
  - is characterized by the moral character of decisions and focuses both the personal and company's interests. The professionals see these practices as being morally competitive that can generate conflicts and hard solving dilemmas[21].

3. Conclusions

As a result of the theoretical research carried we have obtained alot of information and visions that helped us to formulate more acceptations of the concept of "professional judgment".

Therefore, in our opinion, the professional judgment can be defined in four ways:

- as a set of logical linked thinking that has as purpose to obtain some conclusive results for the activity carried taking into consideration certain circumstances, knowledge, evidence, methods, criteria and proper regulation;
- as a process that intervenes when the regulation in place does not cover all the cases found in practice;
- as a mechanism to form an opinion and take decisions taking into consideration the interaction between the experience gained in the field, accumulated knowledge and circumstances;
- as a cognitive process that takes account of ethical codes, knowledge, circumstances but also the behavioral structures of the employee.

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ANALYSIS OF THE EFFICIENCY OF APPLYING THE QUALITY MANAGEMENT SYSTEM IN INDUSTRIAL ORGANIZATIONS

Andrei DIAMANDESCU*

Abstract

In this article we propose to illustrate the methodology of measuring and assessing the impact of quality systems on the performance of industrial businesses. If in terms of the total quality management system – TQM, the impact may be measured by comparing the business performance with a reference standard (for instance ISO 9001), which records the difference compared to the performance prior to implementing the TQM, or, on rarer occasions, by optimizing the costs of quality with the help of econometric models, for the integrated quality improvement system, comprising of the TQM system based on the ISO standards and the Kaizen management system, which we propose and assess within this article, the efficiency/performance will be measured through a methodology based on analyzing the evolution of financial indicators for business performance. This approach was implemented as a result of findings from the businesses where we have been provided with documentation, and where the calculation and assessment of quality system operation efficiency by optimizing costs using the classic or improved econometric models is not approved by the management.

Keywords: *quality management, quality system, efficiency, improvement, method*

1. Introduction

In addressing the topic of this article, we began from the finding according to which only the businesses which provide the market with products and services executed in a manner corresponding with the beneficiary requirements in terms of quality, materialized in a significant increment of competitiveness regarding the competitor supply, can survive in the current economy, under the influence of evolutions such as the globalization of markets, the customization of demand, the adaptation of Romanian economy to EU requirements, the increase in competitiveness between businesses and in the interest for protecting the natural environment.

The concerns regarding quality assurance have also increased in the Romanian economy along with our country's EU integration. This is due to the fact that the quality approach on a pan-European scale is based on the objective of creating a single market and the free movement of goods, which is only possible through the presence of two common features thereof, to ensure interconnectivity and to facilitate real competition. The quality management system adopted by all countries in the European economic space fills this role, with the quality promotion policy representing the underlying component of the European industry development policy.

In the same train of thought, one may observe that quality has currently become a strategic instrument for the EU economic policy, and the quality requirements have increased significantly; one believes that satisfying the client is no longer enough, his expectations must be exceeded by promoting the "Beyond Customer Satisfaction" concept, according to which the product provided must exceed client expectations, must thrill. As a result, the Romanian businesses, as participants in the European and world transfer of assets, have also begun to implement major changes in the development strategy and policies, in order to provide highly competitive products and services, which would facilitate an advantageous market position compared to the competition). In this regard, one may observe that numerous companies on the Romanian market undergo an accelerated process of organizational and management transformations, in order to redefine their place and role on the market and to improve the supply. The implementation of quality management systems plays an essential role within this process. Therefore, at the end of 2013, 24,231 companies were certified according to the ISO 9001 standard for all activity sectors. However, there are still many companies which conduct predominantly stereotypical activities, without implementing an aggressive strategy that would allow them to obtain a high profit in order to reinvest in modernization, restructuring and quality improvement projects, so as to ensure a better position on the market. A comparative analysis conducted in this regard shows that the number of certifications in the quality management system in our country is low compared to most EU countries (Table 1).

The main cause for this situation is a lack of trust for many economic agents in the efficiency of applying the quality systems. The discussions held with the managers of some of the businesses documented led to the conclusions that such managers believe the implementation of quality systems as an expense not covered by the results, and the increase in quality as an

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action which determines the reduction of work productivity and an unjustified increase of expenses. This misconception may be explained by the practice of economic agents where reservations regarding the calculation of quality system efficiency occurs, justified by the fact that they are unable to keep correct tabs on quality costs and the effects thereof. The highlighting of quality costs in the documents (accounting documents), as observed in the practice of companies documented, indeed poses special problems generated by the fact that the accountancy of most business does not feature any accounts for the distinct registering of the two information categories (quality system costs and effects). Difficulties occurred when trying to precisely establish the quality costs are determined both by the methods used by companies for the calculation, planning and tracing of costs, as well as by a series of factors independent from accountancy systems, such as: certain quality costs cannot be quantified or their estimation is subjective: there is a discrepancy between the time of occurrence and the time of identifying deficiencies, as well as between the time of preventive measures and the time of obtaining the effects of such measures; the lack of management involvement; the high necessity of resources for implementing the system, etc. Furthermore, one of the issues posed by the highlighting (registering) of quality costs in the current economic practice, and one which we deem essential, is determined by the impossibility of precisely establishing the indirect expenses for quality assurance, expenses representing the largest percentage of quality costs. On example in this regard is represented by the investment projects for the technical modernization of the business. It is obvious, for example, that by purchasing certain installations, modern technologies the level of product execution precision, and implicitly, the quality of such products is increased. However, the amount of investment associated with this effect cannot be precisely determined. Another aspect we must consider in highlighting and determining quality costs is to take into account and quantify all the cost categories, including the so called "external costs", respectively the expenses for environmental protection and those incurred by the company for obtaining and providing a certain level of quality. Therefore, a holistic approach is needed to define and select quality costs.

Table no. 1 – The evolution of the number of certifications in the quality system for certain European countries

Number of ISO 9001 certifications						
Country / Year	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**
Romania	10737	15865	16200	19405	21641	24231
Poland	10965	12707	12195	10984	-	-
Germany	48324	47156	50583	49540	-	-
France	23837	23065	29713	29215	-	-
Spain	68730	59576	59854	53057	-	-
United Kingdom	41150	41193	44849	43564	-	-
Total number	455303	500286	530039	492248	-	-

* Information source: The ISO Survey of Management System Standard Certifications 2013

As a result, the calculation of quality system efficiency, which implies determining the ratio between costs and effects, cannot be performed. In order to solve this issue, a solution underlying the evolution of the process of quality system implementation within companies, we set out to showcase a methodology with which to measure the efficiency of implementation and operation of quality systems within industrial businesses, without the necessity of an extremely precise determination of quality costs, a methodology tested in a case study within this article.

2. Presentation of the Methodology for Calculating and Analyzing the Efficiency of Quality Systems Based on the Evolution of the Financial Indicators of the Business

2.1. Characterization of the Study Method

The research for finalizing the methodology was aimed at the impact of the integrated system (TQM) comprising of the ISO 9001:2008, ISO 14001:2005 and ISO 50000:2011 standards, combined with several methods from the Kaizen system, on the financial performance of S.C. ARCTIC S.A. The study also benefited from our documentation conducted for other business in the manufacturing industry (*ASSA ABLOY, Cris-Tim, Pirelli din Slatina, Eldon România, Star Transmission Cugir etc.*), a fact which led us to believe

that its results may be generalized for the entire manufacturing industry.

The study is based on a comprehensive research which combines questionnaire-based research, in order to identify and select a sample of companies who have implemented the quality system, with an empirical analysis of financial data collected from such businesses and the direct examination of the financial data publically disclosed by the same. The basic concept used in this research adapts the study methodology to the ***insider*** model, so as to separate the impact of the quality system from those of other measures applied by the company. Furthermore, we also considered a feature common to all researched businesses – that according to which both the studied event, as well as the time of its occurrence may be precisely defined without impediment (for example, obtaining a quality certificate). I have made this statement because there are numerous cases when establishing the exact trigger of a researched event is extremely difficult when the reliability of the business is poor and you cannot trust the public statements made by its representatives. In this regard, the concrete economic situation shows that several organizations claim to have implemented the quality system, measure confirmed by ownership of the quality certificate, when, in fact, they have made no essential changes leading to results that can be attributed to the quality system. Obviously, the use of such unreal information made publicly available by the company that has implemented the quality system will lead, in the study, to results lacking any practical use. In order to avoid such a situation, the methodology used by us was completed by interviews with quality managers within the companies documented. We believe that the use of such interviews to gather information sought from the company has been the difference between our study and the typical questionnaire-based studies.

2.2. Choosing the Indicators for Measuring the Economic Efficiency of Quality Systems Implemented within Romanian Businesses

The main objective of implementing a quality management system is to increase the company's performance. In general, performance is associated with two key processes – management and measuring of performance. Performance measuring occurs as a sub-process of performance management, which mainly focuses on identifying, tracing and communicating performance results by using performance indicators. More precisely, after establishing the objectives desired by applying the decision intended to increase performance (in our case – implementing the chosen quality system), we require indicators which can measure progress separately. In this regard, the use of key performance indicators – KPI is recommended, indicators which can help quantify the achievements of the quality system, respectively the level of objective fulfillment. As a result, such an indicator-based system may be used as a sole instrument for consolidating the managerial decisions to implement quality systems.

The quality of results in applying the system is associated with the selection of performance indicators. The most frequently used performance indicators are financial and they vary depending on the activity carried out and on the company function (production, human resources, commercial, financial, etc.). Moreover, it is necessary that the indicators selected be anchored in the dynamics and typology of the respective company, so that they may faithfully illustrate company objectives up to the last level.

Economic efficiency, determined with the help of financial performance indicators illustrates, in the context of features of the *insider* model, the very result of implementing the quality system, highlighted through the continuous improvement of products, processes, activities and the adequate involvement of employees motivated depending on the level of objective fulfillment, as well as satisfying a corresponding number of clients with the business' capacities and meeting environmental protection objectives.

For a useful analysis, suggestive in expressing the objectives followed in the case study, presented herein, we have provided a careful selection of key performance indicators, by choosing those which provide the competitive advantages generated by the quality system, are directly connected to performance, are measurable and ensure compatibility with various references. Thus, in order to distinctly highlight the contribution of implementing and operating the quality management system in improving the economic and financial results of the company assessed, the following indicators were used: Turnover (CA), Variable expenses, Margin over variable expenses (MCV), Fixed expenses, Operational profit, Break-even (PR), Return on investment (T), Economic rate of return on investment (RRE), Discounted net revenue (VNA), and Economic performance (R).

3. Applying the Proposed Method for Assessing the Efficiency of the Quality Management System within S.C. ARCTIC S.A.

The ARCTIC S.A. trade company manufactures electronic and household products with a high technical level, used for household needs (refrigerators, washing machine, vacuums, etc.). It has 2500 employees and a turnover, for 2014, of 384 mil. EUR. Arctic is present on the Romanian market through the Arctic and Beko brands, with a market share of approximately 35% and is a major exporter. Currently, 90% of the refrigerator appliances is exported to 59 countries throughout Europe, Africa and Asia. In July 2015, Arctic celebrated the production of the 25th million refrigerator since its establishment. In order to ensure a growing outlet demand, the company decided to make a 24 million EUR investment. Thanks to this project, the company will record a rapid increase of its turnover.

The company has implemented an integrated management system in two stages: in 2005 it has implemented an integrated system comprising of ISO 9001 and ISO 14001, while starting with January 2012, it has also implemented the ISO 50001:2011 standard, being a large electricity consumer.

By implementing the three standards in an integrated quality system, the company complied with the requirements imposed by the beneficiaries and by the companies with which it collaborates, the aim of the objective being to reduce the possibility of error occurrence to a minimum and to achieve the *zero faults* principle. Along with this integrated quality system, the company also implemented in 2013 methods corresponding to the continuous quality improvement management system – Kaizen. Therefore, the 6 Sigma, Total Productive Maintenance and Just in Time methods were integrated. As demonstrated below, the implementation of the quality management system had a considerable impact on the increase in company efficiency. Moreover, its consequences were obvious even during the crisis between 2009 and 2010 *when the company did not suffer.*

In order to demonstrate the efficiency of implementing and operating quality systems within industrial organizations, we must first assess the impact of implementing the total quality integrated system (TQM), comprising of the three aforementioned standards, during the 2005 – 2010 period, and of the impact generated by the combined action of the integrated system (TQM) and of the methods associated with the Kaizen management system during the 2010 – 2014 period.

For 2005, the simplified situation of the profit and loss account is showcased in Table no. 2.

Table no. 2 – The Balance Sheet of S.C. ARCTIC S.A. upon 31.12.2005

Indicator	**Amount**		**Percentage from CA (%)**
	Thousand EUR	***Thousand lei***	
Turnover	190000	836000	100
Variable expenses	114750	504900	60,0
Margin over variable expenses (MCV)	75250	331100	40,0
Fixed expenses	66500	300168	36,0
Operational profit	7030	567789	3,7

With the help of these values, the break-even may be determined according to the relation:

$$PR = \frac{CF}{MCV}\ x\ 100$$

Where: PR – break-even; CF – fixed expenses; CV – variable expenses; MCV – margin over variable expenses.

Thus determined, the break-even illustrates the minimum percentage of activity in relation to production capacity, for which profit is nil. Results show that the break-even for the ARCTIC SA trade company amounts to 88.3 %, while in absolute values, it amounts to 166,250 thousand EUR, respectively 731,500 thousand lei.

$$PR = \frac{66500}{75250}\ x100 = 88.3\ \%\ of\ production\ capacity.$$

If we were to use the margin over variable expenses, determined as a percentage of turnover, we would obtain the break-even of values, respectively the minimum value of turnover for which the profit is nil. The calculation formula is:

$$PR = \frac{CF}{MCV\%}$$

$$PR = \frac{66500}{40\%} = 166{,}250\ thousand\ EUR,\ respectively\ 731{,}500\ thousand\ lei.$$

In the same, year the total costs of non-quality, represented by the cost of internal and external faults, rising to 28,000 thousand EUR, the equivalent of 15% of the turnover, were quantified. This means that the effective variable costs only actually amount to 75,250 × (100 – 15) = 63,963 thousand EUR, while the difference, amounting to 11,287 thousand EUR, represents non-quality costs.

The successful introduction of the quality management system represented a considerable improvement of indicators, fact noticeable by analyzing the simplified form of the profit and loss account for 2010 (Table 3).

As can be observed, the turnover reached the amount of 253 mil. The stabilization of the manufacturing process has determined a decrease in fault costs, which translated into a profit increase of 85% compared to 2005.

Table no. 3 – The Balance Sheet of S.C. ARCTIC S.A. upon 31.12.2010

Indicator	**Amount**		**Percentage from CA (%)**
	Thousand EUR	***Thousand lei***	
Turnover	253000	1113200	100%
Variable expenses	153000	673200	60,5
Margin over variable expenses (MCV)	100000	440000	39,5%
Fixed expenses	90330	397452	35,7%
Operational profit	12905	56782	5,1%

Results show that for the ARCTIC S.A. trade company, the break-even for 2010 amounts to 90.3 %, while in absolute values, it amounts to 225,825 thousand EUR, respectively 993,634 thousand lei.

$$PR = \frac{90330}{100000}\ x\ 100 = 90{,}3\ \%\ of\ production\ capacity.$$

The fact that the PR is greater than in 2005 is explained by the rapid increase of turnover. Moreover, this situation also resulted from the decision to invest

in order to increase the production capacity for which, as shown, investments of 24 million EUR were allocated.

The result of the absolute value is:

$$PR = \frac{90330}{39,5\%} = 228,683.5\ €, \text{ respectively } 1,006,207.4 \text{ thousand lei.}$$

In the same, year the total costs of non-quality, represented by the cost of internal and external faults, amounting to 23,276 thousand EUR, the equivalent of 9.2% of the turnover, were quantified. This means that the effective variable costs only actually amount to 100,000 × (100 – 9.2) = 90,800 thousand EUR, while the difference, amounting to 9,200 thousand EUR, represents non-quality costs.

With regards to the inclusion in the time frame associated with the analysis, of the 2009 and 2010, the years of the financial and economic crisis, we must state that such has not influenced the results of the study, as the company suffered no significant consequences, and the financial indicators were on the rise during such period. Therefore, CA increased by 133%, while profit increased by 183%.

The successful introduction of the TQM quality management system and of the continuous quality improvement system – Kaizen, practically meant a step closer to achieving the *zero faults* objective, *as can be seen* in Table 4, where the simplified situation of the profit and loss account for 2014 is showcased.

As shown in the table, the turnover reached the value of 384,000 thousand EUR, representing an increase of 152%. The stabilization of the manufacturing process determined a decrease of defect costs, translated into a profit increase 1.5 times greater than in 2010. This means that a decrease of 9.2% for fault costs has determined a profit increase by approximately 50%.

For 2014, the simplified situation of the profit and loss account is showcased in Table 4.

Table no. 4 – The Balance Sheet of S.C. ARCTIC S.A. upon 31.12.2014

Indicator	Amount		Percentage from CA (%)
	Thousand EUR	***Thousand lei***	
Turnover	384000	1689600	100%
Variable expenses	230400	1013760	60%
Margin over variable expenses (MCV)	153600	675840	40%
Fixed expenses	134400	591360	35%
Operational profit	19200	84480	5%

Results show that for the ARCTIC S.A. trade company, the break-even amounts to 87.5 %, while in absolute values, it amounts to 336,000 thousand EUR, respectively 1,478,400 thousand lei.

$$PR = \frac{134400}{153600} x100 = 87,5\ \% \text{ of production capacity.}$$

The result for the amounts in lei for the break-even is:

$$PR = \frac{134400}{40\%} = 336,000 \text{ thousand } €, \text{ respectively } 1,478,400 \text{ thousand lei.}$$

In the same, year the total costs of non-quality, represented by the cost of internal and external faults, amounting to 7,680 thousand EUR (i.e. 3 times lower than in 2010), the equivalent of 2.0% of the turnover. As a result, the variable effective costs only amount to 153,600 × (100 – 2.0) = 150,528 thousand EUR, while the difference, amounting to 3,072 thousand EUR, represents non-quality costs.

This result shows that the successful introduction of the TQM quality management system, combined with the methods of the continuous quality improvement system – Kaizen, meant a very close step to achieving the *zero faults* objective *(in this assessment of the result, one must consider that the Kaizen system methods were only present for three years from the total five-year period analyzed)*.

As shown in the table, the turnover recorded an increase of 152%. The stabilization of the manufacturing process determined a decrease of defect costs, translated into a profit increase 1.5 times greater than in 2010. This means that a decrease of 9.2% for fault costs has determined a profit increase by approximately 50%.

In addition to these calculations, in order to obtain a clearer perspective of the impact of efficiently implementing and operating the TQM system, completed by methods from the Kaizen system, we deemed it useful to calculate the amount by which the turnover would increase, in absence of an implemented total quality management system (2005 - 2010), and of the system completed with Kaizen methods (2010 - 2014) for the profit to reach the level achieved by using this system..

The calculation formula is:

$$CA_1 = \frac{CF+(1+x)P0}{MCV\ (\%)}, \text{ where}$$

CA_1 – turnover which, given the conditions at hand, allows the increase of profit by X percent;

P_0 – profit for the initial situation.

In the situation prior to implementing the quality management system, the 184 profit increase would have required an additional turnover of:

$$CA_1 = \frac{66500+1,84\ x\ 7030}{40\%} = 79435,2 \text{ thousand } €$$

$$CA_2 = \frac{90300+2,03\ x\ 12905}{39\%} = 116497 \text{ thousand } €$$

This means that, in order to obtain the same profit by incurring non-quality costs, the sale volume should have increased during the 2005 – 2010 period by 41.81%, and by 30.34% during the 2010-2014 period,

when Kaizen methods were also implemented. Therefore, we believe the introduction of quality systems may provide a significant economic impact for the company, and also for the entire national economy, through a more efficient resource management, thus insuring an increase in welfare.

4. Conclusions

The case study performed represents a factual, objective and factual assessment, from a statistical standpoint, of the impact of effectively implementing a quality management system on the financial performance and economic efficiency in general. Moreover, the feasibility of the methodology for calculating the efficiency of the quality system was demonstrated.

The results provided aim to confirm the secial economic capacity of businesses that have implemented the system and to reassure the management of such organization that have implemented the system of the validity of the decision made in this regard. Obviously, there are certain companies which, after obtaining the quality certificate, failed to record continuous improvement progress and fail to provide full satisfaction to their clients. If for such organizations, the advantages of certification were do not fully meet their expectations, the causes do not reside in the limitations of the quality system, but in the manner in which it was commissioned. After certification, one needs to follow the observance of referential requirements, especially of the "*Continuous Quality Improvement*" principle, through efforts of continuous development of all processes. Yet, by the very introduction of certain quality improvement methods (in our examples, methods belonging to the Kaizen system), the businesses documented recorded a substantial increase in efficiency compared to the situation prior to introducing the quality system.

As a result, we believe that in the near future, all industrial businesses will resort to a quality system similar to the one assessed herein – ***the TQM-Kaizen integrated quality improvement management system.***

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THE INTERDEPENDENCE ANALYSIS OF ENTREPRENEURSHIP- ECONOMIC COMPETITIVENESS LEVEL BASED ON THE LOTKA-VOLTERRA MODEL

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Abstract

The entrepreneurship role in ensuring competitiveness and hence in in the national economies development is well known and generally accepted. The inverted influence, respectively the measure in which the competitiveness level of national economies represents a determining factor in terms of economic agents entrepreneurial behavior is however a subject less debated, especially from the empirical analysis.

Under these circumstances, the purpose of this study is to analyze using the Lotka-Volterra, based on data published between 2008-2015 in two of the most popular annual reports (The Global Entrepreneurship Monitor and the Global Competitiveness Report), the degree in which the global competitiveness index and the total entrepreneurial rate influence each other. Thus, applying the model will allow us to identify the type of interaction between the two variables (prey-predator relationship, competition and cooperation), and to estimate the value of the Total Entrepreneurial Rate and of the Global Competitiveness Index for 2016.

Keywords: *Global Competitiveness Index, Entrepreneurial Rate, Interdependency, rhythm, Lotka-Volterra.*

1. Introduction

Both the theory and the practical experience confirm the reciprocal influence between the entrepreneurship evolution and the level of global competitiveness, the latter, according to the Porter model, determinant variable of the national economic development, together with GDP/capita.

The retrospective analysis of the data published in two of the world's most well-known annual reports, The Global Entrepreneurship Monitor and The Global Competitiveness Report, regarding the evolution of the total entrepreneurial rate[1] and of the global competitiveness index[2] between 2008 and 2015, for 31 countries, doesn't reflect a linear correlation between the two variables, but a polynomial (cyclic) one.

The period under analysis is 2008-2015 since the analysis on levels of development, according to the Porter method has been introduced for the first time, within reports, in 2008. Also, the analysis was considered for analysis only 30 countries because the GEM reports do not comprise the same countries each year, and only the countries for which data are available for each year of the target range are included in the survey.

Considering all this aspects, the limited amount of data and the fact that within the entrepreneurship-economic competitiveness analysis intervenes the time variable led to the conclusion that the relationship between the two indicators cannot be analyzed using the linear regression method, which requires reconsidering the interaction of the two variables from a different perspective.

Consequently, to deepen the analysis of the interaction between the two indicators we have chosen the Lotka-Volterra model because:

- it does not require long series of data;
- allows the analysis of interdependency between two or more variables at time "t";
- describes the cyclic fluctuations of the variables pertaining to a non-linear series of data.

2. Succinct presentation of the Lotka-Volterra Model

The Lotka-Volterra model was named after the name of those that created and introduced it in literature, the American chemist and ecologist Alfred Lotka (1880-1940) and the Italian mathematician Vito Volterra (1860-1940). Thus, if originally, in 1920 the model has been created for biostatistics, to explain using the first order differential equations, the reason for the increase in the number of predatory fish, simultaneously with the reduction in the number of predatory fish in the Adriatic Sea, during the WWI, currently it is applicable in various areas, including in economy. The model was applied for the first time in the economic field in1967, when Richard Goodwin,

American mathematician and economist used the model specific equations to describe the correlation between the real wages evolution and the employment rates.

Generally, we can state that the model pursues the correlative evolution of the two indicators X and Y, interdependent indicators, the influence between the two being a special one, prey-predator type.

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[1] In order to synthesize entrepreneurship evolution, it is analyzed from the total entrepreneurial rate perspective, computed as a sum between the early entrepreneurship and the rate of consecrated entrepreneurship.

[2] It is also expressed as a percentage, as a share of the index for each analyzed country, in the total of the maximum rank.

Thus, the Y indicators, also considered as the "predator" is conditioned by the existence of X, which means that in the absence of X, Y cannot exist, and the X indicator considered "the prey" although autonomous, with its own dynamic, is conditioned also by Y's level.

The authors of the model considered that such interdependency can be modeled using the following system of differential equations:

In this context, the constants a, b, c, d express the extent to which they participate to the change of rhythm, thus[3]:

- a, d are growth coefficients of the variables under analysis, in the absence of other influences;
- b, c are called interaction coefficients and express the effect the variance of a variable has on the increase rate of the other variable.

Thus, if the value of the growth coefficients a and d are positive, the rhythm evolution is positively correlated to the evolution of the analyzed variable, while for negative values, the evolution of the rhythm is negatively correlated to the evolution of the analyzed variable.

Also, if the conditions where the interaction coefficients are non-zero (b, c 0), the relationship between the two variables can take one of the following four forms[4]:

- If b>0 and c>0 it means a cooperation relationship, mutualism;
- If b<0 and c<0 means that it is a competition relationship;
- If b<0 and c>0 it means there is a prey-predator relationship, the Y variable being the predator, and the X variable, the prey;
- If b>0 and c<0 between the two variables there is also a prey-predator relationship but, the variable X is the predator and the variable Y is the prey.

Considering the fact that these coefficients contribute together to a variance in the rhythm of the analyzed variables, the conditions a+b=1 and c+d=1 must be met.

At the same time, extreme situations must be taken into account, where one of the factors under analysis are missing. Thus, we have $\begin{cases} \frac{dX}{dt} = X \cdot (a - b \cdot Y) \quad (1) \\ \frac{dY}{dt} = Y \cdot (c \cdot X - d) \quad (2) \end{cases}$,

$a, b, c, d > 0$:

- b = 0 , meaning the Y factor is missing , equation (1) becomes,

$$\frac{dX}{dt} = X \cdot a$$

where $X = k \cdot EXP(a \cdot t)$, which means that the factor X would increase exponentially;

- c = 0, which means that factor X is missing, equation (2) becomes,

$$\frac{dY}{dt} = -d \cdot Y$$

where $Y = h \cdot EXP(-d \cdot t)$, which means that the Y factor would become extinct.

The stationary states of the system are given by:

state S1: x = 0; y = 0

state S2: x = d / c; y = a / b

a simplified version of the model is given by the equation system:

$$\begin{cases} \frac{dX}{dt} = a - b \cdot Y \quad (1') \\ \frac{dY}{dt} = c \cdot X - d \quad (2') \end{cases}$$

3. Determining the rate of change of indicators

The following study makes the transition between the theoretical analysis to the empiric analysis, by applying the Lotka-Volterra model on the empirical data regarding the evolution of the total entrepreneurial rate and of the global competitiveness index, in order to determine the relationship between the two variables and also their changing rhythm. Determining the interaction coefficients will allow estimating the value of the total entrepreneurial rate and of the global competitiveness index for 2016.

For this purpose, will be used centralized values based on data published between 2008 and 2015 in The Global Entrepreneurship Monitor and The Global Competitiveness Report regarding the total entrepreneurial rate and the global competitiveness index in national economies, for 31 countries (based on innovation and on efficiency).

In accordance with the presented model, we shall analyze the following system of equations:

$$\begin{cases} \frac{x_{n+1} - x_n}{x_n} = a - b \cdot y_n \\ \frac{y_{n+1} - y_n}{y_n} = c \cdot x_{n\cdot} - d \end{cases}$$

with the proviso that X, the prey variable, represents the entrepreneurial rate, and the Y, the

[3] Georgescu, Raluca-Mihaela, Bifurcation in biological dynamics with methods of group theory, University of Pitesti Publishing house , 2009, pp. 42.

[4] idem, pp. 43.

predator variable, represents the global competitiveness index.

The solution for the equation system led to determining the constants a, b, c and d whose values are summarized in table no.1 and table no.2.

Table no.1 Lotka-Volterra coefficients for innovation-based countries

No.	Country	a	b	c	d	Probability Ra	Probability GCI
1.	France	0,89	0,11	0,01	0,99	98,90	73,15
2.	Belgium	0,90	0,1	0,02	0,98	28,16	0,00
3.	Finland	0,93	0,07	0,01	0,99	68,11	16,14
4.	Germany	0,91	0,09	0,01	0,99	81,89	53,72
5.	Greece	0,95	0,05	0,02	0,98	56,91	43,68
6.	Italy	0,9	0,11	0,02	0,98	51,87	0,03
7.	Holland	0,94	0,06	0,01	0,99	82,63	14,30
8.	Norway	0,94	0,06	0,01	0,99	91,16	1,31
9.	Slovenia	0,91	0,09	0,02	0,98	81,49	33,26
10.	Span	0,93	0,07	0,01	0,99	32,43	21,19
11.	Great Britain	0,93	0,07	0,01	0,99	47,35	4,15
12.	USA	0,96	0,04	0,01	0,99	64,57	0,00
13.	Japan	0,92	0,08	0,01	0,99	72,28	9,14
14.	Ireland	0,94	0,06	0,01	0,99	95,66	81,61
15.	Switzerland	0,94	0,06	0,01	0,99	54,07	29,53
16.	North Korea	0,95	0,05	0,01	0,99	12,11	0,02

Source: personal computations based on data obtained using the Lotka-Volterra model

Table no.2 Lotka-Volterra coefficients for efficiency-based countries

No.	Country	a	b	c	d	Probability Ra	Probability GCI
1	Columbia	0,97	0,03	0,02	0,98	54,08	2,04
2	Argentina	0,97	0,03	0,02	0,98	52,23	61,58
3	Brazil	0,97	0,03	0,02	0,98	50,42	23,03
4	Chile	0,97	0,03	0,02	0,98	52,15	1,90
5	Croatia	0,92	0,08	0,02	0,98	74,92	21,55
6	Hungary	0,94	0,06	0,02	0,98	2,64	0,02
7	Latvia	0,95	0,05	0,02	0,98	5,52	0,49
8	Peru	0,97	0,03	0,02	0,98	6,91	11,18
9	Uruguay	0,95	0,05	0,02	0,98	30,52	5,59
10	South Africa	0,91	0,09	0,02	0,98	8,37	0,22
11	Romania	0,93	0,07	0,02	0,98	2,72	0,00
12	China	0,97	0,03	0,01	0,99	11,22	4,13
13	Malaysia	0,92	0,08	0,01	0,99	1,74	0,00
14	Mexico	0,95	0,05	0,02	0,98	31,19	1,12
15	Russia	0,88	0,12	0,02	0,98	62,05	0,23

Source: personal computations based on data obtained using the Lotka-Volterra model

The results obtained by applying the Lotka-Volterra model confirm the idea outlined thruought the paper – the interdependency relation between entrepreneurship and competitiveness. The positive values of the two constants of interaction (b and c) for all the analyzed countries reveal the symbiosis relationship, of sustenance between the two variables, not being the case of a prey-predator relationship, which confirms the conclusions outlined in previous analyses- entrepreneurship and competitiveness are two interdependent variables. However the low values of these constants, show that the evolution of the entrepreneurial rate and of the competitiveness level is mutually supported in small measure, the growth rates having a strong independent character.

Thus, we find that the competitiveness level of the national economies influence the entrepreneurial rate but, to a very small extent- between 1% and 2%, regardless of the states' development level (efficiency or innovation-based economies).

This, once again, demonstrates the subjective and conjunctural character of the decisions in the investment process, and also that, although competitiveness must represent a desideratum of all national economies, in building a the strategies for encouraging the entrepreneurial activities must be

applied also other stimulation leverages, adapting this type of behavior – developing the entrepreneurial spirit through the educational process, publicizing and promoting successful cases, ensuring a stable and predictable economic, politic and legislative context, also customizing the tools to national specificities (history, traditions, customs, culture).

Also, applying the Lotka-Volterra model confirms the validity of the reverse analysis-indeed, as all the specialty studies emphasize, entrepreneurship leaves its mark to a higher extent on the competitiveness level of the national economies, entrepreneurship contribution to increasing the competitiveness of national economies raging between 3% and 12% (on average, entrepreneurship leaves its mark on the competitiveness level of innovation-based economies of 7% and 6% for the efficiency-based economies)

Using the a, b, c and d constants enables anticipating the value of the entrepreneurial rate, and of the global competitiveness index for 2016, within the analyzed economies, the results being summarized in table no.3 and no.4.

Moreover, as it can be seen in table no.1 and 2, the probability that the foreseen values for 2016 being reached is higher for the total entrepreneurial rate rather than for the Global Competitiveness Index.

This aspect reflects the fact that entrepreneurship evolution has a more pronounced predictable character than the evolution of the global competitiveness index.

Table no. 3. Global competitiveness index and the entrepreneurial rate for 2016 for innovation-based countries- forecast based on determining the change rhythm of variables, according to Lotka – Volterra model

No.	Country	GCI % 2016	GCI % 2015	ER% 2016	ER % 2015	Δ% ER	Δ% GCI
1	Belgium	67,44	73,43	11,22	10	12,20	-8,16
2	Finland	66,1	78,57	17,51	16,8	4,23	-15,87
3	Germany	85,09	79	10,33	9,5	8,74	7,71
4	Greece	59,78	57,43	18,88	19,8	-4,65	4,09
5	Italy	56,14	63,71	9,68	9,4	2,98	-11,88
6	Holland	77,88	78	18,3	17,1	7,02	-0,15
7	Norway	85,03	73,71	11,79	12,2	-3,36	15,36
8	Slovenia	59,55	57	9,04	10,1	-10,50	4,47
9	Spain	57,95	58,43	11,47	13,4	-14,40	-0,82
10	Great Britain	84,03	75,43	12,09	12,2	-0,90	11,40
11	USA	87,9	79,86	20,83	19,2	8,49	10,07
12	South Korea	84,28	71,29	15,62	16,3	-4,17	18,22
13	Japan*	84,37	78,14	10,01	11	-9,00	7,97
14	Ireland	72,72	73	16,7	15,9	5,03	-0,38
15	Switzerland	71,29	82,29	19, 41	18,6	4,35	-13,37
16	France*	71,15	72,57	8,47	8,2	3,29	-1,96

Source: personal computations based on the data obtained using the Lotka – Volterra model

Table no. 4 Global Competitiveness Index and the entrepreneurial rate in 2016 in efficiency-based countries-forecast based on determining the variance rhythm of variables, according to the Lotka – Volterra model

Nr.	Country	GCI % 2016	GCI % 2015	ER% 2016	ER % 2015	Δ% ER	Δ% GCI
1	Mexico	33,47	61,29	29,46	27,9	5,59	-45,39
2	Columbia	69,55	61,14	28,14	27,9	0,86	13,76
3	Argentina	55,43	54,29	26,22	27,2	-3,60	2,10
4	Brazil	39,26	58,29	39,49	39,9	-1,03	-32,65
5	Chile	54,81	65,43	34,99	34,1	2,61	-16,23
6	Croatia	51,02	49	8,47	10,5	-19,33	4,12
7	Hungary	52,04	51	13,13	14,4	-8,82	2,04
8	Latvia	50,67	63,57	27,77	23,7	17,17	-20,29
9	Peru	65,47	60,14	28,59	28,8	-0,73	8,86
10	Uruguay	56,89	49,71	12,46	16,4	-24,02	14,44
11	South Africa	52,13	62,71	13,89	12,6	10,24	-16,87
12	Romania	41,72	61,71	23,66	18,3	29,29	-32,39
13	China	100	69,86	14,65	15,9	-7,86	43,14
14	Malaysia	99,83	74,71	8,68	7,7	12,73	33,62
15	Russia*	62,99	62,43	8,51	8,6	-1,05	0,90

Source: personal computations based on the data obtained by applying the Lotka – Volterra method

Applying the Lotka-Volterra model provides thus the possibility to anticipate the entrepreneurial activities evolution, which, especially in the case of anticipating an unfavorable situation, enables specific economic-financial levers' adaptation, so that, from an entrepreneurial point of view it shall follow an ascending trend.

The main inconvenient in using this method with the forecasting purpose of the total entrepreneurial rate and of the global competitiveness index, is represented by the short term forecast period- only for n+1, considering that the consequences of stimulation measures aren't felt immediately, moreover, for the case where the reduction of the total entrepreneurial rate is associated to an increasing trend of the national economies competitiveness. This is because, in this last scenario, reduction of the total entrepreneurial rate is recorded considering an increasing competitiveness, which means that during the evolution of the entrepreneurial process operate aspects related to entrepreneurs' behavior/culture (potential, beginners or consecrated) and the behavioral changes, even after a long educational strategy clearly defined and applied, are felt on the long run.

4. Conclusions

The fact that the graphical representation of the correlation between the entrepreneurship rate and the Global Competitiveness Index on level of development of the national economies reflects a polynomial relationship, limited volume of data and the fact that when analyzing this interdependence the time variable must be taken into account, led to the conclusion that the relationship between the two indicators cannot be analyzed using the linear regression method, which led to reconsidering the interaction between the two from a different perspective.

Considering this conditions, the Lotka –Volterra model enabled determining the coefficients of interaction between the two variables and estimating the value of the total entrepreneurial rate and of the global competitiveness index for 2016.

Thus, the level of competitiveness of national economies influence the entrepreneurial rate, but to a small extent- between 1% and 2%, regardless of the states' development level, and the entrepreneurial contribution to the national economies competitiveness growth, is between 3% and 12%.

The analysis and interpretation of empirical data confirms thus, the theoretical approaches, which present entrepreneurship as an important vector for the national economies' development but, it also complements them, revealing a less researched and disseminated aspect - competitiveness influence on economic agents' interest for the entrepreneurial activities.

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WORLD MERCHANDISE TRADE

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Abstract

This article is mainly based on the most recent statistical data of the World Trade Organization and some aspects related to the evolution of world merchandise trade, in terms of volume and value, in 2015. The volume of world merchandise trade continued to grow slowly in 2015 while the dollar value of it declined sharply as exports fell 14 per cent to US$ 16 trillion, down from US$ 19 trillion in the previous year. It presents also the contribution of the volume change and of the change in unit values (which account for fluctuations in prices and exchange rates) to the value trade growth (in current dollar terms). The discrepancy between trade growth in 2015 in terms of volume and value was mostly attributable to swings in commodity prices and exchange rates The course of economic globalization is also shortly looked on based on some data and considerations of Credit Suisse analysts. Three different scenarios were taken into account in this respect. First one in which globalization continues in the form we know it over the past thirty years, second one in which a multipolar world is a better representation of the state of affairs and third, a scenario in which globalization ends due to the rise of anti-globalization political movements. The second scenario seems to provide a better reflection of reality today, despite the fact that a certain slowdown is observable when taking into account the diminishing growth rate of physical trade, the slower penetration of foreign assets of the developed market companies and signs of reshoring of some business back home. Globalization remains intact in terms of consumption and marketing patterns, while companies seem more reluctant to invest abroad.

Keywords: *world merchandise trade, economic globalization*

1. The volume of world merchandise trade

The volume of world trade continued to grow slowly in 2015 recording a growth of 2.7 per cent, measured by the average of exports and imports (the volume of exports grew by 3%, while the volume of imports grew by 2,4%, , as illustrated by Chart 2.). Slow global trade growth was accompanied by a modest increase in world GDP, which grew 2.4 per cent in real terms at market exchange rates in the same period.

Several factors contributed to the lackluster performance, including economic slowdown in China, recessions in other large developing economies including Brazil, falling prices for oil and other primary commodities, strong fluctuations in exchange rates, and financial volatility driven by divergent monetary policies in developed countries. Faster economic growth and rising import demand in developed countries (in Europe and North America) partly made up for weaker demand elsewhere, leaving trade growth and output growth nearly unchanged compared with the previous year (2.8 per cent and 2.5 per cent, respectively, in 2014). Meanwhile, output slowed in China and contracted in Japan. China's economy slowed further in the first quarter of 2016. Growth also eased in the United States in the first quarter of 2016 but accelerated in the euro area. Japan's GDP continued to alternate between positive and negative growth.

2015 marked the fourth consecutive year with trade volume growth below 3 per cent, and the fourth year in a row with world trade growing at nearly the same rate as world GDP. Growth rates for trade and GDP in 2015 remained below their respective averages since 1990 of 5 per cent and 2.7 per cent. The recent slow in trade growth is unusual but not unprecedented, as for example the world trade growth was weaker between 1980 and 1985, when five out of six years saw trade growth below 3 per cent, including two years of outright contraction.

Chart 1. Growth in the volume of world merchandise trade in 2015 (Annual percentage change)

	Exports	Imports
World	**3.0**	**2.4**
North America	**0.8**	**6.5**
Canada	4.4	0.7
Mexico	4.0	13.3
United States	-0.9	6.5
South and Central America	**1.3**	**-5.8**
Europe	**3.7**	**4.3**
European Union	4.0	4.5
Commonwealth of Independent States (CIS)	**-0.6**	**-21.9**
Africa	**0.1**	**1.3**
Middle East	**8.6**	**-1.9**
Asia	**3.1**	**1.8**
Australia	3.3	4.5

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China	4.6	-4.2
India	-2.1	-8.9
Japan	2.2	2.7

Source: World Trade Statistical Review 2016, WTO

As for the contributions to world trade volume growth by regions, Asia contributed more than any other region to the recovery of world trade after the financial crisis of 2008-09. However, the region's impact on global import demand declined in 2015 as China and other Asian economies cooled. in 2015 the region contributed just 0.6 percentage points to the global increase of 2.4 per cent, or 25 per cent of world import growth.

In contrast to Asia, Europe mostly weighed down world trade growth since the financial crisis, making a negative contribution to global import growth in 2012 and 2013. However, by 2015 Europe's contribution was again largely positive, accounting for 1.5 percentage points of the 2.4 per cent increase in world import volume for the year, or 64 per cent of global trade growth.

North America made a positive contribution to world import growth in 2015 (1.1 per cent), while negative contributions were recorded in 2015 for South and Central America (-0.2 per cent) and other regions including Africa, the Middle East and the Commonwealth of Independent States (-0.6 per cent).

On the supply side, "factory Asia" did more than any other region to lift merchandise export volume growth between 2011 and 2014, but its contribution fell below that of Europe in 2015. Asia was responsible for 1 percentage point of the 3.0 per cent rise in world merchandise exports (35 per cent of export growth).

Europe's 1.3 percentage point contribution accounted for 44 per cent of the rise, thanks in part to a reactivation of trade within the European Union. North America's contribution to export growth in volume terms was close to zero in 2015 as demand for US goods slowed in Canada, Asia and South and Central America

A product breakdown of world trade in dollar value (as in volume terms is not available), shows us that fuels and mining products were responsible for more than half of the plunge in trade values in 2015, but that slowing trade in manufactured goods and agricultural products also contributed significantly to the overall decline. Among manufactured goods, the products where trade values notably declined in 2015 were office and telecom equipment, chemicals and other machinery, while clothing and textiles only made small positive contributions to trade growth.

2. The contribution of the volume change and of the change in unit values (which account for fluctuations in prices and exchange rates) to the value trade growth (in current dollar terms).

During the 2000–2010 period, growth in trade value resulted from a balanced contribution of price and quantities: on average, a 9.7 per cent increase in value terms was due to a 4.3 per cent contribution of volume change and a 4.8 per cent change in prices. 2013 and 2015 saw a different contribution to value growth: volume growth stabilized at 2.7 per cent in a context of falling commodity prices. This resulted in a large decrease in value growth , as illustrated by Chart 2.

Chart 2. Average trade growth by volume, value and unit value (per cent)

Period	Volume	Unit Value	Value
1981-1985	2.9	-3.5	-0.7
1986-1990	5.8	6.2	12.3
1991-1995	6.2	1.9	8.4
1995-2000	7.0	-2.1	4.8
2001-2005	5.0	5.1	10.5
2006-2010	3.7	4.6	9.0
2011-2015	3.1	-1.3	1.8
2013-2015	2.6	-6.0	-3.6

Source: WTO Secretariat.

3. The value of world merchandise trade

Unlike merchandise trade in volume terms, which recorded a modest increase, the dollar value of world merchandise trade declined sharply in 2015 as exports fell 14 per cent to US$ 16 trillion, down from US$ 19 trillion in the previous year.

Chart 3. World merchandise exports and imports in 2015 (Billion dollars and percentage)

	Exports	Imports
World	**15985**	**16299**
World	**100.0**	**100.0**
North America	**14.4**	**19.3**
United States	9.4	14.2
Canada	2.6	2.7
Mexico	2.4	2.5
South and Central America	**3.4**	**3.8**
Brazil	1.2	1.1
Chile	0.4	0.4
Europe	**37.3**	**36.2**
Germany	8.3	6.4
Netherlands	3.5	3.1
France	3.2	3.5
United Kingdom	2.9	3.8
Commonwealth of Independent States (CIS)	**3.1**	**2.1**
Africa	**2.4**	**3.4**
Middle East	**5.3**	**4.3**
Asia	**34.2**	**30.8**
China	14.2	10.3
Japan	3.9	4.0
India	1.7	2.4
Australia and New Zeeland	1.4	1.5

Source: World Trade Statistical Review 2016, WTO

The discrepancy between trade growth in 2015 in terms of volume and value was mostly attributable to large swings in commodity prices and exchange rates.

Fuels registered the largest price decline of any commodity group (down 63 per cent between June 2014 and December 2015), as a result of new sources of supply such as shale oil and an easing of world energy demand as economic growth slowed in Asia. The decline in metals prices (down 35 per cent over the same period) was smaller than the decline in fuels due to the fact that there was no increase in the supply of metals comparable to the development of shale oil in the United States. Prices of food and agricultural raw materials also fell, by around 22 per cent each between June 2014 and December 2015.

The appreciation of the US dollar contributed to falling commodity. The dollar appreciated 13 per cent on average against the currencies of US trading partners in 2015. The Chinese yuan appreciated along with the dollar, rising 10 per. The appreciation of the yuan may have

contributed to the economic slowdown in China to the extent that it made Chinese exports more expensive in foreign markets. Meanwhile, major natural resource exporters such as

Brazil and the Russian Federation saw their currencies drop sharply in value in 2014.

The top ten merchandise traders accounted for 52% of the world's total trade in 2015.

Developing economies had a 42% share in world merchandise trade in 2015.

Chart 4. Leading exporters and importers in 2015.(Billion dollars)

Rank	**EXPORTERS**	**Value**	**Rank**	**IMPORTERS**	**Value**
1	China	2275	1	United States	2308
2	United States	1505	2	China	1682
3	Germany	1329	3	Germany	1050
4	Japan	625	4	Japan	648
5	Netherlands	567	5	United Kingdom	626
6	Korea	527	6	France	573
7	Hong Kong	511	7	Hong Kong	559
8	France	506	8	Netherlands	506
9	United Kingdom	460	9	Korea	436
10	Italy	459	10	Canada	436
11	Canada	408	11	Italy	409
12	Belgium	398	12	Mexico	405
13	Mexico	381	13	India	392
14	Singapore	351	14	Belgium	375
15	Russian Federation	340	15	Spain	309

Source: World Trade Statistical Review 2016, WTO

However, the value of merchandise trade and trade in commercial services in 2015 is nearly twice as high as in 2005.

Asia, Europe and North America have accounted for 88% in total merchandise trade of WTO members over the past ten years. The share of developing economies in merchandise exports increased from 33% in 2005 to 42% in 2015. Merchandise trade between developing economies has increased from 41% to 52% of their global trade in the last ten years.

A negative implication in respect to the globalization process has the ratio of merchandise trade to GDP. It fell sharply in 2009 following the economic crisis, bounced back quickly in 2010-2011, declined gradually in 2012-2014, but fell significantly in 2015 to 23%.

4. The course of economic globalization

„The current wave of globalization is the second the world has seen, the first one occurring between the years 1870 to 1913, built on the fruits of the industrial revolution and the rise of the American economy. 'The current period effectively dates from the early 1990s, where events like the fall of communism, rounds of trade liberalism and the growing momentum of the Chinese economy accelerated globalization. This was then driven by US multi-nationals, the advent of the euro, the growth of financial markets and the development of many emerging economies.

However, in recent years the path that globalization is taking has become obstacle strewn and much less clear. The global financial crisis has slowed economic growth, left large amounts of indebtedness in its path and checked the rise of the financial services industry. The Eurozone appears to many to be in a state of perpetual crisis while the structural rise of China's economy has caused some to fear the role it will play geopolitically. Its cyclical slowdown is also promoting concern." This is a short description of the present state of affairs given about two years ago in a study by Credit Suisse that was trying to establish the direction that globalization is taking recently. Three different scenarios were taken into account.

Scenario 1: Globalization continues: The first of these is that globalization continues in the form we know it over the past thirty years. In substance western multinationals dominate the global business landscape, trade grows with few interruptions from protectionism and the internet economy grows, across borders.

Scenario 2: A multipolar world: This second scenario is based on the rise of Asia and a stabilization of the Euro-zone so that the world economy rests, broadly speaking, on three pillars—the Americas, Europe and Asia (led by China). At the corporate level, the significant change would be the rise of regional corporate champions, which in many cases would supplant global multinationals.

Scenario 3: The end of globalization: a slowing trend in economic growth and trade with the added possibility of a macro shock (from indebtedness, inequality, immigration), a rise in protectionism, currency wars, the rise of anti-globalization political movements and a backlash against global corporations.

Earlier, in 2014, Credit Suisse has calculated the so called CS Globalization Index based on economic, social and technological factors. Economic globalization within this index is estimated by trade openness (% of GDP), FDI (% of GDP) and FPI (% of GDP).

Trade openness has risen from around 32% in 1990 to over 54% in 2013 (based on Credit Suisse data), but has fallen in 2015 to 32% (based on World Trade Organization data). This is consistent with the decline of the value of world merchandise trade by almost 3 billion dollars in 2015.

On the other hand, taking corporates as one of the main channels through which globalization flows, Credit Suisse investigated the course of globalization by looking at the trends in the foreign sales and asset shares of major, listed corporations over the last decade.

Foreign sales accounted for 39% of total global corporate sales in 2014, well above the 2004 level when they accounted for 31%.

The trend for foreign assets, however, was different. The penetration of foreign assets is typically lower than that of foreign sales, as they accounted for just 19% of total assets in 2014 on average. In contrast to sales, the upward trend in foreign assets was brought to an end during the global financial crisis. Foreign assets accounted for 21% of the total in 2003, peaked at 26% in 2008, and then dropped to 18% in 2012. This pattern is similar across most sectors and regions.

If we consider the difference between developed and emerging markets companies, there does seem to be more of a retrenchment in the foreign asset exposure of developed world companies versus those in emerging markets, which seem to have expanded their overseas revenues vigorously while their overseas investment has not slowed to the same extent as developed markets.

Among sectors, technology companies are strongly associated with globalization. The sector enjoys a very high share of foreign sales relative to other sectors, but at the same time has the lowest share of foreign assets.

The financial sector, despite the financial crisis, has managed to keep foreign revenues relatively stable, but the share of foreign assets has contracted from the peak of 2007 by some 5%. Industrial and consumer goods companies have exhibited similar trends. The share of foreign assets of developed market companies is around 5% off its 2007 level.

As for emerging market companies, we see a rise in terms of both sales and investments abroad.

Overall, the results of the study of corporate investment and revenue growth show that globalization remains intact in terms of consumption and marketing patterns, while companies seem more reluctant to invest abroad. All is pointing towards a more multipolar world as in the second scenario of the Credit Suisse. The world is most multipolar in terms of trade patterns and economic activity. Trade is becoming more regional though there are signs of the erection of barriers to trade.

Conclusions

The volume of world merchandise trade continued to grow slowly in 2015 while the dollar value of it declined sharply as exports fell 14 per cent to US$ 16 trillion, down from US$ 19 trillion in the previous year. The discrepancy between trade growth in 2015 in terms of volume and value was mostly attributable to swings in commodity prices (large price declines) and exchange rates (the dollar appreciated 13 per cent on average against the currencies of US trading partners).

As for the trend of economic globalization, a certain slowdown is observable when taking into account the diminishing growth rate of physical trade, the slower penetration of foreign assets of the developed market companies and signs of reshoring of some business back home. Globalization remains intact in terms of consumption and marketing patterns, while companies seem more reluctant to invest abroad.

As the analysts from Credit Suisse say "Our sense is that the world is currently in a benign transition from full globalization to a multipolar state, though this is not complete. Specifically, the world is most multipolar in terms of trade patterns and economic activity; but financially the world, although highly globalized, is much less multipolar with the USA still dominating markets. Companies continue to try to sell their goods across borders but are less willing to invest internationally".

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USE OF THE INSTRUMENTS OF SALES IMPROVEMENT IN THE NEIGHBOURHOOD STORES

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Abstract

The retail market in the Republic of Croatia has considerably changed during several last years by entering of large European hypermarkets and by opening a great number of shopping centres. This particularly affected the business of small independent retailers that are due to price uncompetitiveness difficult to cope with competition from hypermarkets.
Sales success depends itself on the success of marketing program of a company. Improving sales brings a whole range of benefits to both producers and consumers and consists of a set of different incentives that are mainly short-term, designed to encourage faster and greater purchasing of certain products or services.
Through well thought entrepreneurial approach and the use of methods for improving sales, neighbourhood stores could contribute through their business strategy to their competitiveness. Gaining customer loyalty, creating a personal relationship with customers, rewarding of loyal customers, promoting new products, helping the buyer in purchasing are some of the ways of improving neighbourhood store sales.
The paper presents research results to which extent neighborhood stores in Osijek-Baranya County use instruments of sales improvement in order to enhance their sales and relationship with customers.

Keywords: *neighborhood stores, entrepreneurial approach, the instruments of sales improvement, business strategy*

1. Introduction

The emergence of large retail formats in the Croatian market in the past few years has led to a change in the consumers' habits. Today, consumers do their weekly and monthly grocery shopping in hypermarkets and go to neighbourhood grocery stores to buy only the most essential goods. The reason behind this is the variety of products that can be found in hypermarkets, as well as their large price competitiveness in relation to neighbourhood grocery stores.

This paper focuses on the theoretical approach to improvement sales, instruments of sales improvement, the role of neighbourhood grocery stores as selling places, the possibilities of achieving customer loyalty in these stores, and the results of the research on the use of instruments of sales improvement in neighbourhood stores.

The research could be of importance to both owners and employees of neighbourhood stores: it could help them realize the possibilities and benefits of using instruments of sales improvement, which would in turn lead to customers getting the most out of their money, but also to stores achieving customer loyalty. The questions that this survey deals with are whether neighbourhood stores use any instruments of sales improvement, and, if they do, which ones. Other papers on this subject have also approached the issues of sales improvement and its instruments from a theoretical point of view, but have not conducted any similar studies where neighbourhood stores were the object of the study.

So far, promotional activities have proved themselves successful in making an impact on customers' attitudes and the sales volume. The instruments of sales improvement can win new customers, but also affect the loyalty of regular customers to a certain selling place.

The use of one of the instruments of sales improvement, along with a more personal approach to customers, could lead to an increase in sales for the neighbourhood grocery stores.

2. Neighbourhood stores as selling places

In Croatia, trade is one of the most important economic sectors. Out of the total number of registered legal entities in trade, 28% of them are business entities. Given the importance of trade, as a sector that is supposed to be of interest to the overall Croatian economy, a legal basis has been established: its function is to take care of the employees and customers in terms of supplying them with goods in remote and isolated areas, as well as with goods that bear relation to cultural and family traditions and the needs of the tourists. During the process of establishing the legal

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basis in Croatia, the functioning of the entire community is taken into account[1].

The data for the 19 countries of the EU for 2012, show that Croatia had 20 200 stores in retail trade. The average number of inhabitants per shop is 211. Since it is in direct contact with consumers and detects all changes in relation to their consumer habits, trade can be seen as an indicator of economic trends, and the changes it has gone through can attest to that claim. Since 2008, under the influence of the global crisis, there has been a stabilization of consumption, and these trends have continued throughout recent years, with the exception of 2010, when the turnover of retail trade grew at an annual level of 1%. After the recovery in 2011, there has been a stabilization of consumption and a decline in turnover on an annual basis in 2012 of - 4.2% and in 2013 of - 0.6%. The year 2014 recorded turnover growth of 0.4% compared to the same period in 2013[2].

Changes in the Croatian trade in the last decade reflect the changes in retail formats. With numerous hypermarkets entering the Croatian market, as well as the announced arrival of other hypermarkets, the entire Croatian trade has changed, and it has brought about changes even in the consumers' habits. Prior to 1990s, the Croatian retail trade was dominated by smaller stores located in city centres and neighbourhood grocery stores that mostly sold food products.

"Neighbourhood store is a selling place in which the trading activity of selling is carried out, and the goods sold there are mostly food products. In surface, they range from 15 to 200 square meters, which is why they are also called small stores. Neighbourhood stores are located in neighbourhoods or parts of town. Their existence is essential because they provide service to a smaller number of customers and they are in close proximity to their homes, so that customers can easily buy household goods, and especially the much-needed food products. Elements needed for running a successful neighbourhood store: location and position of the sales object, size of retail space, visibility, sign and a clean facade, a range of products, an arrangement of products and a tidy retail space, fresh and safe food products, service and professionalism"[3].

The modern retail market, as opposed to the once fragmented retail market ruled by traditional small independent retailers to a greater or lesser extent, is marked by the processes of concentration, domination and expansion of large-format stores and the result of all this, which is marginalization of small independent retailers[4].

Today, it is difficult to predict customer loyalty to one retail format. However, personal contact with customers and sales promotion methods can coax the customer into shopping in neighbourhood grocery stores.

Table 1. Key segments for small independent retailers

Area	Description
Consumer behaviour	- One available store - Random or emergency purchases - Purchase of products that are not available elsewhere
Employment	- A way to encourage entrepreneurship due to small entry barriers
Local people	- Contribution to the structure of the local community - Providing a sense of identity
The variety of choices	- Competitive advantage via differentiation strategy
Dynamism	- The introduction of new products and retail innovation - a better understanding of the local market and consumer needs as a potential source of competitive advantage

Source: Vojvodić, K. „Strategies survivel of small independent retailers". (paper presented at the XI. Business Logistics in Modern Management, Faculty of Economics in Osijek, Osijek, Republic of Croatia, November 12, 2009), page 213.

The rule goes as following: the closer the store is to the consumer, the greater the likelihood of the consumer making a purchase there. A greater distance from the consumer allows for a number of factors to influence and lower the probability of going to a certain store[5].

3. The term of sales improvement

"American Marketing Association (AMA) defines sales improvement as those marketing activities that do not fall within the range of personal sale, propaganda and publicity, and that stimulate the customers to purchase, as well as the efficiency of the mediator in presentations, demonstrations and other non-typical sales activities. Sales improvement is a form that is complementary to other forms and stimulates all forms of saving money when purchasing"[6].

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The impact of promotional activities on the attitudes of consumers can be seen in two main processes[7]:

1. in the process of formation of positive consumer attitudes
2. in the process of changing the intensity (strength) of positive or negative consumer attitudes, and the process of changing the direction of attitudes (negative to positive attitudes).

Sales improvement consists of short-term incentives to encourage the purchase or sale of products or services along with basic benefits offered with the product or service. Sales improvement provides reasons that lead to immediate sales. The idea is to motivate consumers to immediately buy a particular product. Sales improvement includes a wide range of promotional tools that stimulate a faster or stronger reaction in the market. Sales improvement should help build a long-term relationship with the customer, as well as help ensure the product a position in the market, instead of creating a momentary sale or a temporary choice of a particular brand. Sales improvement has certain limitations as well. Traders have to be aware of the fact that new buyers, who are the target of their promotion, can be consumers of a certain type of product, customers loyal to some other brand and consumers who often change brands. Sales improvement often attracts customers who often change brands because, those who do not use that product or use another brand, look for cheaper or more cost-effective products. Thus, sales improvement encourages customers to try new products, rather than constantly using one and the same, and also informs the consumer of prices, as they like to buy products at special prices[8].

"The tasks of sales improvement are: to speed up the transfer of products between the producer and the consumer, to raise the level of cultural and professional services for end users, to improve the image of the economic entity, to create a favourable pre-purchase ambient situations at selling places, to increase consumer awareness, to reduce seasonal fluctuations of products, to attract new customers, as well as potential customers to the retail facilities, and to increase the number of loyal customers"[9].

A number of instruments can be used in order to achieve the objectives of sales improvement. The plan for sales promotion should take into account the type of market, the objectives of sales improvement, competitiveness and cost-effectiveness of each instrument separately. The main promotional tools intended for consumers are[10]:

- samples - small quantities of products offered to consumers for testing
- coupons - documents that guarantee discounts for consumers when purchasing a product
- offers of refund (rebates) - a partial refund that the consumer receives after sending the manufacturer a "proof of purchase"
- packing at a better price - reduced price which is highlighted by the producer on the label or packaging
- premiums (gifts) - products that are offered either for free or at a lower price as an incentive to purchase goods
- special promotional material - useful items that carry a company logo and are given to consumers as gifts
- reward for loyalty - money or other rewards given for regular use of the products or services of a certain company
- promotion at the point of purchase (POP - Point of purchase) – point-of-sale display and product presentations in stores
- contests, raffles, lotteries and games - a type of promotion that offers consumers the possibility to, by playing games of chance or putting an effort of some other kind, win something, such as money, a trip or a product.

Table 2. Main forms of consumer-oriented sales improvement

Prize for consumers	Promoting test purchase	Stimulating trade	Reinforcing brand image
Immediate	1	3	5
	Samples	Discount	
	Coupons	Bonus pack	
	Coupons on shelves	Premiums with packages	
Delayed	2	4	6
	Coupons in direct mail	Rebates/refunds	Self-liquidating premiums
	Free coupons in post offices	Telephone cards	Competitions
	Delivered coupons	Preset programs	

Source: Kesić, T. Integrated marketing communication. Zagreb: Opinio. 2003., page 391.

ales improvement has most often a direct impact on consumer attitudes. Instruments of sales improvement can be reflected in the attitudes of consumers in the following ways:

- with consumers or nonconsumers who have formed a positive attitude about a certain product: instruments of sales improvement will generally heighten the intensity of those positive attitudes, and the consumer's interest in buying that product (a higher

[7] Kotler, Ph. Marketing management. Zagreb: Informator. 1989., page 625.
[8] Kotler, Ph. et al. Marketing basics. Zagreb: Mate. 2006., page 785-787.
[9] Meler, M. Marketing basics. Osijek: Faculty of Economics in Osijek. 2005., page 293.
[10] Meler, M., op.cit., page 293.

degree of commitment)

- with potential consumers with negative attitudes towards the product: inducing these potential consumers to try out the product creates primarily good starting points to weaken the negative attitudes in their intensity; this way, the very process of creating positive attitudes among potential consumers is more easily influenced
- with consumer or nonconsumers who have not formed attitudes towards the product: the goal of the instruments of sales improvement is to induce consumers to test the product and help create a positive experience which would lead to positive attitudes[11].

Issues needed to be solved by sales improvement plan for instruments[12]:

1. coupons
   - What saving will customer have while buying product with a coupon?
   - Which segment of the market coupons will seize?
   - Which appeals will be used on customers for using coupons?
   - How coupons will be distributed (time, place, method)?
   - Which method will follow effectiveness of this sales promotion model?
2. special price packing
   - What saving will customer have while buying special prize packings?
   - Which segment (segments) of the market this sales promotion model will seize?
   - Which appeals will be used on customers for this sales promotion model?
   - How this model will be distributed (time, place, method)?
   - Which method will follow effectiveness of this sales promotion model?
3. customer rewards
   - Which products will serve as rewards for customers?
   - Which segments of the market (customers) will be rewarded? Why?
   - Will there be rewards given in the form of free products or special prize products?
   - Which appeals will be used on customers for this sales promotion model?
   - How customer rewards will be distributed (time, place, method)?
   - Which method will follow effectiveness of this sales promotion model?
4. product demonstration
   - When, on which method and where the product is will be demonstrated?
   - Had the merchandisers acquired the knowledge, skills and abilities for product denostration?
   - Which target segment of customers will be subject of demonstration?
   - Which method will be used to stimulate customers on attending product demonstration?
   - Which method will follow effectiveness of this sales promotion model?
5. free samples
   - Which customers will get free samples?
   - What is the intention of free samples distribution?
   - How the samples will be distributed?
   - Who will distribute samples?
   - Which appeals will be used on sample distribution?
   - Which method will follow effectiveness of this sales promotion model?
6. low price offer
   - Which customers (segment) will be granted for discount on featured price?
   - Will it be time and place-limited activity?
   - What is the intention of this sales promotion plan? What is the achievement?
   - Who will guide and organize activities?
   - Which appeals will be used on discount for customers?
   - Which method will follow effectiveness of this sales promotion model?
   - 7. Which customers (segment) will be granted for discount on featured price?
   - Will it be time and place-limited activity?
   - What is the intention of this sales promotion plan? What is the achievement?
   - Who will guide and organize activities?
   - Which appeals will be used on discount for customers?
   - Which method will follow effectiveness of this sales promotion model?
7. money refund
   - How the money refund model will be monitored andcontroled?
   - What amount of purchased bill will be refunded? What percentage?
   - Will there be same percentage on every bill or rates will be differentiated by size, structure and meaning of bill and place of purchase?
   - Will refund be applied on individual bills or/and on accumulated purchases during specific period?
   - What is the intention of this sales promotion plan? What is the achievement?
   - Who will guide and organize activities?
   - Which appeals will be used on money refund for customers?
   - Which method will follow effectiveness of this sales promotion model?
8. trading stamps
   - On which selling places and market segments trading marks will be distributed?
   - How long will this sales promotion model last?
   - Which customer and consumer motives are incounted for implementation of this model?
   - What rules will be applied on this model implementation?
   - Who will guide and organize whole activity?

[11] Nakić, S. „Consumer attitudes in promotion activites". Practical management 2 (2014)., page 112.
[12] Nakić, S. Marketing plan. Međugorje: Faculty of social sciences, Hercegovina University. 2016., page 231-234.

- Which appeals are going to be refered to customers?
- Which method will follow effectiveness of this sales promotion model?

9. exhibits on selling place
   - What sales exhibits are will be used?
   - On what selling places it is going to be used?
   - How to create a successful apeal to customers?
   - How long will this sales promotion model last?
   - Who will guide and organize whole activity?
   - Which appeals are going to be refered to customers?
   - Which method will follow effectiveness of this promotion model?

The influence of sales improvement instruments on consumer attitudes is showing in Table 3.

Table 3. The impact of instruments of sales improvement on the formation, stability and changes in consumer attitudes

Instruments of sales improvement	The formation of attitudes	The stability of attitudes	The change in the intensity of attitudes	The change in the direction of attitudes
Packaging at a special price		X		
Prizes for customers			X	
Demonstrations of products	X	X		X
Free samples	X		X	
Offers at a lower price		X	X	X
Refund		X		
Consumer competitions			X	
Award games		X	X	
Store brands		X		
Point-of sale display		X	X	

Source: Nakić, S. „Consumer attitudes in promotion activites". Practical management 2 (2014)., page 113.

4. How to achieve customer loyalty in neighbourhood stores?

The study of consumer habits in retail (GfK, 2010) shows that the main reasons for going to a certain store are their range of products, proximity to one's place of residence and price acceptability. On the other hand, consumers' preferences when deciding where they will go shopping for food products indicate that consumers most frequently decide on supermarkets (47%), small shops (23%) and hypermarkets (15%). There are two elements that should be noted regarding that. The first one is the advantage of the location of neighbourhood grocery stores that are in proximity to the consumers' place of residence and the customers' habit to shop there for basic, everyday products. The second element refers to a smaller sales area which, on the one hand, limits the range of products offered to customers, but at the same time allows for faster shopping. The emphasis should be placed on the differentiation of those elements of independent retailers' business to which customers are committed. When it comes to the development of such an approach, independent retailers have a certain advantage, since they are flexible and their stores are in proximity to customers' homes. Such position can facilitate their approach to customers and the development of strategies that could be a determining factor of their future survival[13].

In considering the application of sales promotion, a business entity needs to[14]:

- define objectives: in terms of consumers, objectives include encouraging greater use and purchase; in terms of retailers, objectives include encouraging retailers to accept new products and higher stocks; in terms of sales force, objectives include support for a new product
- choose the means: for achieving these goals, there are many instruments of sales promotion at their disposal (samples, coupons, special packaging, product demonstrations, award games)
- test the program: the program should be tested to determine its effectiveness
- create a program for the application and control of sales promotion (e.g. how were sales before, during and after sales promotion).

A well thought-out sales strategy and the use of appropriate methods of sales improvement can increase sales in neighbourhood grocery stores. The business of neighbourhood grocery stores can be explained through Pareto principle, which reflects the typical economic thinking and cost-effective procedures - the store's turnover (around 80%) depends on a small percentage of customers (about 20%). This is why those customers must be offered bigger rewards, since they make up for them in the store's turnover during their lifetime of loyalty (rewarding regular customers)[15].

The advantages of applying customer relationship management (CRM) approach are[16] (Goldstein, 1; 272):

- better customer retention and customer loyalty because it can adequately meet their needs
- an increase of market share by applying cross-selling and up-selling strategies
- the possibilities of providing services that are better adapted to customers
- greater efficiency, since this approach helps with time management
- greater competitive advantage because of good access to the customer.

[13] Vojvodić, K. op.cit., page 217.
[14] Kotler, Ph. op.cit., page 682.
[15] Pavlek, Z. Successful stores. Zagreb: M.E.P. Consult. 2004., page 32.
[16] Goldstein, B. The best marketing tools for small entrepreneurs. Zagreb: Algoritam. 2009., page 272.

One of the instruments of sales improvement that could be used in neighbourhood grocery stores are discounts, which represent a reduction on the regular price of the product. The usual discounts range from 10% to 25% of the nominal price. This form of sales improvement is used in the following cases: as a reward for existing customers, as an incentive for consumers to purchase larger quantities, as an incentive to repurchase, to help promotional investments reach consumers, to ensure a place in the shop windows and other areas of presentation, to assist sellers and obtain the support from intermediaries[17].

The best methods of sales improvement in neighbourhood stores are: discounts for the amount of purchased goods, tokens of appreciation (e.g. a birthday card), written thank you notes for frequent shopping, hospitality, friendly relationship with customers, award games, free samples, gifts to customers, delayed payment, promotion of new products, a joint discount for a certain type of product (e.g. all types of cleaners) and so on.

Some of the more innovative idea for sales promotion are: a week of attention dedicated to the customer, discount for blood donors, discounts for those whose birthday is on the day of the purchase, best mask contest, pancake days, late-night shopping, competition in decorating Easter eggs, encouraging a good atmosphere in the stores on some special days, "guess the number" prize games e.g. how many apple are there in the basket etc[18].

In order for neighbourhood stores to retain the loyalty of existing customers and increase the number of new customers, they should maintain a personal approach to them, expand their product range and increase their supply of fresh (organic) fruits and vegetables that most such stores are missing. In Zagreb, in the past few years, the popularity of neighbourhood stores has been on the rise again. They offer products from organic production and delicatessen whose origin is verified (jams, juices, venison salami and sausages, pastries, cheeses, homemade teas, pasta ...) from different family farms, thus generating "a small market". This has attracted the segment of pensioners as customers due to the proximity of these stores to their homes, as well as mothers who are concerned with a healthy diet. Some stores have improved their sales by personally delivering products or selling their products through e-commerce.

5. Research on the use of instruments of sales improvement in neighbourhood stores

For the purposes of this paper, the research was carried out in 10 neighbourhood stores in Osijek-Baranja County in Croatia. Osijek-Baranja County is located in the east of Croatia and has 305,032 inhabitants. Its centre is Osijek with a population of 108,048 inhabitants. This county serves as an example of an area where there has been a change in the structure of retailing. In fact, prior to the opening of shopping malls, neighbourhood stores and retail stores located in the centre of cities were extremely popular. With the opening of shopping malls (such as Portanova and Avenue Mall), which have become a place of hypermarkets, but also entertainment where people spend their free time, there are now only a few neighbourhood stores left that offer mostly food products. Since consumer habits have changed, the question is: how can small neighbourhood stores survive in a competitive market?

The aim of the paper is to explore how often and what instruments of sales improvement do neighborhood stores use in Osijek-Baranja County. The three set criteria for the formation of the sample are:

1. the criterion of business: retail trade
2. the criterion of size: small neighborhood stores
3. the criterion of geographical affiliation: shops located in Osijek-Baranja County.

Sample size: n = 10.

Time of research: October 2016.

Stores from the sample were selected randomly.

Table 4. The use of instruments of sales improvement in neighbourhood stores

Neighbourhood store	Samples of products	Coupons for purchase	Offers of refund	Packaging at a lower price	Gifts for customers	Loyalty rewards for customers	Promotion in stores (point-of-sale display and product presentations)	Award games	Other instruments (name which ones)
1	x	-	-	x	x	-	-	-	-
2	-	-	-	-	-	-	x	-	-
3	x	-	-	x	-	-	-	x	-
4	-	-	-	x	x	-	-	-	-
5	x	-	-	x	-	-	-	-	-
6	x	-	-	x	-	-	-	-	-
7	x	-	-	x	-	-	x	-	-
8	-	x	-	-	x	x	x	-	-
9	-	-	-	x	-	-	x	-	-
10	x			x	x	x	x	x	-

Source: author's work

Based on the obtained answers, instruments of sales improvement were ranked accordingly, as is shown in Table 5.

[17] Kesić, T. Integrated marketing communication. Zagreb: Opinio. 2003., page 398.
[18] Pavlek, Z. op.cit., page 13.

Table 5. The ranking of instruments of sales improvement that were used

Rank of the instrument	Instrument of sales improvement	Number of neighbourhood stores that use this instrument (n=10)
1	Packaging at a lower price	8
2	Samples of products	6
3	Point-of-sale displays and product presentations	5
4	Gifts for customers	4
5	Award games	2
6	Loyalty rewards for customers	2
7	Coupons for purchase	1
8	Offers of refund	0

Source: author's work

Table 5 shows that packaging at a lower price is the dominant instrument of sales improvement used in neighbourhood grocery stores. Other commonly used instruments are product samples and point-of-sale displays and product presentations. None of the stores from the survey use offers of refund, and only one uses coupons for purchase. The study indicates that neighbourhood stores do not use instruments of sales improvement as much as they should in order to increase their sales and become more competitive in the market.

6. Conclusions

Sam Walton, the founder of Wal - Mart, once said: "There is only one boss. The customer. And he can fire everybody in the company from the chairman on down, simply by spending his money somewhere else." This statement has proven to be correct when it comes to the business of neighbourhood stores as well. The changes in the retail market in the last ten years in Croatia indicate significant changes in the trading business and customer behaviour. With the appearance of shopping malls and large hypermarkets, customers do their weekly and monthly grocery shopping in hypermarkets, and rarely in small neighbourhood stores. The reason behind this is the wide range of shopping malls, which, in addition to a wide range of products, offer a place where people can spend their free time in a number of ways: by going to different events, the cinema, restaurants.

In order for neighbourhood stores to survive in the retail market, they must improve their business and entrepreneurial approach to retain the existing customers. In this study, a sample of 10 neighbourhood stores has shown that packaging at a lower price and product samples are instruments that are most often used in sales improvement. The survey also suggests that neighbourhood stores do not use instruments of sales improvement, as an important promotional factor, as much as they should. This study has proven that neighbourhood stores still have room to improve their business through various promotional activities.

The subject of the following studies could deal with the same issue, but take another geographical area, e.g. Zagreb, due to differences in prices and in purchasing power. Also, a survey could be conducted among customers on the effect of sales improvement instruments on their attitudes.

With the use of some of the measures and instruments of sales promotion, imaginative entrepreneurial approach, friendly approach towards the customer, as well as by expanding the range of healthy food products they offer, small neighbourhood stores could increase their sales and gain customer loyalty.

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THE EVOLUTION OF E-COMMERCE IN ROMANIA

Otilia-Elena PLATON[*]

Abstract

The evolution of e-commerce in Romania in the past few years was significant and in 2016 the total amount of money spent on online shopping exceeded 1.8 billion Euros. Since it is believed that e-commerce will be the future trend in global commerce, this topic has an increased importance in the specialized literature. The purpose of this paper is to present the evolution of the e-commerce market in Romania, mainly in the past two years, and to outline the trends that are expected to occur this year and in the near future. The paper presents a short literature review regarding the concept of e-commerce and a secondary data analysis regarding the characteristics of the e-commerce market in Romania.

Keywords: *e-commerce, consumer-oriented e-commerce, electronic commerce, e-commerce market, online sales.*

1. Introduction

In commerce the pace of change is rapid and one of the most prominent transformations was created through the strong development and expansion of electronic commerce. E-commerce generated a paradigm shift for sales and "has changed the way business is conducted in many industries" (Schneider, 2015), becoming an efficient way to lower costs and increase profits from sales. In this field, both the demand and the supply are going through significantly changes that "pose big challenges for retailers, and also represent unprecedented opportunities to innovate on behalf of customers" (World Economic Forum, 2017). E-commerce managed to form a "global marketplace" (Chan, 2004, p. 284) and created sales opportunities for sellers and many purchasing opportunities for buyers (Schneider, 2015).

E-commerce is believed to be the future trend in global commerce and online sales are expected to grow from around 10% today to 40% or even 50% in some sectors in 2027 (World Economic Forum, 2017). The future of shopping will be therefore mainly electronic.

In Romania, consumers' orientation towards electronic commerce became more and more significant in the past few years. Factors such as a higher rate of Internet penetration and usage, wage increase, VAT decrease and price decrease, contributed to the growth of online sales in Romania in the recent years (GPeC, 2017). According to the official Romanian e-commerce market report, published by GPeC (2017), in 2016 the total value of the e-commerce market in Romania exceeded 1.8 billion Euros, more with 0.4 billion Euros than the value recorded in 2015.

Given the importance of e-commerce, numerous papers and studies are dedicated to this topic in the existent specialized literature. The role of this article is to outline the current characteristics of the e-commerce market in Romania and to identify, through a secondary data analysis, some trends regarding its future development.

2. The concept of e-commerce

According to Chan (2004, p. 292), "e-commerce concerns the sale and purchase of goods and services by electronic mechanisms, in general, and on the Internet, in particular". Taking into consideration only the last aspect of e-commerce, Carey (2001, p. 5) considers that "e-commerce (or electronic commerce) is the term used to denote a commercial (usually contractual) transaction that takes place between two or more people using the communications infrastructure known as the Internet". Schneider (2015), emphasizes that the term electronic commerce means not only shopping on the Internet, but it also includes different types of business activities that use Internet technologies. Thus, several categories of electronic commerce can be defined, depending on "the types of entities participating in the transactions or business processes" (Schneider, 2015, p. 6).

Since e-commerce can relate to both consumer-oriented and business-oriented aspects (Chan, 2004), e-commerce can be easily separated in these two main categories. As it can be seen in Figure 1, *the consumer-oriented e-commerce* can be divided furthermore into three types: B2C (business-to-consumer), C2C (consumer-to-consumer) and C2B (consumer-to-business). *The business-oriented e-commerce* (B2B) deals with commercial transactions carried out between business partners or collaborators.

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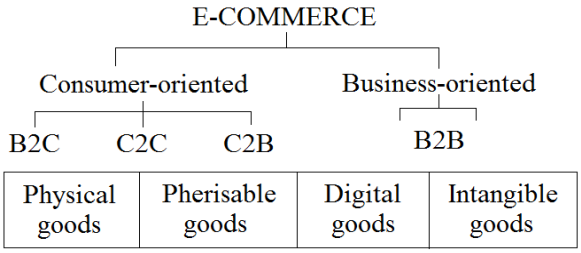
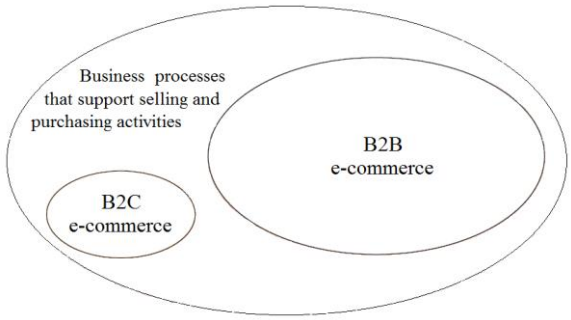
Figure 1. Types of e-commerce



Source: Chan, 2004, p. 285 (adaptation).

Beside these two main categories, e-commerce also involves business processes that suport selling and purchasing activities. Figure 2 shows the relative size of e-commerce elements in terms of money volume and number of transactions. According to it, the business processes that suport selling and purchasing activities are the largest element of e-commerce, followed by the business-to-business (B2B) e-commerce and the business-to-consumer (B2C) e-commerce (Schneider, 2015).

Figure 2. Elements of e-commerce



Source: Schneider, 2015, p. 8.

For this paper only the business-to-consumer e-commerce shows interest. *The B2C e-commerce*, also known as consumer shopping on the Web (Schneider, 2015), involves the selling of tangible or intangible goods from an electronic retailer (e-retailer or e-tailer) to individual consumers and it resembles to some extent the traditional retail business (Chan, 2004). The retail business can be represented by a hybrid retailer, who sells goods both in the physical and in the digital environment, or it can be represented by an electronic retailer, who sells goods only in the digital environment. The types of goods that can be sold include: physical goods, perishable goods, digital goods and intangible goods (services) (Chan, 2004).

The mechanism of B2C e-commerce is based on a series of key elements, such as: a virtual shop, a search engine to facilitate finding products on the virtual shop, an e-catalog for presenting product information, a virtual shopping cart, communication and customer support, payment functions and physical or digital product delivery services (Chan, 2004). In order to ensure a greater success of sales, "companies must be able to transfer their merchandising skills to the Web" (Schneider, 2015, p. 20) and convince customers to buy through marketing, advertising and promotions.

According to Schneider (2015) there were 3 stages in the evolution of e-commerce. The first stage of development lasted from 1995 until 2003, the second stage lasted from 2004 until 2009, and the third stage started in 2010 and it is still under development. The third stage in the development of e-commerce was determined by a number of factors such as (Schneider, 2015):

- an increasing number of mobile devices users and the proliferation of high-speed mobile phone newtorks that enabled more connections between consumers and retailers.
- an increasing interest towards social networking platforms from both the users and the companies; the companies engaged social networks in commerce and started to use them for advertising, promotion and sales.
- an increasing number of small businesses started to sell online.
- an increasing number of tracking technologies were integrated into e-commerce.

Along with the development of smartphones and tablets, the e-commerce activity diversified. Mobile devices became more powerful and popular and started being used in different application areas, including retail. The mobile telephone-based commerce, known as mobile commerce or m-commerce, offers new opportunities for online businesses and it is one of the main future trends in e-commerce.

Referring to the opportunities that e-commerce offers, is should be mentioned that the main advantage of B2C e-commerce is that it simplifies the consumer buying process. On the Internet, the consumers can easily obtain more information and they can compare and evaluate products and prices. These aspects enable them to take better decisions and to have a greater control over the buying process. "E-commerce provides buyers with a wider range of choices than traditional commerce" (Schneider, 2015, p. 22). On the Internet, consumers can analyze different products or services, sold by different sellers, thus improving their decision, saving time and money.

3. The e-commerce market in Romania

According to the official Romanian e-commerce market report published by GPeC (2017), in 2016 the total value of the e-commerce market in Romania exceeded 1.8 billion Euros. This figure took into consideration only the value of the e-tail market (tangible goods sold online, disregarding their nature), excluding services such as: bill payments, utilities paid online, event tickets, plane tickets, hotel or holiday reservations etc. Compared to 2015, the Romanian e-commerce market grew by approximately 30%, from 1.4 billion Euros to over 1.8 billion Euros. Between 2014 and 2015 the total value of the e-commerce market grew from 1.1 billion Euros to over 1.4 billion Euros. Therefore in the last years, the e-commerce market has experienced a continuous growth, of about 30% per year. "The e-commerce industry is one of the

few Romanian industries growing constantly every year" (GPeC, 2017). If the growth trend will continue, next year the Romanian e-commerce market (on the e-tail segment) will exceed the threshold of 2 billion Euros.

The e-commerce share in total retail was of approximately 4% in 2016, similar to 2015 when the share varied between 4% and 5%.

In 2016 in Romania were registered approximately 11.2 million Internet users, more with 0.2 million than in 2015, meaning an Internet penetration rate of 58%. Regarding the number of consumers, in 2015 there were registered 6.7 million online shoppers. In terms of the supply, on the Romanian market, in 2016 there were approximately 5000 online shops active and over 20000 websites that have shopping flow and add-to-cart active buttons.

A selection of the main aspects regarding the evolution of the e-commerce market in Romania between 2015 and 2016 is presented in table 1.

Table 1. The evolution of e-commerce in Romania between 2015-2016

E-commerce aspects	**2015**	**2016**
Romania's population	19.8 mil.	19.4 mil.
Internet users	11 mil.	11.2 mil.
Internet penetration rate	56%	58%
Smartphone penetration rate	50%	70%
Online orders placed from mobile devices	25-30%	35-40%
Online shopping value (e-tail)	1.4 bil. €	1.8 bil. €
Average value of online shopping/day	3.8 mil.€	4.9 mil. €
Average number of purchases/year	8.2	8.4
Black Friday sales	100 mil.€	130 mil. €
Online card payment	514 mil.€	745 mil. €

Source: GPeC, 2016&2017.

According to GPeC (2017), in 2016 the average number of purchases made by a Romanian online buyer was 8.4, increasing from 8.2 purchases in 2015, 8.1 purchases in 2014 and 7.9 purchases in 2013. Also in 2016, the average value of online shopping per day was 4.9 million Euros, increasing from 3.8 million Euros in 2015.

The weekdays on which most of the Romanians purchase products online are Wednesdays and Thursdays.

During Black Friday 2016, the Romanians bought products online of 130 million Euros, increasing from 100 million Euros spent during Black Friday 2015. During Black Friday 2014 the total value of sales was around 75 million Euros. "According to top online shops in Romania, Romanian people's appetite for discounts was the reason why online shops started having more and more frequent Black Friday campaigns (sometimes named differently)" (GPeC, 2017), each of these campaigns generating an approximately 30% growth in online sales.

The main product categories that were sold online in 2016 are similar to those sold in 2015. The top four product categories were: *Electro-IT&C* (e.g. PC and computer parts, notebooks, tablets, mobile phones, electronics and home appliances), *Fashion & Beauty* (e.g. clothes, shoes, accessories, cosmetics, products, watches etc.), *Home & Deco* (home design products, furniture etc) and *Baby, Kids and Toys* (e.g. toys, strollers, baby clothes, diapers etc.). "Comparing to 2015, the transaction average order value decreased for all the above categories with the sole exception of Home & Deco where the average order value doubled" (GPeC, 2017). In 2015, for *Electro-IT&C*, the Romanian buyers spent 680 RON, a higher average order value than in 2016, when they spent 669 RON per transaction. For *Fashion & Beauty* the average order value decreased from 180 RON in 2015 to 161 RON in 2016. For *Home & Deco*, the average order value doubled from 220 RON in 2015 to 474 RON in 2016. For *Baby, Kids & Toys*, the average value order decreased from 210 RON in 2015 to 203 RON in 2016.

During the last two years, the smartphone penetration rate grew significantly in Romania, increasing from 50% in 2015 to 70% in 2016. Romanian buyers started to use smartphones for shopping online and browsing online shop content. "Therefore, the top Romanian online shops reported significant increase in mobile device traffic: over 50% of online shops visits come from mobile devices" (GPeC, 2017). The number of online shopping orders placed from mobile devices has grown as well, from 25-30% of total orders in 2015 to 35-40% in 2016.

Regarding online card payments, in 2016 the total value grew significantly, reaching approximately 745 million Euros, increasing by 44.9% from the value registered in 2015, when the total value was 514 million Euros. In 2014 the value of online card payments was 337 million Euros. Out of the total value, in 2016 *RomCard* processed 575 million Euros in 3D Secure and registered a significant growth comparing to 2015, when the company processed 394 million Euros. *Netopia mobilPay* processed 170 million Euros in 2016, more than in 2015, when the company processed 120 million Euros.

Romanians preferred online card payments especially when they paid for services and less when they paid for e-tail. Out of the total payment methods used in the e-tail segment, the online card payment percentage was approximately 6-7%, both in 2015 and 2016. The preferred payment method (approximately 90% of orders) was cash on delivery. Other payment methods such as online banking, micropayments by SMS etc. were used only for 2% or 3% of all the payments. The top three product categories for online

card payments included: bills payment, e-tail payments and telecom services payments.

In 2016, 64% of Visa card online payments were directed to international online merchants. The purchases included mainly plane tickets, but also travel and hotel reservations, as well as online adult websites and gambling & casino websites. The average order value on Visa cards increased from 40 Euros in 2015 to 50 Euros in 2016. The figures show that in 2015 Romanian buyers "spend more money in foreign online shops than in Romanian online shops, the average order value being 58 Euros for foreign shops and 40 Euros for Romanian online shops" (GPeC, 2016).

4. Future trends of e-commerce in Romania

Although most of the Romanian online buyers prefer to purchase from desktop devices instead of mobile devices, mobile commerce has grown considerably since 2015 (GPeC, 2016). According to the official Romanian e-commerce market report published by GPeC (2016), in 2015 "1.4 million Romanian online shoppers used a mobile device to complete a purchase, and approximately 850.000 used a mobile shopping app to complete a purchase". Mobile commerce was "the trend of 2016 and will continue to be the main focus for 2017, as Romanian online shops have understood that the mobile is no longer the future but the present" (GPeC, 2017). Given the fact that m-commerce is having a fast development, the main aspects that need to be optimised are improving the online shop mobile user experience and the websites loading time (GPeC, 2017). Also, the e-tailers must adapt the website content and communication to this new trend.

Nowadays consumers expect "to order something on their mobile devices, have it delivered or pick it up in store – often on the same day, in a few hours, or even in a few minutes. It's up to retailers to adapt to these changes – and in some areas even lead the way – or they'll fall behind and disappear" (World Economic Forum, 2017). Consumers want everything to happen fast. The Romanian consumers are looking for the online shops to offer them several advantages, such as: free delivery, discounts and promotional campaigns, free returns, and fast delivery (GPeC, 2016). Online shops and delivery companies must be able to complete these demands. The e-commerce market must become a more proactive and less reactive market (GPeC (3), 2017). The e-tailers should try to innovate in order to keep up with the changing consumer demands and behaviour.

Besides mobile, other important keywords regarding the future development of e-commerce in Romania include: video content, automation, personalization and omnichanel experience (GPeC (2), 2017).

Given the fact that by 2020 Google estimates that 80% of online content will be video content, the e-tailers have the opportunity and obligation, at the same time, to create and deliver quality video content (including live streaming, vlogging, virtual reality etc.), in order to improve communication and promotion, to increase consumers` trust and to stimulate their sales (GPeC (2), 2017).

The companies should also adopt marketing automation in order to measure their results and to establish patterns regarding their consumers` buying behaviour. Marketing automation will help companies to be present and communicate online with their consumers at the right moments and in the right context.

Personalization is another important aspect. The most successful companies will be those who will communicate and customise their content according to their customers` profile and interests.

The omnichanel or multichanel experience will be a source of competitive advantage. A pleasant consumers` experience should be created by retailers at all points of contact, both online and offline, and both before and after the purchase.

5. Conclusions

The Romanian e-commerce market had a continuos growth during the last years, of about 30% per year, and it will continue to develop based on the trends that were presented in this paper. Taking into consideration that the e-commerce market is a global market, it should be mentioned that the future development of electronic commerce in Romania will follow the international trends. The long-term developing trends will involve 3 main directions (World Economic Forum, 2017):

5.1. An increasing power and influence of consumers

Given the fact that on the Internet, consumers have a greater control over their shopping experience, and that their satisfaction is very important for retailers, in the future consumers "will be more empowered than ever to drive the change they want" (World Economic Forum, 2017). The development of technology, artificial intelligence, augmented reality and virtual reality will help consumers to fulfill their needs in a simpler way. Since they will have less time to buy from physical stores, they will prefer to choose mainly products sold online. Consumers will choose to shop with retailers who are able to sell different types of products and who will provide transparency around product information, pricing and the supply chain, so that they can be satisfied about the purchase.

An important shift on the market is represented by the fact that "until recently the price was the important factor influencing the buying decision, but now the smaller price is not the only factor – Romanian people start paying attention to the quality of service and post-acquisition services, time of delivery and time of response and the price is no longer the main factor.

The quality of service becomes the most important differentiator in Romanian e-commerce" (GPeC, 2016).

5.2. Global access to a wider range of goods

E-commerce offers a wider range of choices for consumers than traditional commerce and on the Internet, consumers can analyze different products or services, sold by different sellers from all around the world. The retailers that will offer the most qualitative services will have the chance to be elected and to sell more.

5.3. Shared value

According to World Economic Forum (2017), "retailers will only survive if their business creates shared value that benefits shareholders and society". Social and environmental sustainability will appeal more to customers in the future.

Based on all the information presented in this paper, retailers should improve their online sales activity and align to the international trends. Also, further research in this domain should be carried out since it is an evolving domain and its pace of change is extremely rapid.

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MARKETING PROGRAMME FOR TOURISM POTENTIAL VALORIZATION THROUGH AGRITOURISM

Mirela-Cristina VOICU[*]

Abstract

Mehedinti is the county that "excels" in most areas. On the one hand, it is a county with exceptional tourist potential and, on the other hand, is one of the most economically underdeveloped counties. In these circumstances, agritourism appears as one of the best solutions to capitalize the area's tourism potential without substantial investment. This is encouraged by the current concern of the European Union reflected in the approval of the EU Strategy for the Danube Region (EUSDR) by the EU Council, which has created great opportunities for funding and action in the Danube region.

In this context, through the following paper we seek to emphasize the importance of agritourism as a solution for developing tourism in the Mehedinti county, developing in this regard a marketing programme that aims to valorize this region's tourism potential.

Keywords: *agritourism, tourism marketing, marketing programme, tourism potential, tourism resources*

1. Introduction

Mehedinti county is part of an area that has become a priority for the European Union. Thus, considering the initiative launched by Romania and Austria in 2008, the European Council (June 8 to 19, 2009) requested from the European Commission to make all the efforts for the adoption of an EU Strategy for the Danube Region by the end of 2010. The EU Strategy for the Danube Region (EUSDR) was adopted in June 2011 as a macro-regional strategy of the European Union, aiming at developing the economic potential and improving the environmental conditions of the region, encouraging for this purpose long-term cooperation both between local and regional authorities, and between authorities, the private sector and NGOs, by generating projects for the region's development.

Capitalizing the exceptional tourism potential and geopolitical position of the romanian part of the Danube region in the European context, harmonized with an appropriate legal and institutional framework will entail a full integration of Romania into the regional and european structures.

On the other hand, given that the Danube Region is characterized by vulnerability accentuated by any kind of local anthropic intervention, a reassessment of the activities impacting these areas is required, including tourism, and finding a compromise solution, that of the optimal environmental pollution. Regarding tourism, this solution can be represented by agritourism. Through the additional revenue that it could provide, agritourism can help improve the economic stability of rural communities and farms given that agricultural products have low prices, and agricultural production costs and the suburban areas development are growing. Also, agritourism allows the diversification of households and farm activities and represents a buffer against the fluctuations of their income.

In order to emphasize agritourism as a solution for capitalizing the tourism potential in the area of Mehedinti county the features and importance of this type of tourism for the area subjected to analysis, and the actions undertaken so far by the authorities to capitalize the tourism potential through agritourism will be presented, a SWOT analysis on the area of interest will be conducted and, finally, we will propose a series of solutions that consider the superior capitalization of the of area's tourism potential through agritourism.

2. Considerations regarding the importance of agritourism in the Mehedinti county area

Agritourism is the activity that transforms rural households in tourist destinations for recreation and education purposes.

In the specialty literature agritourism is defined as: "the activity of reception and hospitality performed by individual or associations of agricultural entrepreneurs and their families using their own enterprise (household, farm) or a rented one such that the performed activity is complementary to the activities related to the land cultivation, forestry and livestock, which must be further considered as main activities" .

Specialists in the field consider agritourism as a segment of rural tourism represented by tourism products that have a direct link with the environment, products or stays of agrarian nature. As a distinct segment within rural tourism, agritourism involves: accommodation in peasant household, consumption of

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agricultural products from the household and a greater or lesser participation in specific agricultural activities . Agritourism products are offered by agricultural entrepreneurs and their families that are connected and complementary to agricultural activities .

In addition, there are authors that are integrating walks on farms organized for families and schoolchildren, harvesting for own consumption, carts of hay or sleigh rides and overnight stays in peasant households into the agritourism category.

On the other hand, there are specialists who disagree with the idea that agritourism is an extension of rural tourism supporting instead the idea that this is "a freestranding form of tourism because despite of the fact that capitalizes the same rural areas agritourism brings something new namely is introducing the tourist in the peasant activity, allows him to participate, and become an integral part of the household not just a spectator" .

Agritourism is a solution for peasant households that may earn additional revenue in this way. Agritourism contributes to the diversification of households' activities and to the placement of their agricultural products constituting a safety net against the risks existing in the agricultural market. Agritourism appears as an appropriate diversification strategy given that this activity does not require excessive investment in the households' infrastructure. Households pursuing to achieve the diversification of their activities through tourism focus with preference on those activities that can use existing resources to the detriment of those activities which would require additional investment, agritourism being used as a method to obtain additional revenues and to deal with the risks of increasing costs of agricultural equipment and other required inputs . Thus, in Mehedinti county peasant households can practice agritourism by offering those activities already practiced by them at the farm, which will not greatly alter their agricultural production.

What would determine a tourist to choose an agritourism product to the detriment of a "classic" one? The reasons may include the need for a return to nature, the need to remove the effects of stress caused by the anonymity and uniformity of urban congestion by integration in the village community and the wellbeing that this integration provides, the desire to know the cultural and traditional art heritage of an area, the desire to know the farmers simple life and the tranquility of such a life, the desire to consume food prepared using traditional methods and to practice specific peasant occupations .

Failure to implement the agritourism solution in rural households can be avoided by implementing a careful and well-founded planning including the one regarding the involved marketing activity.

Mehedinti County has an adequate framework for carrying out agritourism, archaic activities and folkloric traditions being well preserved, giving it a unique character for tourists coming from urban areas. The rural world can become in this case the main object of tourist attraction. Agritourism can thus contribute to solving specific problems regarding spatial planning policy and the desired balance between town-village.

3. The stage of tourism potential valorization through agritourism in the Mehedinti county area

In addition to the legislative regulatory rules regarding specific tourism activities functionality a number of strategies and programs like Romania National Tourism Master Plan 2007-2026 or the annual tourism marketing and promotion programs were founded in order to stimulate, between other things, the development of agritourism in the Mehedinti county area. Added to these are added the strategies, programs and projects for regional agritourism development such as: Regional Development Strategy 2014-2020; Mehedinti county, Drobeta Turnu-Severin municipality and Orşova development strategies.

So far, in Mehedinti county the following projects were funded in the Regional Operational Programme 2007-2013 and 2014-2020, Priority axis 5 - Sustainable development and promotion of tourism :

- "Theodor Costescu" Cultural Palace and Severin Fortress Rehabilitation;
- Iron Gates Region Museum Complex rehabilitation and valorization as a tourism product;
- Orsova touristic seafront landscaping – Phase II;
- Ponoarele village tourism potential promotion through specific marketing activities and cultural heritage, manmade sights and tradition valorization;
- Svinita village cultural, natural and historic heritage promotion through tourism marketing and strengthening local, regional and national tourism industry. Highlighting the village unique objectives and increasing the number of visitors on short and medium term;
- Drobeta Turnu Severin tourism potential, natural, historical and civilization resources promotion through specific marketing and communication methods aimed at increasing the number of visitors and strengthen local and national tourism with a focus on the Severin Medieval Fortress;
- Danube Gorge - Eşelniţa, objectives with touristic potential unexplored to the true value. Unique European landmarks promotion by means of specific marketing and tourism promotion aimed at increasing with 25% the number of visitors and local and regional tourism development;
- History, genesis and culture in Orşova city;
- Simian island landscape and historical heritage, etc.

Nevertheless, the development of tourism, in general, and agritourism, in particular, is below the level of potential with which Mehedinti county is endowed.

4. SWOT analysis

The strengths are the advantages that the area of Mehedinti county holds in relation to other tourist areas, being represented by the following:

- The concerned area represents a strategic region located on the Serbian border and with access to the Danube River, important communication channel with EU Danube countries thus having a high potential for tourism development;
- The area is characterized by cultural diversity conferred by the presence of communities of Serbs, Czechs etc., and by a rich cultural heritage. Thus, the county population structure in terms of ethnicity is characterized by a rate of 4.11% Roma followed by Serbs (0.4%) and Czechs (0.2%)[1];
- Mehedinti county has important natural resources for tourism development:
  - *Mehedinti County's tourism potential* is constituted by the impressive landscape formed by the Danube River and its gorge, the landscape diversity of the highlands area, the existence of particular elements of flora and fauna, many of which are recorded in scientific reserves, plus the impressive testimonials of a past millennia, expressed by a number of historical, architecture and art monuments, some unique, by their value and their novelty. Comissioning of the Rhine - Main - Danube Canal has put the county seat, Drobeta Turnu Severin, in direct contact with all the coastal cities from the Black Sea to the North Sea.
  - *Drobeta Turnu Severin*, through its position at the exit of the Danube River in the defile, but also because of its numerous socio-historical and cultural objectives could be a polarizing center of the Mehedinti tourism industry. Severin`s main tourist attractions are:
    - Trajan's Bridge ruins (built during the Dacian wars fought by Emperor Trajan against Decebal);
    - Castra of Drobeta-Turnu Severin (made in the same period as Trajan's Bridge);
    - The ruins of the medieval church located near the Roman castra;
    - South of the municipality, on the Danube shore, lies the monumental building of the Iron Gate Museum, with sections of history, archeology, ethnography, natural sciences and a great aquarium.
  - County's *main tourist areas*, outside Drobeta Turnu Severin, are:
    - The Iron Gates I area with the Danube defile, clisura with the Large and Small Boilers, the reservoirs, hydropower and navigation systems, numerous viaducts raised above wild valleys;
    - *Orsova Municipality* unfolded as an amphitheater on the Cerna bay shore. The city is the gateway to the Danube Clisura defile ("Iron Gates" Natural Park). It has natural beaches on the Danube shore. Together with the Danube Clisura (Boilers, in particular) and Baile Herculane (including the adjacent area) forms a traditional tourism triangle;
    - Simian island - is located downstream of Drobeta Turnu Severin, where the former fortress from Ada-Kaleh island (now under the reservoire waters) was moved;
    - The northern part of the county, characterized by the beauty of the landscape. Here the Baia de Arama city can be found where the Sfintii Voievozi Church can be visited. The church was built in Byzantine style and painted in 17th century. About 4 km northwest of Baia de Arama the Ponoare carsta complex and Topolnita cave (the second largest in the country with an explored length of 10.330 m) can be found;
    - Not far from Baia de Arama is *Bala balneoclimateric resort* with thermo-mineral waters. Bala's mineral waters are as good as those from Herculane and in some respects even better and powerful, but unfortunately underused;
    - Strehaia area, located about 40 km from Drobeta Turnu Severin, with Strehaia Monastery fortress, built around 1500, the linden forest, and eastward, Gura Motrului Monastery.
    - Natural reservations have a special place in the county. Among these are: *Cracul Găioara Botanic Reservation* (The Iron Gates Colilia is growing on *Cracul Găioara*, the only place in the world where it was found), *Valea Oglănicului Botanic Reservation, Cracul Crucii Botanic Reservation, Gura Văii – Vârciorova Botanic Reservation, Faţa Virului Botanic Reservation, Dealul Dohomnei Botanic Reservation, Bahna Paleontological Reservation* (the karst limestone preserves a 16 million years old fossil fauna), *Large and Small Boilers Reservation, Sviniţa Paleontological Reservation.*
- *The area's rich cultural heritage*: churches, monasteries, museums. In this area there are many religious (churches and monasteries dating from different centuries), ethnographic and ethno-folkloric (there are numerous celebrations which are still kept, traditional houses; in Balta there are two ethnographic sites in Prejna and Costești; there is an ethnographic center in Baia Baia de Aramă), and cultural objectives (memorial houses and monuments). There are many villages that are still keep alive the traditions, culture

[1] *The stable population by ethnicity - Romania and Mehedinti County by municipalities/cities/villages*,the official website of County Statistics Office – Mehedinți, http://www.mehedinti.insse.ro/phpfiles/MH-etnie2011.pdf.

and popular holidays (ethnographic site in the villages of Balta, Prejna, Dâlbocița, assembly watermills from Ponoarele etc.). Also in the Mehedinti Plateau there are many tourism and agritourism guesthouses where tourists can enjoy organic products, benefit from accommodation in traditional houses and can take part, if they want, in household activities (Ponoarele, Isverna, Ilovita, Baloteşti Godeanu). To these are added a number of increasingly popular traditional festivals that take place annually attracting more tourists every year (Nadanova Lilac Festival, Baia de Aramă ,,Munte, munte, brad frumos" Festival, Titerleşti ,,Pe fir de baladă" Folklore and Folk Crafts National Festival, Bala ,,Plaiul Cloşani" Festival, Ponoare Lilac Celebration).

- *Special events in the county's rural areas* such as: Pojejena - sheep measurement – May 6, Mărțișor Ball (Ilovița, February 28), Drawers Ball (Ilovița, January 31), Village Sons (Ilovița, last Sunday in July) Figs Festival (Svinița), Danube Villages Festival (Svinița, May 1-2) etc.;
- *Low industrial pollution of the environment in the scenic beauties area*;
- *The existence of therapeutic resources;*
- *Orşova is one of the points through which one of the European Greenways trails passes - Euro Velo Routes,* an aspect that contributes to linking the county to other Danube regions, representing an asset in attracting foreign tourists;
- *A significant percentage of the Mehedinti county population is employed in agriculture*;
- *The existence of excess living space in rural households usable for agritourism.*
- Mehedinti County **weaknesses** are the following:
- *Natural and human potential is very poorly exploited* although it is suitable for the development of tourism products from which border counties can benefit, including those on the Serbian side of the Danube;
- *Lack of information centers and tourist maps;*
- *The tourism infrastructure is underdeveloped* as it can be seen from the latest situation provided by the County Statistics Office – Mehedinți:

Table 1. Mehedinti County tourist accommodation capacity on July 31

Type of accommodation structure	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**
Total	**27**	**35**	**42**	**42**	**45**	**55**
Hotels and motels	12	15	15	15	16	22
School and preschool camps	-	-	-	-	-	-
Urban boarding houses	5	8	12	12	12	14
Rural tourist boarding houses	9	12	15	15	16	19
Tourist villas	1	-	-	-	-	-
Tourist chalets	-	-	-	-	1	-

Source: County Statistics Office – Mehedinți, http://www.mehedinti.insse.ro/main.php?lang=fr&pageid=485

On the other hand, the *net use index* of accommodation places in 2015 was 25.1%, 6.2 pp more compared to the same period in 2014[2]. Also in 2015, the arrivals in the establishments of tourist reception increased by 56.3% compared to those recorded in 2014, Romanian tourist arrivals representing 86.0% of total arrivals[3].

- *The poor state of the transportation infrastructure*. Within the Mehedinti county public roads are measuring 1856 km in length, 374 km of which are represented by national and European roads and 1482 km by county and village roads. The modernization of these roads is low considering that only 38% of them are upgraded.
- *Tourist offer is underdeveloped*;
- *Poor development of the SME sector*;
- *Low state of preservation of some of the anthropic sights and progressive degradation of cultural heritage*;
- *Degradation of some of the natural sights due to high human pressure4;*
- *Lack of a refuse disposal system and use of river basins as the village landfill;*
- *Mehedinti is Romania's only county with no village connected to a natural gas network;*
- *Poor promotion of tourism potential, both natural and anthropic;*
- *High unemployment rate.* With an unemployment rate of 10.65%, Mehedinti County occupies the first places among the highest national rates, along with Vaslui and Teleorman.
- *The demographic context of the region is characterized by demographic decline, migration from rural to urban areas and an average life expectancy below the national level.*
- Mehedinti County is among the areas with the lowest number of inhabitants. The regions's demographic context is the result of several trends that

[2] County Statistics Office – Mehedinți, http://www.mehedinti.insse.ro/main.php?lang=fr&pageid=486.

[3] *Report on the socio-economic status of the Mehedinti county in 2015*, 2016, the official website of Mehedinți Prefecture, pp. 53, http://www.prefecturamehedinti.ro/uploads/files/COMISII/Raport%20starea%20economico%20sociala%20a%20judetului%20Mehedinti2016.pdf.

[4] *Report on the socio-economic status of the Mehedinti county in 2015*, 2016, the official website of Mehedinți Prefecture, pp. 33, http://www.prefecturamehedinti.ro/uploads/files/COMISII/Raport%20starea%20economico%20sociala%20a%20judetului%20Mehedinti2016.pdf.

have accelerated over the past two decades - the region's general demographic decline, migration from rural to urban areas, the average life expectancy below the national level. It can be observed not only a constant rate of negative natural increase (each year more deaths were recorded than births) but also a continuous decrease of the birth rate5.

- *Lack of skilled labor in tourism and staff fluctuation due to a continuous search for better jobs;*
- *Limited number of institutions with experience in developing and implementing projects.*

Opportunities refer to those elements that can positively influence the valorization of the area's tourism potential. The most important opportunities are:

- *The existence of structural and cohesion funds;*
- *The local government's interest to develop economic relations between Romania and Serbia;*
- *The local government's interest for tourism development in the area of interest;*
- *The rural population percentage in the Mehedinti county's total population was 51.21% after the latest census, in favor of rural tourism development;*
- *The possibility of a relatively simple implementation of hiking trails in the touristic circuit;*
- *New types of tourism are in the process of development;*
- *The development of tourism industry capacities and tourism products*.

The strongest **threats** for Mehedinti county area are:

- The risk of not attracting foreign investment due to poor accessibility, lack of utilities, high costs, in favor of external locations;
- Lack of coordination between projects in the area;
- Environmental protection measures at the expense of tourism activity;
- Poor environmental quality in some areas of interest;
- Touristic products' lack of competitiveness;
- The competition of tourist areas in the region, or other regions or countries, with similar tourist offer;
- Insufficient funds allocated for transport infrastructure rehabilitation (especially road infrastructure);
- Inefficient use of funds for local tourism development.

5. Marketing programme for the Mehedinti county tourism potential valorization through agritourism

The marketing programme's main objective is Mehedinti county's tourism potential valorization through agritourism, an objective that can be achieved through strategies that depend on a unitary coordination of efforts and investments for environmental policies implementation and sustainable management in the Danube region. Only in this way, Danube communities can develop through tourism.

Mehedinti county's agritourism development is motivated by the presence of traditional rural settlements, country houses and farms, traditional architecture, folk art, agricultural occupations and folk events in an area characterized by high ethnic diversity with various traditions and habits (Romanian, Serbian, Czechs, Swabians, Roma, Hungarians).

Thus, the ***main activities*** to be undertaken within the marketing programme regarding Mehedinti county's tourism potential valorization through agritourism will be represented by:

- national and international market research and database development to which all the organizations involved will have access;
- creating integrated agritourism products/programs for areas with agritourism potential aiming at improving the tourists experience and a slower consumption of resources;
- development of a distribution system for the Romanian agritourism product, in order to facilitate its access to target markets.

Also, ***short and medium-term measures*** for Mehedinti county's agritourism development should be:

- organizing meetings for consultation and exchange of ideas, organizing information/presentation seminars and networking and socializing events aimed at establishing a social and economic connection between the local authorities from the area of interest in order to achieve a common project to support agritourism;
- creating a framework for permanent collaboration with the most important travel agencies in the county;
- developing strategies and a program for agritourism development through which the local community will be able to use all types of capital (natural, human, economic, cultural);
- developing a brand for the tourism identification of the area;
- assessment and inventory of all premises and land destined for investment and creating a database with accessible and useful background information for potential investors which may lead to reducing the time spent in the process of land searching for an eventual business;
- establishment of tourist information centers in the Mehedinti county rural and urban areas with tourist vocation;
- setting up consultancy centers and training technical assistance teams to assist tourists, owners of guesthouses and travel agencies;
- organizing fairs, ethno folk and special events that highlight the area's cultural potential;

[5] *Report on the socio-economic status of the Mehedinti county in 2015*, 2016, the official website of Mehedinți Prefecture, pp. 21, http://www.prefecturamehedinti.ro/uploads/files/COMISII/Raport%20starea%20economico%20sociala%20a%20judetului%20Mehedinti2016.pdf.

- creating magazines, brochures, flyers, tourist maps and illustrated guides with informations about the timing and schedule of events organized in the area and distributing them in info-kiosks, on the internet, tourism fairs and tourist offices;
- valorization of natural and anthropic tourism objectives by attracting investments for new access roads and improving the existing ones;
- tourism promotion with a focus on: the return to nature, knowledge and temporary adherence to membership groups specific of rural areas, active recreation, fresh air and fruits diet, consumption of fresh food from the household host, sports, fishing, hiking;
- investment in infrastructure, restoration, conservation;
- marking access roads for cyclists that lead to recreational areas in the county;
- restoring of existing monuments and introducing them in the touristic circuit;
- development of alternative tourism activities in the rural area, led by the local population and based on local natural and human potential: tourists` accommodation in local farms and active participation in local community life, identifying themselves with it during the stay;
- development and distribution of promotional material for the media (articles, broadcasts), web pages, various brochures, booklets, catalogs, leaflets, posters about the tourist offer;
- participation in specialized domestic and international fairs (as is the International Fair of Rural and Agricultural Tourism, Kielce, Poland or Agri & Slow Travel Expo, Bergamo, Italy), based on a concrete planning;
- promoting specific tourism products which include:

− Agro-entertainment (fruit harvesting, animal care);

− Agro-recreation (camping trips, hiking, cycling tourism, fishing, plant identification and collection, tractor or horse-drawn carts rides);

− Agro-education (enriching tourists' knowledge regarding agricultural and fruit-growing production, from planting a fruit tree to ways to capitalize their products, knowledge about the country life, traditions and celebrations, recipes and ways of preparing them etc.);

− Agro-commerce.

- active use of dedicated web platforms: Portal of EU Strategy for the Danube Region (http://www.danube-region.eu/), Portal of the Mehedinti County (http://www.sejmh.ro/), Mehedinti County Directorate for Culture and National Heritage (http://www.mehedinti.djc.ro/Index.aspx), ANTREC (http://www.antrec.ro), "Danube Boilers" Tourism and Leisure Association (http://www.cazaneledunarii.com.ro), Iron Gates Natural Park Administration (http://www.pnportiledefier.ro/index.html, http://www.facebook.com/pages/Parcul-Natural-Portile-de-Fier/126629447364212?sk=wall), "Camena" Ecological Tourism Association (http://www.camena.ro/, http://www.muntiimehedinti.ro/home.html), Romanian Community in Serbia (http://www.comunitatea-romanilor.org.rs), of social networks and all forms of mutual human contact;
- Affiliation and membership to national and european structures and meetings aiming at attracting relevant stakeholders, sponsors, consortium partners, resource persons (clubs, training sessions, forums): European Greenways Association, European Council for the Village and Small Towns, Naturefriends International, The Association for Tourism and Leisure Education (ATLAS), Danube Competence Center - the Danube region tourism cooperation platform, ACTE – The Association for Culture and Tourism Exchange, ICPDR – International Commission for the Protection of the Danube River, Danube Tourist Commission, ELARD - European LEADER association for Rural Development, VOLUM Federation (The Federation of Organizations Supporting the Development of Volunteerism in Romania).

In this respect, it is necessary to conduct a consultation and advocacy process that include the following activities:

− Organizing meetings for consultation and exchange of ideas with representatives of the County Council, Municipal Council, town halls, Mehedinti county local councils and with County Directorate for Cultural Heritage and Cults;

− Organizing meetings for consultation and exchange of ideas with representatives of the National Association of Rural, Ecological and Cultural Tourism (ANTREC), Eco-Urbi Drobeta focused on the development of ecology and ecological tourism, Mehedinti Association for Tourism Promotion, Pro Mehedinti Association, "Danube Boilers" Tourism and Leisure Association, Iron Gates Natural Park Administration, Environmental Protection Agency - Mehedinti, "Camena" Ecological Tourism Association, representatives of key businesses in the area etc.

− Organization of information and presentation seminars dedicated to all stakeholders;

− Itinerant photographic exhibition with a tourism theme organized in education institutions in the county and outside the county and in public spaces with intense traffic;

− Organizing networking and social events;

− Creating a platform dedicated to an active online promotion of the Mehedinti tourism development project.

6. Conclusions

The marketing programme proposed in this paper represents one of the ways of solving the Mehedinti county economic imbalance through tourism potential valorization.

The marketing programme has as prerequisite complying and promotion of sustainable development encouraged by the current EU concern reflected in the EU Council approval of the EU Strategy for the Danube Region (EUSDR), which created great opportunities for funding and action in the Danube region.

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THE PROFILE OF THE ROMANIAN ACCOUNTANT

Cristina Elena BIGIOI[*]

Abstract

Tax and accounting rules are required by law for each company. The accountant has an important role in the life of an enterprise, contributing greatly to the business success. The study aims to identify the benefits, requirements and features specified to apply for a job as accountant. The methodological approach is empirical one. The study take into account the job offers mentioned in December 2016 under one of the most popular Romanian jobs sites.

Keywords: *accountant, job, profile, role, Romanian*

1. Introduction

Businesses have known for long time continuous development in various fields. The accounting profession has had to cope with this development. Accounting is "the language of business", the accountant providing information related to financial accounting, managerial accounting, tax, payroll, estimating income and expenses.

In terms of professional training, the accountants are forced to refine and adapt their knowledge, especially to legislative changes. In terms of requirements, employers increasingly require well trained people who quickly assimilate knowledge and adapt them to work. On the other hand the labor market in the accounting field is characterized by an imbalance, demand exceeded supply jobs. Thus, the remuneration of the professional accountant experienced some changes, too.

The report from 2016 of International Accounting Bulletin highlighted the decreasing revenues from fees to accounting firms outside the group BIG 4. The analysis of this information by executives and directors from accounting associations concluded that the evolution of technology change the accountants' role. An accountant evolves from a compliance officer to a strategic adviser[1].

Choosing an accountant is particularly important because he is someone who will be with you in your journey to success[2]. An accountant became a partner who cares about the success of clients' business and provides essential support[3]. A study undertaken in 2013 by the accounting software giant Sage highlighted the increasing confidence in the advice business accounting. The relationship with the accountant becomes a partnership not a purely transactional relationship[4].

The Association of Chartered Certified Accountant identified a strong recognition of the valuable contribution of accountants to the running of business and of the key role in helping companies act ethically toward stakeholders[5].

Starting from the ideas mentioned above, this study aims to analyze the requirements for jobs in the accounting field, in order to shape the profile of the accountant in Romania. The recruitment site with the highest number of visitors in the country was chosen as the database for data collection.

The study aims to identify: wage, type of job, the gender diversity, which areas of the country are looking for accountants, if are required foreign languages, if knowledge is tested, which are the accounting software required.

The assumptions of the approach are:

H1: An accountant needs economic studies

H2: There are more chances of employment in the capital of the country.

H3: English is the most requested foreign language.

H4: An accountant is more than a Bookkeeper

H5: It is necessary to have IT skills

2. The journey to become an accountant

Juridical persons in Romania have a legal obligation to organize and manage accounts, according to Accounting Law No 82/1991. Accounting assist in recording transactions for an entity, processing and

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[1] Vincent Huck, *Accountancy world survey results: the big are getting bigger*, 2017, available at http://www.theaccountant-online.com/news/accountancy-world-survey-results-the-big-are-getting-bigger-5755089/.

[2] Nick Longden-Sage, *Why the accountant partnership is the most important success factor for small businesses in the online age*, 2014, available at http://www.accountingweb.co.uk/community/blogs/nicklongdensage/why-the-accountant-partnership-is-the-most-important-success-factor.

[3] Tracey Bird, *The changing role of the accountant*, available at https://sage-exchange.co.uk/news/industry-news/the-changing-role-of-the-accountant.

[4] *The Sage Pulse Survey 2013*, available at https://2020group.wordpress.com/tag/sage-pulse-survey-2013/.

[5] ACCA, *Closing the value gap: understanding the accountancy profession in the 21st century*, 2012, available at http://www.accaglobal.com/content/dam/acca/global/PDF-technical/other-PDFs/tech-tp-ctvg.pdf.

publishing information related to the financial position and performance of the entity, information with importance for the decision-making process of various types of internal and external users[6].

Accounting can be organized and managed within the entity (through separate department) or outside (with service contract)[7]. In both cases, higher economic studies are required for the person concerned. In addition, in case of outsourcing of accounting, legal or natural person must be authorized, a member of C.E.C.C.A.R (Body of Expert and Licensed Accountants of Romania).

The economic director or chief accountant or authorized person is responsible for the improper application of accounting regulations[8].

To become a chartered accountant member of CECCAR someone must have high economic studies and must go through three stages: maintaining an entrance exam, a probation period of 3 years, supporting an aptitude test on completion of their training[9].

This confirms the hypothesis 1 formulated at the beginning of the approach: *H1: An accountant needs economic studies.*

For an accounting the liability is high, there must exist economic training and additional training (in case of outsourcing of accounting). Moreover, the legislative changes (with a frequency high enough in Romania) require periodic updating of knowledge.

Human capital is the only component of a company that may undermine its future development from within[10]. It is said that an accountant you climb or you descend the ladder of success.

For a smaller business, an accountant collects data and generates report, but for a larger sized company, an accountant can help as an adviser and financial interpreter[11].

Assisting with corporate strategy, providing advice and helping to reduce costs, improving their top line and mitigating risks, a competent professional accountant is an invaluable asset to the company[12].

Given the changing role of the accountant, the education should incorporate broader managerial capabilities and skills[13].

3. The competencies of an accountant

The accountant can be divided into two categories: *bookkeeper* and *accountant*. A *bookkeeper* is just someone who presents some results after introduce some data in an accounting software. His role is passive. An *accountant* is much more than it.

A good accountant needs to have a lot of competencies, as follows:

- Accuracy
- Solving tasks before deadlines for help others to respect their own deadline
- Be a good manager of time
- Keeping their managers informed, especially during month-end and year-end closes[14]
- Communication skills to make accounting understandable language
- Professional integrity, accompanied by trust; an accountant without integrity is like a sailor without a compass[15].
- Continuous personal improvement
- Pay attention to details
- IT skills: work is more easier by using a computer, especially using an accounting software and Excel
- Flexibility, especially to legislative changes
- Overview of business
- Proactive attitude by offering efficient solutions as soon as an opportunity arises or a deficiency is found
- Legislative support, differentiated according to business needs[16].

In Romania is hard not to find a bookkeeper. The challenge for an entrepreneur is to find an accountant, and not a bookkeeper[17], someone who is involved in obtaining business success, who identifies potential problems and provides solutions.

4. The Romanian accountant

For conducting the study the starting point was the recruitment website www.ejobs.ro. The motivation of this election is that the study undertaken in November 2015 and published in February 2016 by

[6] Article 2 of Law No. 82/1991 of accounting.

[7] Article 10, paragrahs 2 and 3 of Law No. 82/1991 of accounting.

[8] Article 10, paragraph 4 of Law No. 82/1991 of accounting.

[9] Article 3 of Ordinance No. 65/1994 republished on the organization of accounting expertise activity and of certified accountants.

[10] Nicolae Simona, *The Knowledge Based Society – Myth or Reality for Romania?* , 2010, IBIMA Publishing Communications of the IBIMA, Vol. 2010, http://www.ibimapublishing.com/journals/CIBIMA/cibima.html Article ID 216312.

[11] Susan Davis, *What role does an accountant play in business operations?*, available at http://smallbusiness.chron.com/role-accountant-play-business-operations-411.html.

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[13] IFAC, *The accountancy profession and employers can do more to prepare accountants for finance leaderhip*, 2013, available at https://www.ifac.org/news-events/2013-10/accountancy-profession-and-employers-can-do-more-prepare-accountants-finance-lea.

[14] Gary Hohbein, *10 competencies of top staff accountants*, Journal of Accountancy, 2017, available at ttp://www.journalofaccountancy.com/newsletters/2017/feb/10-competencies-top-staff-accountants.html.

[15] Andrei Badiu, *Ce inseamna un 'bun' contabil ?*, 2012, available at http://www.3bexpertaudit.ro/Fisiere/Ce%20Inseamna%20un%20BUN%20Contabil-Studiu%20de%20caz-Andrei%20Badiu.pdf.

[16] *Profilul contabilului modern*,2015, available at https://www.expert-contabila.ro/profilul-contabilului-modern/.

[17] *Business IMM: Cum arata un contabil bun? 5 afaceri, 1 specialist si 2 mari categorii de contabili*, 2015, available at http://www.startupcafe.ro/stiri-howto-20385964-business-imm-cum-arata-contabil-bun-5-afaceri-1-specialist-2-mari-categorii-contabili.htm.

Gemius Romania placed this website on the first place in the top depending on the number of visitors[18].

Like reference range, it was selected the period 01 – 31 December 2016. Collecting information for the study was conducted for the jobs referred to "accountant" or "acccounting". The period taken into account can be considered poor in terms of interest in the search for a job given that December is a month of religious holidays and days off. Yet, considering that there is a period of time since the launch of the recruitment advertisement until the final candidate election, placing curriculum vitae in this period takes effect at the beginning of the next year.

The research work involved searching the archive of the recruitment site. From the database were extracted 210 advertisements for jobs in the field under review.

a) Job location:

3 jobs were external application, 10 jobs advertisements (representing 4.76% of all) provided several cities and the rest provide one of others 34 cities in the country.

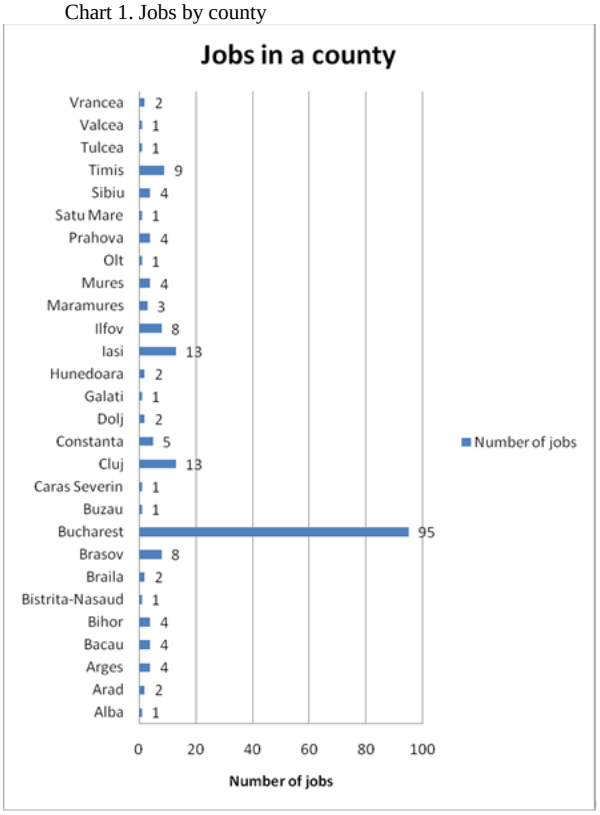
Given the distribution of jobs by cities, most jobs (95, representing 45.23%) were offered for the capital of the country. This was expected, considering that Bucharest is a great city that offers most opportunities for career development. This confirms the hypothesis 2 formulated at the beginning of the approach: *H2: There are more chances of employment in the capital of the country.*

In the ranking are situated other major cities of the country. In second place is situated Iasi, with 13 advertisements (6.19%) followed by Cluj, with 12 advertisements (representing 5.71%), Timisoara with 9 advertisements and Brasov with 8 advertisements.

For 14 cities there is one single advertisement. For all other 15 cities there are between 2 and 4 advertisements.

The distribution of the advertisements by county is represented in Chart 1.

Chart 1. Jobs by county



Source: Author's projections

b) Types of job:

The types of jobs mentioned in the advertisements are centralized in Table 1.

Table 1. Types of jobs

Title of job	**Number of jobs**
Accountant	115
Junior Accountant	24
Primary Accountant	20
Chief Accountant	20
Senior Accountant	15
Expert Accountant	6
Accounting Assistant	4
Financial Accountant	3
Accountant Manager	3
Total	**210**

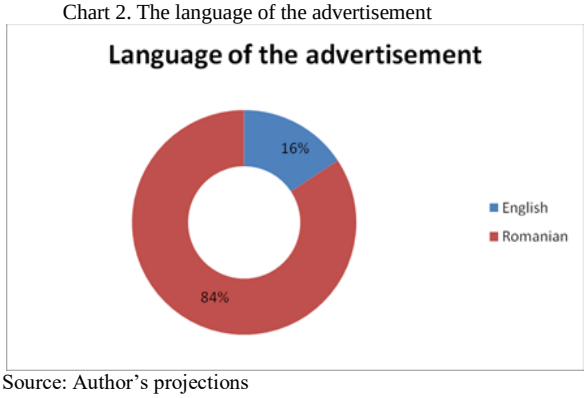
Source: Author's projections

c) The used Language

33 advertisements, representing 15.71% of all, are formulated in English, the rest are formulated in Romanian (Chart 2). 9 advertisements formulated in English are mentioned in locations outside Bucharest.

[18] Gemius Romania, *Unde isi cauta romanii de munca. Cele mai accesate site-uri de joburi*, 2016 available at http://www.gemius.ro/685/unde-isi-cauta-romanii-de-munca-cele-mai-accesate-site-uri-de-joburi.html.

Chart 2. The language of the advertisement



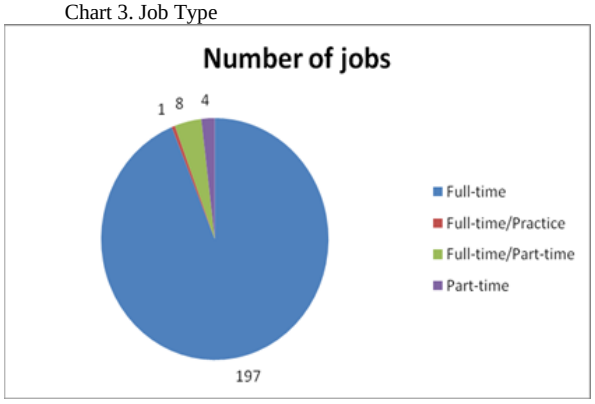
Source: Author's projections

d) Job type

Full-time jobs are the most numerous (197 advertisement, representing 93.80% of all), 4 jobs are part-time, 8 jobs allows full time or part time and just one mention full-time or practice (Chart 3).

Two advertisements were for a job for a determined period.

Chart 3. Job Type



Source: Author's projections

e) Career level

Most advertisements require a middle level for experience (86). Just once does not require experience. For 7 advertisements the career level is undefined (Table 2).

Table 2. Career level

Career level	Number of jobs
Mid-level	86
Different levels	69
Entry level	40
Management	7
Undefined	7
Unskilled	1

Source: Author's projections

f) The foreign languages

136 advertisements, which represent 64.76% of all, mention the necessity of knowing a foreign language. As expected, the most requested foreign language is English. This confirms the hypothesis 3 formulated at the beginning of the approach: *H3: English is the most requested foreign language.*

Other foreign languages often requested are: French, German, and Italian (Table 3).

Table 3. Foreign languages required

Foreign languages	Numbers of advertisements
English	111
French	7
English; German	4
English; French	3
Italian	3
English; Italian	2
German; Polish; English; French	2
Spanish	2
English; Portuguese	1
German; Polish; Hungarian; Ukrainian	1

Source: Author's projections

g) The salary

No one advertisement mentions the salary, but it was expected. The wage is confidential. For 14 advertisements the salary was framed in one of the preset ranges. Surprisingly, the two advertisements with the salary framed in the best ranges were not for Bucharest (Table 4).

Table 4. The ranges of salary

Salary	Number of advertisements
200-300 euro	2
300-400 euro	2
400-500 euro	3
500-1000 euro	6
1000-1500 euro	1
>1500 euro	1

Source: Author's projections

h) Soft skills

An accountant must know to operate with accounting software. In 84 advertisements the software required are as follows:

Table 5. Software Required

Software	Number of Jobs
ERP (SAP; ORACLE)	36
WINMENTOR	19
SAGA	18
NAV	2
NAVISION	2

NEXUS	2
SUN	2
CLASS	1
MICROS	1
WIZCOUNT	1

Source: Author's projections

There are 36 requirements for business-management software (Enterprise resource planning ERP). The most required accounting software are WINMENTOR and SAGA.

These results confirm the hypothesis 5 formulated at the beginning of the approach: *H5: It is necessary to have IT skills.*

i) Other requirements

For 19 advertisements, category B driving license was required.

Just two advertisements mention that the candidate's knowledge will be tasted through written tests. One of them was a job in a state company, for a management level of experience.

In none of advertisements is not referred to the gender of the candidate.

A study undertaken in 2016 by AFECA[19] has revealed that women are well represented in Romanian profession (77%), along with countries like Poland and Hungary, in contradistinction to France, Dutch and Swiss (15-25%)[20]. These large differences seen on the same continent are closely related to the political and cultural history of Europe. Central and Eastern European countries guarantee legal equality for women[21].

An advertisement requires that the CV contain a photo of the candidate.

The candidate must be a member of C.E.C.C.A.R this means a chartered accountant (required in 8 advertisements).

Master's Degree in accounting is a requirement for 4 advertisements.

Knowledge of International Financial Reporting Standards (IFRS) is a mandatory requirement for 8 advertisements.

One advertisement has the mention about the age of the candidate (between 30 and 40 years).

j) Most requested characteristics

Analyzing the requirements of employers expressed in employment ads analyzed, Romanian accountant must have the following characteristics:

- Higher economic education (142 requirements)
- Communication skills (90 requirements)
- Good knowledge of accounting and fiscal legislation (53 requirements)
- Attention to details (51 requirements)
- Responsibility (50 requirements)
- Analytical skills (43 requirements)
- Respecting deadlines (32 requirements)
- Seriousness (26 requirements)
- Stress resistance (18 requirements)
- Flexibility (16 requirements)
- Results oriented (14 requirements)
- Honesty (14 requirements)
- Team player (10 requirements)
- Rigor (10 requirements)
- Working under pressure (8 requirements)
- Organizational skills (8 requirements)
- Positive attitude (8 requirements)

These characteristics confirm the hypothesis 4 formulated at the beginning of the approach: *H4: An accountant is more than a Bookkeeper.*

5. Conclusions

The role of an accountant was changed over time, today is not enough just entering data into a computer, but rather providing a support for the management of the company. The accountant becomes a strategic adviser who has the ability to leas the business to success together with the manager. To achieve this goal, are necessary economic knowledge and a continuous improvement of knowledge, especially because in Romania legislation is modified with a great frequency.

According to the requirements mentioned in the job advertisements, the Romanian accountant must know English and have higher education. It's easier to find a job if the experience is middle level. The knowledge of business management software is important. It is possible to earn a good salary, not necessarily in the capital of the country, although the chances are low.

Features based on the analysis of requirements mentioned in employment advertisements show that an accountant should be a trustworthy person. This person must be able to work under pressure, to resist stress and respect all the deadlines.

Moreover, the accountant should have positive attitude and find the best solutions for business. Accountant must manage their time well, since you have to identify potential business problems, to find solutions for them and also update their knowledge all the time. A good accountant is an invaluable asset to the company, but it is a stressful job. It could not be

[19] Association des Femmes diplômées d'Expertise Comptable Administrateurs.

[20] AFECA, *Gender diversity in the European accountancy profession*, 2016, available at http://www.femmes-experts-comptables.com/wp-content/uploads/2016/09/UK_Benchmark-Afeca-web.pdf.

[21] Hilde Blomme, *Internationa Women's Day: Gender diversity in the European accountancy profession,* International Accounting Bulletin, 2017, available at http://www.internationalaccountingbulletin.com/features/international-womens-day-gender-diversity-in-the-european-accountancy-profession-5761382/.

determined by the study undertaken if stress is compensated by salary because the salary was not mentioned (for few advertisements the salary was framed within a predetermined value range).

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ANALYSIS OF THE RELATIONSHIP BETWEEN ECONOMIC VALUE ADDED AND MARKET VALUE ADDED

Kristína Jančovičová BOGNÁROVÁ*

Abstract

Economic Value Added (EVA) is one of the most important modern performance measures. The main difference between EVA and traditional measures is that EVA incorporates both financing costs of debt and equity capital. In addition, EVA includes adjustments that minimize some accounting distortions. EVA and Market Value Added (MVA) provide a more accurate evaluation of the firm's financial performance. This paper involves a case study that analysis the use of EVA in selected Slovak companies. It examines the incremental information of a set of performance measures in the time period of 2010 - 2015, using regression models. Furthermore, we analyse the MVA performance and the relationship between EVA and MVA.

Keywords: *Economic Value Added, Market Value Added, financial performance, traditional measures, modern measures*

1. Introduction

Copeland *et al*. define Value Based Management (VBM) as the process of continuously maximising the value of a firm. According to them shareholder value creation is the main objective when applying VBM techniques. VBM is based on discounted cash flow (DCF) concepts. The value of the firm is determined by the present value of its future cash flows. Investing in projects where the return exceeds the cost of capital results in value creation, while investing in projects with returns below the cost of capital destroys value.

Developing performance measures that could be applied to evaluate financial performance and shareholder value creation is of great importance.

Traditional financial performance measures are often criticised for excluding a firm's cost of capital, and are therefore considered inappropriate to be used when evaluating value creation. Furthermore, these measures are based almost exclusively on information obtained from financial statements, and so are exposed to accounting distortions. Despite these limitations analysts and investors still widely apply the traditional measures. On the other hand, as a result of the perceived limitations of traditional measures, value based financial performance measures were developed. The major difference between the traditional and value based measures is that the value based measures include a firm's cost of capital in their calculation. They also attempt to remove some of the accounting distortions.

Proponents of the value based measures present these measures as a major improvement over the traditional financial performance measures and report high levels of correlation between the measures and share returns. In those cases where these measures yield positive values, economic profits are generated, and consequently shareholder value is expected to increase. Negative values indicate the destruction of shareholder value.

A number of different value based financial performance measures have been developed. These include, amongst others, Economic Value Added (EVA), Cash Value Added (CVA), and Cash Flow Return on Investment (CFROI) and other. While proponents of these measures report high correlations between the measures and the creation of shareholder value, a large number of studies have yielded far weaker relationships.

In the first part of the paper two value based measures are identified and discussed. The focus is placed on their theoretical foundations, calculation and interpretation. An overview of existing studies reporting on the relationship between these measures and shareholder value creation is also provided.

The second part of the paper involves the empirical analysis of the measures. It is devoted to the application of the O´Byrne model in order to identify, compare and evaluate the relationship between selected performance measures (earnings, earnings per share and economic value added) and market value added of a company. The analysis was carried out on a sample of selected Slovak companies.

2. EVA and MVA

According to Stewart EVA is an estimate of the economic profit generated by a firm. The difference between an economic and an accounting profit is a capital charge that is levied on the capital provided to the firm. In the case of an accounting profit only the cost of debt capital is included. EVA, however, considers the costs of all its forms of capital (debt, as well as equity)and compensates all its capital providers accordingly.

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EVA is determined by calculating the difference between the cost of a firm's capital and the return earned on capital invested, and multiplying it with the amount of capital invested in the firm.

$$EVA_t = (r - WACC) * IC_{t-1}$$

where:

r = the return on the capital invested

WACC = the firm's after-tax cost of capital

IC_{t-1} = the invested capital at the beginning of period *t*

EVA quantifies the surplus return earned by the firm. In those cases where a firm is able to earn a return that is higher than its cost of capital a positive value for EVA is calculated. A negative EVA value is calculated when the cost of capital exceeds the return on the invested capital.

Alternatively, the measure can be calculated by comparing the net operating profit after tax with the total cost of capital invested.

$$EVA_t = NOPAT_t - Total\ cost\ of\ IC = \\ = NOPAT_t - (WACC * IC_{t-1})$$

where:

$NOPAT_t$ = Net operating profit after taxes

If a firm is able to earn NOPAT values in excess of its total cost of capital invested it generates a positive EVA figure. However, should NOPAT be insufficient to cover the firm's total cost of capital, a negative value for EVA is calculated.

A company's total market value (MV) is equal to the sum of the market value of its equity and the market value of its debt. In theory, this amount is what can be "taken out" of the company (i.e. when all shares are sold and debt is repaid) at any given time. The MVA is the difference between the total market value of the company and the economic capital. The economic capital, also called invested capital (IC), is the amount that is "put into" the company and is basically the fixed assets plus the net working capital.

$$MVA = MV\ of\ company - IC$$

From an investor's point of view, MVA is the best final measure of a company's performance.

MVA is calculated at a given moment, but in order to assess performance over time, the difference or change in MVA from one date to the next can be determined to see whether value has been created or destroyed. EVA is an internal measure of performance that drives MVA.

The return on IC minus the WACC is also called the "return spread". If the return spread is positive, it means that the company is generating surplus returns above its cost of capital, and this translates into higher MVA.

The link between MVA and EVA is that theoretically, MVA is equal to the present value of all future EVA to be generated by the company.

$$EVA\,MVA = \\ present\ value\ of\ all\ future\ EVA$$

3. Empirical Analysis and Conclusions

Before presenting our own research, the results of the most relevant previous studies are going to be presented.

The relevance of accounting information has already been tested in multiple studies; two studies for the German stock market are *Booth et al. and Harris et al.* In the USA the question of the valuation relevance of accounting based performance measures has established itself as a major field of research. In the last years EVA has been researched in depths, because EVA supposedly is an innovative approach with a broad following in the business community. Currently the general opinion on the pros and cons of EVA is not unanimous.

Easton, P. Harris, T. and Ohlson, J. observed that EVA is an increasingly popular corporate performance measure one that is often used by companies not only for evaluating performance, but also as a basis for determining incentive pay. Like other performance measures, EVA attempts to cope with the basic tension that exists between the need to come up with a performance measure that is highly corelated with shareholders wealth, but at the same time somewhat less subject to the random fluctuations in stock prices. This is a difficult tension to resolve and it explains the relatively low correlation of all accounting based performance measures with stock returns at least on a year to year basis.

Stewart (III), and Bennett, G. observed that "EVA is a powerful new management tool that has gained growing international acceptance as the standard of corporate governance. It serves as the centerpiece of a completely integrated frame-work of financial management and incentive compensation." In essence, EVA is a way both to legitimize and to institutionalize the running of a business in accordance with basic microeconomics and corporate finance principles. The experience of a long list of adopting companies throughout the world strongly supports the notion that an EVA system, by providing such an integrated decision making framework, can refocus energies and redirect resources to create sustainable value for companies customers, employees, shareholders and for management.

Thenmozhi, M. carried out a study in order to have an understanding of how the traditional performance measures are comparable to EVA, data of three financial years between 1996 and 1999 were chosen from 28 companies. Only 6 out of the 28 companies have positive EVA while the others have negative. The EVA as a percentage of Capital Employed (EVA/CE) has been found to indicate the true return on capital employed. Comparing EVA with other traditional performance measures the study indicates that all the companies depict a rosy picture in terms of EPS, RONA and ROCE for all the three years. The study shows that the traditional measures do not reflect the real value of shareholders and EVA has to be measured to have an idea about the shareholders value.

Ray, Russ observed that the missing link between EVA and improved financials is actually productivity. EVA can be a powerful tool. When properly applied, it allows a firm to ascertain where it's creating value and where it's not. More specifically it allows a firm to identify where the return on its capital is outstripping the cost of that capital. For those areas of the firm where the former is indeed greater than the latter EVA analysis then allows the firm to concentrate on the firm's productivity in order to maximize the value created of the firm. Finally, as investors buy more shares in the firm in order to have more claims on its increased value, they automatically bid up and eventually maximize the firms share price. And as any good capitalist knows, maximizing share price is the name of the game in a free market economy. Thereafter marginal increases in value added can be attained by either decreasing the firms cost of capital or by increasing its productivity.

Harris et al. investigate the relation between market values, stock returns and accounting measures for both Germany and the US. They come to the following results: Increasing the time from one year to three or more years increases the relevancy of earnings. EVA is superior in explaining both absolute market values and market value changes.

Biddle et al. investigate a sample of 773 US companies. They look at the information content of four accounting measures: Net Income, Operating Cash Flow, Residual Income and EVA for both the absolute levels of market values as well as the change of market values over time. Furthermore, they try to assess which part of the EVA calculations has a major impact on the value relevance. According to their results EVA has always a lower explanatory power than Net Income, EVA offers little additional information, as the biggest adjustment, the capital charge is comparatively stable over time.

Authors Bao, B.H., Bao, D.H., Riahi-Belkaoui, A., Fekrat, M.A., and Picur, R.D. are, based on their research findings, of the opinion that the superiority of EVA in relation to traditional financial performance measures is justified.

On the other hand, other studies bring evidence that EVA is not a better indicator of the financial performance of the company than the traditional measures based on accounting profit (eg. Biddle, G.C., Bowen, G.S., Wallace, J.S., Chen, S., Dodd, J.L.).

Concluding, the major result of all above studies is that it remains unclear which performance metric offers superior information, measured by its relevance for explaining stock returns.

The studies carried out by the above mentioned authors examined mostly the relationship of financial performance measures to share price respectively return on share. By contrast, in the next section of this paper, we focus on the MVA and apply the selected model approach to assess the linkage of selected performance measures to MVA.

In order to perform our study, data of 50 selected Slovak companies had to be selected from the following sources: published company accounts, capital market data, and data on ownership structure. The time horizon of this study includes the six years starting from 2010 and ending in 2015.

We applied the O´Byrne model in order to examine the relationship between selected performance measures on the one hand and market value resp. MVA of the sample of companies on the other hand. The selected performance measures were earnings, earnings per share and EVA.

O´Byrne differentiates between positive and negative values of EVA, includes a dummy variable for industries, and includes a correction factor for firm size (logarithm of capital employed). The reasoning is that the capital market values positive and negative results of performance measures differently by and that there are empirically significant firm size effects, which can lead to distortions.

$$MVi,t/Ci,(t-1) = a0 + a1*(X+i,t/ci,t)/Ci,(t-1) +$$
$$+ a2*(X-i,t/ci,t)/Ci,(t-1) +$$
$$+ a3*(ln(Ci,(t-1)) + aj\sum(Ij) + e$$

with

$MV_{i,t}$ market value of company i in year t

$Ci_{,(t-1)}$ capital employed by company i at the beginning of year t

$X_{i,t}$ performance measure per share in year t

$c_{i,(t-1)}$ cost of capital for company i in year t

I_j dummy variable for industry

The results are presented in table 1:

		Earnings	EPS	EVA
a_0	Intercept	1,08 0,02	0,71 0,11	1,90 0,00
a_1	Performance measure +	18,71 0,00	20,44 0,00	17,87 0,00
a_2	Performance measure –	-2,71 0,05	-3,88 0,00	-0,75 0,50
a_3	ln (C)	0,00 0,08	0,00 0,01	0,00 0,42
a_4	Automobile	-1,01 0,00	-1,00 0,00	-1,15 0,00
a_5	Construction	-1,00 0,00	-1,04 0,00	-1,04 0,00
a_6	Chemical and pharmaceutical	-1,18 0,00	-1,18 0,00	-1,00 0,00
a_7	Consumer goods	-1,06 0,00	-1,14 0,00	-1,42 0,00
a_8	Steel and electro.	-0,95 0,00	-0,97 0,00	-1,0 0,00
R^2	Adjusted R^2	**0,357**	**0,406**	**0,359**
	F stat.	54,01 0,00	66,11 0,00	54,28 0,00
	Significance F	0,00	0,00	0,00

In the case of Slovak companies the traditional measure EPS has the biggest explanatory power with R^2 of 40.6%, while the modern measure EVA explained only 35.9% of market value changes of the companies.

Now, we modify the above applied model in the sense that instead of market value, we will examine the relationship of MVA and the financial performance

measures, in order to evaluate the value orientation of monitored indicators of financial performance. MVA, in fact, measures the difference between the market value of the company and the value of invested capital (debt and equity). The higher the value of this ratio, the better, because high levels of MVA suggest that the company creates real value for shareholders. Negative MVA value means that the company does lower the shareholder value. It should be stressed that the aim is to maximize MVA and not the market value of the company, because it can be also done by increasing the amount of invested capital. The increase in the value of MVA will only happen, if the capital invested is more profitable than the cost of capital.

$$MVA_{i,t}/C_{i,(t-1)} = a_0 + a_1*(X^{+}_{i,t}/c_{i,t})/C_{i,(t-1)} + +a_2*(X^{-}_{i,t}/c_{i,t})/C_{i,(t-1)} + +a_3*(ln(C_{i,(t-1)}+a_j\sum(I_j) + e$$

$MVA_{i,t}$ market Value Added of company i in year t

The results are presented in table 2:

		Earnings	EPS	EVA
a_0	Intercept	2,08 0,01	1,01 0,01	0,75 0,00
a_1	Performance measure +	10,31 0,00	8,24 0,00	19,19 0,00
a_2	Performance measure –	-4,01 0,05	-3,18 0,30	0,39 0,48
a_3	ln (C)	0,00 0,08	0,20 0,01	0,00 0,49
a_4	Automobile	-1,41 0,00	-1,03 0,00	-0,63 0,00
a_5	Construction	0,09 0,00	-1,00 0,00	-0,24 0,01
a_6	Chemical and pharmaceutical	-2,07 0,00	-0,38 0,00	-0,59 0,00
a_7	Consumer goods	1,06 0,00	0,94 0,00	-0,41 0,00
a_8	Steel and electro.	0,05 0,00	-0,77 0,00	-0,44 0,00
R^2	Adjusted R^2	**0,328**	**0,249**	**0,402**
	F stat.	52,15	43,97	56,71
	Significance F	0,00	0,00	0,00

When we replaced the market value with MVA, EVA´s explanatory power has increased (from 35.6% to 40.2%) and thus in this model came first in explaining changes in MVA. Earnings´ and EPS´ results have also changed. In the case of EPS it decreased from 40.6% to 24.9%, the decrease in the earnings is less (from 35.7% to 32.8%).

According to the results of the models we came to the conclusion, that in case of selected companies in the analysed time period we can confirm the dominance of a modern performance measure EVA above the two other traditional performance measures in explaining the changes in MVA.

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THE ACCOUNTING INFORMATIONAL SYSTEM, ESTABLISHED WITHIN THE STATE TREASURY, AN ESSENTIAL ELEMENT IN SUBSTANTIATING DECISIONS

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Abstract

The exercise of the management functions and relationships at the level of the organizations is achieved through the leadership system (or management). The management system of the group represents the assembly of elements of a decision making nature, organizational, informational, motivational, etc. through which it is ensured a greater effectiveness and a maximum efficiency. In the design and implementation of the management system there must be taken into account the specific elements of each entity, particularly the profile, size and structure of the human resources, material and financial, the position of the entity in the national and international economic context, etc.

Keywords*: accounting informational system, decision-making system, management system, informational procedures*

Introduction

The emergence and development of the informational society present in all the areas of economic and social life, therefore including the public sector, marked strongly the informational systems. Thus, the public administration, in the context of our country's accession to the European Union, had to adopt certain functioning measures, especially underthe conditions required by the informational society. The automated part of the informational system is represented by the computer system, whose introduction into the treasury's activity requires and allows the use of modern management methods relieving the specific responsibilities of each component in the territorial unit of the treasury.

Thus, one can define the informational system as a set of methods, procedures, techniques for collecting, transmitting, processing, storing data and information, their analysis basing the decisions to be taken, in our case referring to the State Treasury. Regardless of the characteristics of the entity, the management system comprises several components, namely: the organizational system, the informational system, the decision making system, the management methods and techniques system, other elements of management. The management system can be considered a set of elements of methodological, operational, decisional and informational character joined by causality, but which may also act independently to meet the management process and the management relationship inside an economic entity, considered a system. Component of the managemerial system, the informational system operating within the State Treasury is a useful tool for both the internal management of the institution and for the communication of the financial information to the external users interested.

The Accounting Informational System - Conceptual Approaches

The accounting informational system of an economic entity, defined as the set of human resources and capital in an organization that deals with the preparation of accounting information and also the information obtained by gathering and processing economic transactions, will become increasingly computerized, relying on a continuously increasing computer system.

Thus, the component elements of any informational system, which depend on each other and are constantly working together, are:

- the information entering the system;
- the circuit and the informational flow
- informational procedures;
- the means for handling the information.

Through its content, the information has effects on the ongoing process, effects that can be assessed and compared. Thus, the information can be assigned two types of values:

- of content (by volume) by the multitude of data, texts, documents, graphics requested and provided.
- by utility, associated with the expectancy or the actual gain, calculated as the difference between the outcome of the ongoing process, with and without the information in question. The value of the information is associated immediately with its destination for the control of the ongoing process, for its coordination and decision making.

The general framework IASB highlights the limit generated by the relevant and reliable information, the opportunity. The need for opportunity is manifested in two aspects:

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- It is possible that the reporting of information on a transaction to be achieved before all its aspects are known, which would affect its credibility;
- Postponing the reporting of information until all aspects of the transaction are known, has a relevant effect, because the beneficiaries have been meanwhile forced to take decisions.

In this context there is the possibility to transform the opportunity from a limit, in two additional attributes of information:

- the actuality: the ability to present a recent event;
- the precision: the degree of accuracy of information.

The informational circuit represents the path followed by the information between the transmitter and the receiver.

The informational flow is the amount of information conveyed between the transmitter and the receiver on the circuit of information, characterized by certain peculiarities: length, displacement, reliability, cost, etc.

The informational procedures fall into a classic scheme comprising: gathering, processing, storage and dissemination of information. Through the informational procedures there are established: first, the supports of information used; subsequently there is established the sequence of handling information, the operations they support, the models and calculation formulas used.

Reconsidering the role of the accounting informational system in the modern society, determined by the fact that the information is seen increasingly more as the most important resource of social wealth and economic development, determine significant changes in the organizational management.

The Role Of The Accounting Informational System In The Process Of Substantiating Decisions

In the current conditions, the existence of the accounting informational system, which represents the dynamic side of the financial accounting system, connects the leading and the led systems of public institutions, but also connects this and the environment. The computer system, as part of an accounting informational system, plays a central role in facilitating the interaction between the activities of an institution through disclosure of information / data. Without accurate information and reporting systems, organizations can not have appropriate resources for proper management, the government has the responsibility to ensure that the accounting systems, at the level of administrative territorial units, correspond to a unitary framework designed to meet the organization's needs.

The informational system is created based on the data provided by the public accounting within the State Treasury units that must provide data and information in order to allow the construction of a minimal dashboard for the State Treasury management units, at all levels, based on which it can establish measures and actions meant to result in efficiently addressing the problems that they have to solve.

The past and present accounting information which supply the dashboard of each Treasury should allow, above all, the construction of relevant forecasts that are closer to reality at any time of the year, regarding payment needs, on one hand and the possibilities for their coverage with resources, on the other hand.

The processing function of the available data, in order to obtain the information necessary for making and substantiating decisions related to the accounting informational system, represents the starting point in defining the overall structure of the accounting informational system.

The functionality of a performant accounting informational system applies more to the computerized system, presented as a system of inputs and outputs, processed during piloting, being able to affirm that this is the result of the interaction between the three subsystems: operational system, management system and informational system. Accounting must enable the calculation of precise coordinates as to the amount of payments and that of receipts, based on which there have to be drafted the measures for arranging public loans, attribute that, in our opinion, is the cornerstone of the purpose and mission of the accounting information within the Treasury.

The development of the discounted loans is reviewed during this time of year; the picture of economy financing still secures new elements of decor or plays the monetary policy of the previous year.

The information to allow the construction of forecasts in leadership can only be achieved based on methods that take into account: individual approaches, economic outlook, regulatory developments, processed appropriately in order to develop coherent data.

Also, the decisions made in establishing these forecasts vital for "maintaining great balance" must take into account the macrofinancial environment, not to disrupt its normal operation.

The second major objective of the accounting information from the Treasury must be to ensure the integrity and proper administration of public funds that it has in administration. In this regard, the accounting of Public Treasury has to be organized in such a way, as to be able to submit at any time the situation of assets and liabilities of the institution as well as the overall results on the establishment of public resources and their use throughout the financial year on budget components, and within, on beneficiary public institutions

The Informational Flows Created In The State Treasury Units And Their Significance

The accounting and operational informational flows within the State Treasury are organized and operate on three levels, namely:

- horizontally within each unit of the Treasury (Central, county, operational);

- Under the Treasuries within a county, where it forms a small informational pyramid;
- vertically, between the operative Treasuries, on one hand, and the Central Treasury, on the other hand, where it forms an accounting information pyramidal system.

The most dense informational and accounting flows occur in ***the operational units of the State Treasury***, where there are actually performed the basic operations on the establishment and use of public resources.

The informational-operative and accounting flows that are established within an operative Treasury and of a county public accounting office, during the activity that it carries therein, as well as in its relations with the subordinated operative treasuries and the general Treasury. A certain organization and specific tasks towards the existing situation in the districts concerning the State Treasury units are met at the State Treasury units in the Municipality of Bucharest, in the sense that the treasuries of each sector have a degree of independence in many respects towards the Treasury activity and accounting of Bucharest, realizing informational - accounting flows directly with the central Treasury, compared to the existing situation in the relation between the operational treasuries in the counties (municipalities, cities, utilities), on one hand, and the treasury activities and public accounting of the county, on the other hand.

Thus, the treasuries of the sectors of Bucharest have the same relationship of competences and subordination to the central treasury as the Treasury Activity and public accounting of the Bucharest Municipality.

Therefore, within the attributions and functions of the treasuries of Bucharest sectors and the Treasury activities and public accounting of Bucharest Municipality there are twinned together all the duties and functions that the operative municipal, town, village treasuries have in the counties, on one hand, and the treasury and public accounting activities of the county, on the other hand.

Accounting Information System Structures And Their Characteristics

Since by the treasuries within the operational directorates and administrations of public finances run the main financial flows leading to the creation and use of public funds into the economy, it is necessary that the information related to these flows to be significant and to arrive operatively to the major decision makers in the state leadership.

Thus, through the organizational pyramidal system created in the State Treasury, namely the General Directorate of Public Accounting and Management Unit of the State Treasury, on one hand, and the offices of the Treasury and Public Accounting of Bucharest county, of the Bucharest Municipality sectors and the operative treasuries in cities, towns and villages, on the other hand, it is created a complex accounting informational system of indicators that must comply with the requirements of the important decision makers in the economy and society.

In this regard, the State Treasury is created and operates an informational and accounting system of indicators daily, monthly, quarterly and annually.

The daily informational-accounting system consists of:

a) The operative execution of the Treasury Account;
b) The execution account of the state budget in economic profile.

From the daily operative execution results, therefore, complex information and data regarding the structure of the financial resources of the State Treasury, more detailed information being that concerning the state budget (herein the revenues are highlighted on all major taxes and fees) and some less extensive related to the local budget or the cash execution of the budget of the State Treasury.

a) the situation of deposits in the account of the State Treasury;
b) the cash execution of the state budget;
c) the cash execution of the local budget;
d) the implementation of the State Social Insurance Budget;
e) the cash execution of the revenues and expenditures budget of the State Treasury;
f) the situation of the public institutions liquidities;
g) the execution account of the state budget expenditures in economic profile;
h) the cash execution of the local budget expenditures in economic profile;
i) the execution account of the State Treasury budget expenditures, detailed on chapters, articles and paragraphs.

It follows from the above that the monthly accounting information is more numerous than the daily operative one, comprising a larger and more significant number of indicators.

What is also relevant is the fact that, depending on the requirements and needs of the central decision makers, the implementation of the components of the general consolidated budget is more analytical in some forms, on the revenue side, and in others, more analytical on the spending side.

Despite all these distinctions between the "daily operations" of information on the indicators resulting from the accounting of the State Treasury and the "monthly operations" of the accounting information, there should be noted that the indicators from the daily operations are designed such that they can always enable the decision makers to take the appropriate measures to positively influence the process of formation and use of public funds.

Quarterly, the State Treasury units communicate to the General Treasury, through the informational system created, an additional number of indicators and data, from those transmitted through the daily and

monthly operations. Thus, quarterly, the territorial treasuries also communicate:

a) The balance sheet of the Treasury;
b) The statement on the implementation of the budgetary expenditures incurred by the state budget;
c) The statement on the implementation of the budgetary expenditures incurred by the State Treasury budget;

Through the annual informational system implemented on indicators that need to be transmitted to the central Treasury concerning the financial flows conducted through the territorial treasuries, there are comprised, in addition to the quarterly indicators described in the previous chapter, also:

a) The situation of liquidities of local institutions;

b) The situation of liquidities of autonomous institutions fully financed from extra-budgetary means through which it is presented more detailed the situation of the liquidities of public institutions, broken down on central, local and autonomous government institutions;

Following all submitted so far, it results that the informational system organized within the State Treasury, first the one daily operated, completed with the monthly one, ensures a complex indicator system, allowing the governing bodies within the General Treasury to establish in advance the necessary measures for shortfalls of public funds, determined by the temporary cash gaps, and of the budget deficit financing.

The quarterly indicators, especially the annual ones, do nothing but record the actually existing situations at some point in the process of formation and use of the public financial resources. If, due to informative quarterly circumstances, from the first, second and third quarters, there can also be taken measures accordingly, the financial-accounting annual information does not allow this anymore, they may possibly constitute important signals, for measures taken accordingly for future periods.

Conclusions

Since the organization of the first units of the State Treasury in 1993, the accounting information on the progress of the financial flows regarding the establishment and use of public funds experienced a continuous improvement, both when we are referring to their content and structure, and also to their degree of efficiency. The content and structure of the accounting information of the State Treasury depend largely on the period to which they refer to, more synthetic in the case of daily, semi decade, monthly reporting and more complex and rich in information if the reports are quarterly and annual.

We remember that the future goals of the Treasury accounting must be primarily those of building up information and indicators able to render as synthetic, truthfully and faithfully possible, the situation of the financial circuits of the Treasury, the decision makers and to a lesser extent that of control and rectification. We consider that the responsibility, especially in terms of resource outflows through cash payments, that the authorizing officers order, to remain to a larger extent their task.

It is unlikely that an official of the Treasury to have a more complex degree of understanding of things, than a director or chief accountant of a public institution, in order to decide which expenditure is legal, appropriate or economical and which is not.

Based on the data provided by accounting regularly and mandatory monthly, quarterly and annually, for their own needs and for the Central Treasury, the operative treasuries and the County Department, draw execution statements regarding the financial flows developed for the component budgets of the general consolidated budget.

The accounting of the State Treasury is the main database for the whole informational system of the Treasury, therefore, by the way it is organized and managed, largely depends the veracity and, ultimately the effectiveness of the data reported through the informational system of the State Treasury.

In the current conditions, the existence of an accounting informational system, which represents the dynamic side of the financial accounting system, makes the connection between the leading and the led systems within the public institution, but also between this and the environment. The computerized system, as part of an accounting informational system, plays a central role in facilitating the interaction between an institution's activities, by sending information / data. Without information and accurate reporting systems, the organizations can not have the appropriate resources for proper management.

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TANGIBLE ASSETS IN TERMS OF DISCONNECTION BETWEEN ACCOUNTING AND TAXATION

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Abstract

The purpose of this paper is to make a summary of the accounting and tax provisions of the tangible assets, regarding the current trend of disconnection between tax and accounting. Also, we are going to *put together both tax and accounting provisions and we highlight* which are the *necessary and compulsory tax* documents *for fixed assets.*
In taxation, the principle "guilty until proven innocent" is applyng. That means that responsibility to know the Fiscal Code is an obligation "sine qua non" for taxpayers.
Thus, there is in low the principle that "no one can excuse invoking *ignorance of the law" ("Nemo censetur ignore legem").*
Based on these considerations, we found it necessary to make a summary of the fiscal obligations that have economic entities on fixed assets. This synthesis can provide to a company a basis for strong arguments *in discussions with tax authorities that can prevent an aggressive approach of them.*

Keywords: *fixed assets, accounting amortization, the file of transfer prices, amortization, capital assets.*

1. Introduction

The recent history of Romanian accounting is characterized by instability in seeking the best solutions to align to European and / or international accounting system. This research focuses on presenting that situation wich are in the areea of disconnection between accounting and taxation about fixed assets.

In the early 1990s, accountancy was dependent upon taxing, which was exerting a significant influence on accounting and on the approach to the recognition and measurement. Accounting rule was poor, so it was almost exclusively consisting in recording mode of economic and financial operations. "The lack of formal solutions to solve specific accounting problems were an area of freedom available for accountants, space in which to exercise their professional judgment. In this way was tested the creativity, is checked perseverance in the study of other rules and adapting to their needs"[1].

In a research study on normative type concerning changes that occurred in the accounting regulations in Romania[2] in the last ten years, the authors concluded that "at present, in Romania, accounting and taxation is disconnected, only barrier left to overcome in custom accounting practitioner to think in terms of economic transactions tax ".

Although formally accepted, disconnecting between accounting and taxation, in the implementation process continues to face many difficulties. It can see great progress, sometimes unexpected, followed by recovery and reinterpretations, as noted G. Popescu3.

But there remains an artificial dependency between taxation and accounting, maintained by the practice. And we refer to situations in which, although there are accounting rules, it choose the taxation rule to the detriment of accounting one, for several reasons: convenience, saving time and administrative costs. An example of this is the depreciation: accounting rules may differ significantly from fiscal rules, which has the effect of keeping the two records amortization: accounting (in the accounting records) and tax records (in a special register for this purpose).

Taxation has also passed through many changes in the last twenty years. Some of the changes were dictated by state fiscal policy, by the political interests of various parties in power, and some of integrating, in 2007 the European Union. All changes related to harmonized taxation had a direct impact on each category of taxpayers, individuals and businesses, and from an accounting viewpoint changes confirms that all plans must be made for the image correlation both fiscal and accounting statements financial statements to reflect reality and to be comparable at both micro and macro level.

2.1 The accounting policies - real leverage in the context of disconnection

Emphasizing the conformity of annual financial statements with the provisions of accounting reference

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[1] Costel Istrate, *Evoluţii, convergenţe, realizări, puncte tari şi puncte slabe în contabilitatea întreprinderilor mici şi mijlocii*, articol publicat în Congresul profesiei contabile din România „Profesia contabilă între reglementare şi interesul public, Ed. CECCAR, Bucureţti, 2008.

[2] M. Ristea, I. Jianu, I. Jianu*; Experienţa României în aplicarea Stadardelor Internaţionale de Raportare Financiară şi a Standardelor Internaţionale de Contabilitate pentru sectorul public,* Revista Transilvană de Ştiinţe Administrative, 1 (25)/2010, pp. 188.

[3] Gheorghe Popescu, Adriana Popescu, Cristina Raluca Popescu - *Imaginea fidelă versus fiscalitate în contabilitatea românească a anului 2006*- editura Gestiunea, Bucureşti, 2006.

regarding their true image, M. Ristea[4] underlines the fact that the conformities with the provisions from accounting regulations do not exclude the presence of some liberties.

The presence of several options in the accounting referential, namely wide varieties of accounting policies, as well as a variety of assessment techniques, can sometimes lead to serious consequences on the decision-making process. The option of the company management for one of the many treatments and accounting policies creates implicitly the possibility to deliberately choose the treatment or policy that meets the interests of the entity, which does not always converge to the accurate image but rather to a conventional one. Thus, V. Munteanu and M. Zuca[5] believe that it is possible that a distortion of the quality of financial information to result from this, generating uncertainties in relation to the consistency and comparability of the information intended for users.

The utility of accounting policies[6] „results from practical reasons, from the need to establish the development conditions of certain transactions that have an impact in accountancy and finally from the fact that accounting information is the basis of decisions taken by administrators and shareholders".

Although considered from the start like a worthless busywork, the usefulness of presenting accounting policies like a manual has been demonstrated in time. It has been shown to have a practical role to contribute to the economy of time especialy when accounting personnel is changed, for example, in addition to the stated purpose of contributing to presenting a true and fair view of the financial position and earnings.

As emerges from the above, the accounting policies affect the level of the outcome and there should be a guarantee that the entity has not turned to accounting manipulations in order to increase profits. Such a state of things is improved for companies that are required to audit their annual financial statements.

2.2 The fiscal policies

Fiscal policies represent a set of decisions, choices and actions at company level with the objective to achieve an optimal fiscal cost that matches the company's aspirations.

At company level, **fiscal policies** represent the concrete manner in which specific instruments and techniques are used to achieve the objectives of fiscal management. If, for accounting purposes, the entities are subject to accounting rules in order to present an accurate image of the financial position, the outcome as well as the modification of the financial position, from the fiscal point of view, they are subject to fiscal rules existent in the moment of calculating income taxes and taxes.

Fiscality acknowledges some of the principles, methods and rules stipulated by the accounting regulations. Without covering the subject, we are referring to the principle of the permanence of methods, the principle of matching expenditures with revenues, stock assessment methods when leaving the inventory, etc. But there are situations where it is developing its own applicable methods and rules for the calculation of income tax, such as recognition and depreciation of tangible assets, the recognition of revenue and expenditure, providing stimulants or tax incentives, etc. Throughout this paper we shall largely refer to these differences between fiscal and accounting rules and methods.

2.3. Accounting rules on tangible assets

Basic problems framed in engaged relations between accounting and taxation regarding fixed assets refers to: recognition, initial measurement, subsequent measurement and amortization.

Fixed assets, also known as **tangible assets** or **property, plant, and equipment** (**PP&E**), is a term used in accounting for assets and property that cannot easily be converted into cash. The fixed assets represent single or the complex of objects utilized independent in business entity in the production of goods or services, for rental to others or for administrative purposes. Is expected to use for more than one accounting period.

In order for an asset to be recognized in the financial statements, it must follow the definition: *Asset is a resource controlled by the entity as a result of past events and from which future economic benefits are expected to flow to the entity.*

Before a fixed asset is recognized in the financial statements, the following recognition criteria ought to be met:

- The inflow of economic benefits to entity is probable.
- The cost/value can be measured reliably.

Initial evaluation of the tangible assets fall in the general rules for evaluation. The exception is where it is necessary setting up provisions for decommissioning of fixed assets. They are included in the value of the goods that require substantial costs from disassembly and ecologising of the site as these costs should be covered by economic entity during the economic benefits are obtained from the exploitation of those goods.

Subsequent evaluation refers to the subsequent expenditure and evaluation to reflect in the financial statements at cost or revalued amount.

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[4] Mihai Ristea, *Conformity and Liberty in Accounting Policies of Financial Period Closing*, article published in Pro Domo, Monthly Journal of CECCAR, no. 2/2011 pg 19-22.

[5] Victor Munteanu and Marilena Zuca, *Considerations on the use of creative accounting in the deformation of information within the financial statements and "the maximization" of the company's performance,* article published in Audit financiar Magazine no. 3/2011, page 3-10.

[6] Georgeta Petre, Alexandra Lazăr, Elena Iancu, Monica Avram, Elisabeta Duinea, Daniel Petre, *Accounting Policies in Conditions of Application of Accounting Regulations corresponding to Fourth Directive of CEE,* Official Gazette Publishing House, București, 2010, *pg 22.*

Subsequent expenditure that can be made regarding fixed assets can be grouped into two categories:

− Costs incurred in order to maintain the performance of the asset, namely expenses for repairs and maintenance asset. This do not add to its carrying amount, they will be treated as period costs;

− Costs incurred in order to increase the performance of asset by improving or its performance, or by reduce costs. They are termed modernization expenses and are recognized as a component that increases the carrying amount of the asset.

In practice there is a certain difficulty to make difference between the maintenance and improvement expensis for a fixed assets.

The decision on how to recognize such subsequent costs have effect on the financial position or on the performance of an economic entity and may constitute an economic strategy with effects on the result.

Revaluation is an alternative for presentation of a tangible asset in the balance sheet at choice with the presentation at cost. In a previous study we presented revaluation rules and a case study whose purpose is the revaluation.

Amortization

Amortization is the allocation of the depreciable amount of a fixed asset over the estimated life.

An overview of accounting depreciation is shown in the table below[7]:

Accounting depreciation of fixed assets
Tangible assets are assets that: - Are held by an entity for use in the production of goods or services to be leased to third parties or used for administrative purposes and - Are used for a period longer than one year.
The assessment base is: - acquisition cost for bought goods; - production cost for goods produced in the entity; - contribution value determined by an expert assessor for property obtained as a contribution to capital; - market value or fair value for assets received free of charge or plus to the inventory found;
The assessment base can change with: - including in depreciation of value of the costs after putting into service of an asset when they improve operational status of the asset in comparation with the initially estimated performance of that asset; - amortizable value may be decreased if the utility of an asset or group of assets is permanently altered as a result of moral damage or wear; - revalued value, in case of application for revaluation treatment.
Useful life is determined by economic life.
Useful life can change: - After revaluation; - May be reviewed
Not amortized: land
It amortized and: - Investments for arrangement of lakes, ponds, land and other similar works.
It amortized: - Investments to tangible assets leased, on the lease duration. On expiry of the contract value of the made investment and the corresponding depreciation gives to the property's owner
Depreciation method: - The linear method; - Degressive method; - Accelerated method; - Method per unit of product.
It is necessary to use the same method of depreciation for all assets of the same nature and to have identical terms of use.
It is also amortized - Development costs are amortized over the contract period or duration of use - Costs of setting up are amortized over a maximum period of five years, if the entity chooses not to recognize them in period's costs. - Goodwill is amortized, usually within a period not exceeding five years. - Patents, licenses, trademarks, rights and other similar assets are amortized over their expected use by the entity holding them.

[7] Mariana GURĂU**,** Maria GRIGORE - *Comparative Study on Accounting and Fiscal Amortization* - LEX ET SCIENTIA International Journal, No. XX, Vol. 2/2012, pg 170-181.

2.4. Taxation rules of tangible assets

The declared purpose of this paper is to put together bought tax and accounting provisions and, in particular, to highlight which are the necessary and compulsory tax documents for fixed assets.

In taxation, the principle "guilty until proven innocent" is applyng. That means that responsibility to know the Fiscal Code is an obligation "sine qua non" for taxpayers.

Thus, there is in low the principle that "no one can excuse invoking ignorance of the law" ("Nemo censetur ignore legem").

Based on these considerations, we found it necessary to make a summary of the fiscal obligations that have economic entities on tangible. This synthesis can provide to a company a basis for strong arguments in discussions with tax authorities that can prevent an aggressive approach of them.

2.4.1. Amortization.

In the acceptation of the Fiscal Code, the concept of asset is used to define any property, which is held for use in the production or supply of goods or services, to be leased to third parties or for administrative purposes, if it has a normal duration more than one year and a value greater than the limit established by Government decision.

In fiscal terms, we can define amortization as a recovery by deductions of acquisition, production, construction assembly or improvement assets costs from the result. Fixed assets are differentiated in amortizable fixed assets and unamortized fixed assets.

At the entrance in the entity of a fixed asset it will be drawn up a sheet of the fixed asset in order to record tax depreciation. In the context of disconnection between accounting and taxation, a company can choose different depreciation methods and economic life for accounting purposes, over those chosen for tax purposes. In this situation, the resulting differences will be highlighted through the "Register of tax recording".

Fiscal depreciation of fixed assets
Depreciable fixed assets are represented by any tangible which meets the following conditions: - Are owned and used in the production, supply of goods or services to be leased to third parties or for administrative purposes; - Have a fiscal value higher than the limit established by Government decision; - Have a duration of use more than one year.
By exception, if an item of tangible asset has a fiscal value less than the limit established by Government decision; the taxpayer may choose to deduct costs or to recover these costs by depreciation deductions.
The assessment base is *fiscal value* represented by: - acquisition cost, - production cost, - market value of assets gained free of charge or provided as contribution, the entry in the property taxpayer Fiscal value includes accounting revaluations.
The assessment base can change with: - the later costs will be included in asset cost, if this leading to higher economic benefits - Replacing the initial fiscal value with revalued value, only if it is not lower than the entry value.
The normal operating period – from Catalog
The normal operating period can not be reviewed (change).
Not amortized: - Land, including forests; - Paintings and works of art; - Goodwill; - Lakes, ponds and lakes that are not the result of an investment; - Public goods financed from the budget; - Any asset that does not lose value over time due to use, according to the rules; - Own holiday homes, housing protocol, vessels, aircraft, cruise ships, other than those used for his income.
It amortized and: Land arrangements, linear over a period of 10 years
It amortized: - Costs of investments to fixed assets leased, rented or leased by the management who made the investment, during the contract or during normal use, as appropriate.
Depreciation method: - In case of construction applies linear depreciation method; - In case of technological equipment, machinery, tools and plants, as well as computers and peripherals thereof, may opt for linear depreciation method, degressive or accelerated; - In case of any depreciable asset, can opt for linear or degressive depreciation method. - Per unit of product for exploitation of mineral substances useful; - Vehicles can be amortized and depending on the number of kilometers or number of operating hours provided in the manuals.
It is necessary to use the same method of depreciation for all assets of the same nature and having identical terms of use.
It is also amortized * using linear method during the contract period or useful life of: - Costs related to the acquisition of patents, copyrights, licenses, trade marks or factory - Other intangible assets recognized for accounting purposes, - Development costs which are recognized as intangible assets from accounting point of view • linear, over a period of three years - Cost of acquisition or production software. • Degressive or accelerated depreciation method. - For invention patents
Not amortized: - Costs of setting; - Goodwill,

As we can be see from the table, between accounting and fiscal treatment there are asymmetries at all levels: elements that are subject to depreciation, depreciation methods, the possibility of revision, revaluation. Perhaps for this reason, the accounting rules and fiscal rules come to meet the need of specialists with very clear specifications about depreciation.

2.4.2. Adjusting of capital goods' VAT

The adjustment is required for **capital goods** because one must take into account that these goods are, by definition, used by the taxable person for a number of years and that the VAT tax deductment for these goods is allowed only on the condition that they are used for operations which give a deduction right.

Capital goods include all fixed capital goods, as well as transformation and improvements of fixed assets/ parts of fixed assets, should they exceed 20% of the value, excluding maintenance and repairs. Fixed assets are considered capital goods regardless of whether they are recorded as inventory or fixed assets.

The VAT adjustment represents the correction of the tax deduction right, either by the annulment of the right exercised at the moment of acquisition/construction/improvement of goods, or by exercising this right after the acquisition/construction/improvement of goods, if it was not exercised initially.

The person has to maintain ***a record of the capital goods*** which are the object of the VAT adjustment, which would allow for a control of the deductible value and any adjustments made. This record needs to be kept for a period starting from the moment when the tax on the acquisition of the capital good becomes demandable and it ends after 5, or respectively 20 years after the end of the period during which the deduction adjustment can be solicited.

Adjustment periods are differentiated depending on the type of capital goods, thus:

- 5 years for capital goods, other than fixed assets;
- 20 years for fixed assets, including transformation or improvement of fixed assets, should the costs exceed 20% of the value.

When to conduct a VAT adjustment?

a) The deduction adjustment is performed for capital goods when they are used, by the taxable person, for:

- Either partially or entirely for purposes other than their economic activity;
- Operations which do not give a tax deduction right;
- Operations for which the tax deduction is different than the initial deduction.

b) In situations when elements included in the calculation for the tax deduction are changed;

c) In situations when the deduction right for a capital good was limited, partially or in totality, and is used in an operation which allows for a deduction. For deliveries of goods, the additional value of the tax deduction is limited to the value received for the delivery.

The adjustment is done only once or once per time period:

A. The adjustment is performed **only once** for the entire remaining adjustment period, including the year during which the destination of the good is changed, when:

a) The destination of the capital good i is changed;

b) A capital good, whose deduction right was limited, partially or in totality, is the object of a delivery which allows for a tax deduction;

c) The capital good no longer exists, unless:

- It can be proved that the capital good was the object of a delivery which allows for a tax deduction, or
- The capital good has been destroyed.

From a fiscal perspective, the VAT adjustment will be declared by using the VAT expense account form, code 300, with a minus sign at row 31, called "Pro rata adjustments/Adjustments for capital goods". Furthermore, it will be recorded in the capital goods register, which must be kept for a period starting from the moment when the tax, for the acquisition of the capital good, is eligible and ending 5 years after the end of the period during which a deduction adjustment right could be exercised. This is to permit the control of VAT deductible and adjustments. Any other records, documents and journals concerning the capital goods must be kept as well, for the same period.

B. When the pro rata changes, the adjustment is performed **for more than one financial period**. The steps for this are the following:

a) The initial tax deductible is divided by 5 or 20;

b) The result from pt. 1 is multiplied with the definitive pro rata for each one of the subsequent 4 or 19 years;

c) The tax deducted initially, according to the definitive pro rata, is divided by 5 or 20.

The results from pts. b and c are compared. Any difference between them represents the adjustments which need to be made and which will be recorded in the regularization of the tax expense account of the last period of the fiscal year.

2.4.3. The file of transfer prices

Transfer prices are the prices for which goods or services are transacted between affiliated companies, part of the same group.

These prices, according to the law, must be set at market value, as the transaction would be made between companies with no connection between them.

But in practice this never happens, in the sense that the prices are often designed to favor the tax interests of the group (as few taxes to be paid).

The solution found by the legislature in order to counteract this disadvantaged situation for the budget consisted in request of compiling a dossier of the

transfer prices to show how it obtained the amount of that transaction's prices and demonstrating observance of market price.

The file of the transfer pricing is an important instrument of tax administration for the control of profits movement in other more favorable jurisdictions, it is necessary to demonstrate that prices are at the level of the maket.

A thorough process for preparing a file of the transfer pricing will bring value to the company.

The positive aspects arising from a much better understanding of the business in Romania and also of the transactions / processes from the Group, of the market in which the company operates, the manner where it acts the competition and, most importantly, the preparation of a file transfer pricing may lead to the identification of tax optimization solutions.

The obligation to prepare annual the transfer pricing file belongs to entities of large taxpayers if they carry on transactions with affiliates with a total annual value, calculated by adding the value of transactions with all affiliated persons excluding VAT, higher or equal to any of the tresholds of significance below:

- 200,000 euros for interest earned / paid for financial services;
- 250,000 euros for transactions or services received / rendered;
- - 350,000 euros in case of the transactions on purchase / sales of tangible or intangible assets.

The ceilings are calculated according to the BNR exchange rate for the last day of the fiscal year and are associated with the transactions performed with affiliated persons carried out since 2016.

The transfer pricing file will NOT be requested and is not made:

- From the entity that owns an advance price agreement, for transactions and periods covered by advance pricing agreement issued by ANAF; or
- From the transactions for which it was issued a decision of adjusting / estimating the income or expense of any affiliated person.

A person is affiliated if her relationship with another person is defined by at least one of the following cases:

a) a natural person is affiliated with another natural person if these are husband / wife or relatives up to the third degree inclusive;
b) a natural person is affiliated with a legal person if the natural person owns, directly or indirectly, including holdings of affiliated persons less than 25% of the value / number of shares or voting rights of a juridical person or if effectively controls legal person;
c) a juridical person is affiliated with another juridical person if at least it holds, directly or indirectly, including holdings of affiliated persons less than 25% of the value / number of shares or voting rights in other juridical person or if controls in fact that juridical person;
d) a juridical person is affiliated with another juridical person if a third person owns, directly or indirectly, including holdings of its affiliated persons, less than 25% of the value / number of shares or voting rights in both the first juridical person, as well as the twice, or if effectively controls those businesses.

It is considered that a person effectively controls a juridical person if it is established that both, factually and legally, by using information and / or documents, the administrator / management staff has the ability to decide on the business of the juridical person concerned, by signing transactions with other juridical persons wich are controlled by the same manager / senior staff or that the directors of the juridical person is shareholder or administrator in the juridical person.

The deadline for preparation of the transfer prices folder is the legal term for submission of Statement 101 regarding profit tax, namely:

- 25 February for taxpayers who earn mainly income from cultivating cereals, industrial crops and potatoes, horticulture and viticulture (or 25 of the second months from the end of the adjusted fiscal year);
- 25 March for other entities (or 25 of the third month since the closure of the changed fiscal year).

These entities have the obligation to present by demand of the tax authorities, during the course of a tax inspection, transfer pricing documentation. Moreover, transfer pricing file can be requested by the tax authorities outside a tax inspection actions.

The deadline for making available the transfer pricing file shall not exceed 10 calendar days from the request, but not earlier than 10 days from closing date for the preparation.

3. Conclusions

As shown in the study of accounting and fiscal policies, as well as the relation between accounting and fiscality, the elements that can generate differences between these two areas are the following: acknowledgement and measurement, depreciation and implicitly the taxation of profit.

Any difference between the accounting policies adopted by the company and the fiscal policies must be amended accounting-free. We must not let the fiscal policies influence us when choosing the accounting policies even though this would mean less work.

Robert Bricker has remarked in an article (R. Bricker, Toward understanding academic research. Accounting, CPA Journal, American Accounting Association, February 1993) the too narrow horizon of accounting practitioners, the removal of the theory by practice. Our opinion on this subject is that this removal is "encouraged" by the fact that an approach of the accounting theory in terms of fiscal rules is easier, requires less time, effort and resources. This inevitably leads to a limitation of satisfying the users' needs of financial and accounting information. Therefore, accounting and tax research must be combining the

information obtained as a result of theoretical research with information from economic reality.

But there are many problems that an accountant is forced to face and largely state they are caused by excessive bureaucracy, the greater the number of laws that come into amending the Tax Code and accountants who make trouble.

As a general conclusion we can consider without reserves that **significant progress was made** i**n Romania regarding accounting and taxation as well as regarding the disconnection of taxation from accounting**. This process of perfection of the accounting and fiscal system needs a special attention in the future because on an international and European plan, the mentioned fields are very dynamic, fact that also influence the national environment in the conditions in which business doesn't know boundaries and its effects, favourable or not, spread very quickly.

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THE INFLUENCE OF MONETARY POLICY ON INVESTMENT DECISION IN THE EURO ZONE

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Abstract

The paper aims to highlight and analyze the main theoretical and practical aspects regarding the relationship between investment and monetary policy, as monetary policy decisions had a greater or lesser relevance on investment decisions. First, the authors make a short review into the theoretical analysis of interconnections between money and investments, and then they try to reveal how the monetary policy influences the investment decisions through the transmission mechanism channels. The effect of monetary policy measures on investment decision is followed by the authors on three levels of analysis: the selection of investment projects, the choice of sources of financing and the measurement of risk.

Keywords: *Monetary policy transmission mechanism, capital budgeting, cost of capital, investment decision.*

1. Interconnection between monetary policy and investments

In the economic sense, investments can be defined as total expenses for the accumulation of capital goods by creation, modernization or replacement of fixed assets in order to obtain future cash flows. This definition highlights the feature of certainty of the investment expense made today against the character of uncertainty in obtaining future cash flows.

In this regard, there should be made delimitation between investments in real assets and investments in financial assets. While the first helps to increase investor wealth, others express how it finances first and reflect the contribution of capital providers (shareholders or creditors) to their creation. This paper refers only to investments in real assets.

From a macroeconomic perspective, the investments are a component of GDP in aggregate demand, so they have a direct and immediate impact on it, in that an increase in investment increases GDP, other things being the same (ceteris paribus). Moreover, since income (GDP) is an important determinant of consumption, revenue growth will be followed by an increase in consumption, so that there is a positive feedback between consumption and income through investments.

Due to this mechanism, imports will increase and, as a result, will grow also investments based on equipment, machinery and foreign technology. Thus this will conduct to an increase in real interest rates which in turn depends on the deliberate choice of the central bank to increase or nominal money supply. Therefore, increasing the real interest rate is an inflection point leading to compression of investment, which in turn hampers GDP growth.

Through their short and violent fluctuations, investments are particularly an important economic variable of the business cycle. During economic expansion, investments grow at a much faster pace than consumption or GDP, regardless of interest rate movements. In contrast, on inflexion points of the economic situation, the influence of interest rates on investment is significant. During peak growth, the significant increase in interest rates would multiply disadvantageous the cost of credit for investment, reducing their dynamics. Investments often reach climax sooner than GDP, triggering a negative multiplier of consumer income and thereby stimulating the economy to go through a downturn.

In times of depression, the emergence of low interest rates on the credit market is a welcome thing for companies, which in combination with any positive expectations regarding the economy going, can cause an increase in the low level of investment during the recession. On the other hand, investments in machinery and equipment may know, in contrast, a decline as economic recovery leads to the use of existing capital, not fully untapped.

In analyzing the interconnections between money and investments, it is necessary to define monetary policy. Component of the mix of stabilization policies, monetary policy is an economic policy by which the monetary authority of a country controls the supply of money in the economy and which is used to promote certain endpoints such as price stability, growth and employment. Although most economists consider that monetary policy has a major impact on macroeconomic performance, there are significant differences in terms of decisions and actions to be taken that reflect a number of disagreements on economic policies, expressed through three macroeconomic models. The models chosen to represent economic structures that constrain monetary authority in choosing its policy focus on inflation, unemployment, income distribution

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and growth, whereas, potentially, monetary policy affects all (Palley, 2007).

The Neoclassical economic model (Palley, 2007) dominated thinking about macroeconomics and monetary policy to the financial crisis in 2007. This model considers that monetary policy controls inflation through nominal interest rate, which determines the nominal rate demand growth. In this context, monetary policy may have an unanticipated short-term impact on inflation, unemployment, income distribution and economic growth. Anticipated monetary policy affects inflation in the long term. Unlike unanticipated monetary policy, anticipated monetary policy is characterized by that monetary authorities should pursue an objective of stabilizing the price level and a rule of steady growth in money supply.

The model considers inflation as a negative factor, as "bad" and therefore monetary policy aimed price stability (zero inflation) to avoid uncontrollable inflation developments that can entice employees and companies in making inefficient decisions on labor and investment. Where deflation becomes a problem due to low nominal interest rates and there is also uncertainty about the impact of monetary policy on aggregate demand, then monetary policy will choose a target of positive inflation to protect the economy from the emergence of deflation (Palley, 2006). This seems to be the current thinking of central banks both in the US and in Europe, where two percent inflation target for monetary policy has become the norm.

The Neokeynesian model was dominated economics and economic policy decisions from early 50s to late 70s and it is now a theoretical framework for the study of inflation and the business cycle of most central banks in the field of modeling. The implications are that monetary policy can impact both on the short and on the long term the unemployment, the real wages, the income distribution and the capital-labor ratio. Their long-term value depends on the size of the portfolio substitution between money and capital goods, in response to inflation. However, monetary policy can not influence the rate of long-term growth and its impact in the short term on real wages is negative, so that optimal monetary policy depends critically on the preferences of policy makers on inflation and unemployment.

The Postkeynesian model analyses the microeconomic fundamentals differently from Neokeynesian model (Palley, 2007), although it reaches some similar conclusions. In this model, the monetary policy not only influences inflation, but it affects, too, unemployment, real wages and profit rate and growth rate. This is why monetary policy is considered to be so important. At high rates of unemployment, the only cost of expansionary monetary policy is higher inflation. However, when the unemployment rate drops there may be a compromise between higher wages and lower unemployment than higher inflation and lower growth, a potentially unfavorable situation. The shapes of the profit rate and the growth rate functions are important, and these in turn depend largely on the wage curve shape. It seems the curve wages, the profit rate function and the growth rate function are relatively flat, which indicates the likelihood compromise between unemployment and growth (Palley, 2007).

2. Transmission mechanism of ECB monetary policy

As an EU institution, the European Central Bank (ECB) is the monetary authority of the single currency zone in Europe (Euro zone). ECB is the heart of the Eurosystem - the central banking system of the euro area that includes also the national central banks (ECB, 2016a).

Unlike the Federal Reserve (formed by twelve regional central banks of U.S.A.) and Bank of England (the central bank of the United Kingdom) who have more statutory objectives than one, the main objective of ECB is to maintain price stability as essential pillar for economic growth and job creation – two of the European Union's objectives (Article 127 of the Treaty on the Functioning of the European Union).

The ECB has also specific tasks in banking supervision, banknotes emission, statistics collecting and processing, macroprudential policy and financial stability as well as international and European cooperation (ECB, 2016a).

The ECB main body of decision taking is the Governing Council having as objective keeping inflation below, but close to, 2% over the medium term. In order to achieve its primary objective, the Governing Council bases its decisions on a two-pillar monetary policy strategy and implements them using its operational framework (ECB, 2016a).

The ECB's monetary policy strategy is inflation targeting and based on the definition of price stability as a year-on-year increase in the Harmonised Index of Consumer Prices (HICP) for the euro area of below 2%. The implementation of ECB inflation targeting strategy is made by a set of monetary policy instruments explained in the General documentation on Eurosystem monetary policy instruments and procedures (ECB, 2016b).

The process through which monetary policy decisions affect the economy in general and the price level in particular is named the transmission mechanism (ECB, 2016c).

Considering a functional perspective, there are two stages of monetary transmission. In the first stage, monetary policy measures have an impact on various segments of financial markets, which is reflected in the adjustment of market rates and asset prices, in exchange rates and other financial conditions (e.g. maturity structure). In the second stage, these changes alter the propensity to consume of the economic agents and thus they affect the value of assets and incomes. In the latter segment there is an important way in which monetary policy affect the investment behavior of firms. Private

investment is a highly volatile component of aggregate demand, having an important role in economic growth and employment.

Monetary policy is essentially related to the real economy by the interest rate channel affecting all asset prices, the net value of balance sheet items, as well as banks' lending behavior. An important feature of the traditional interest rate channel is the primary focus on real interest rates rather than nominal rates and the role of long-term interest rates.

Short-term interest rates are considered the determining factor in this process. In fact, these interest rates perform three distinct functions: 1. affects the present value of net benefits over time through the discount rate applied in investment selection; 2. determines the cost of financing by bank loans and the rate of return demanded by shareholders, and 3. strongly influences the economic climate, both as regards financial markets and real goods and services markets.

Besides the interest rate on short-term influencing decision-making firms, household and governments, there is a range of interest rates on different maturities that are configured according to the monetary policy interest rate affecting debt management decisions. As aggregate demand is determined by long-term evolution of real interest rates, the term structure of interest rates becomes an important role in making monetary policy effective starting from the monetary policy interest rate. Indirect influence of the central bank on long-term interest rates stems from the fact that these rates are set by market participants as a weighted sum of the expected short-term interest rates, over which the monetary authority acts directly. Bond yields are determined by the offset component of inflation demanded by investors for holding these long-term instruments. Thus it is performed the structuring of term interest rates from those on long-term to those on short-term. In this way, the yield curve, although it relates only to fixed income instruments but with high share in the financial market, is significant for the entire loan market.

The influence of the interest rate channel on the economy can be revealed as follows. A reduction of monetary policy interest rate lowers interest rates on short-term market, so it is expected to increase investment. Whereas cumulative investments increase the capital stock and open the way to improve production conditions. Production capacity, productivity potential, cost efficiency and quality of production will rise to the extent that the investments were targeted and implemented. As a result, export competitiveness will increase, and, thus, employment will increase.

Regarding another component of the monetary policy transmission, namely the credit channel, it includes mechanisms by which imperfect financial markets amplify the effects of conventional interest rate.

The bank is a financial intermediary that collects money from economic agents with liquidity surplus and transfers them according to their analysis and decisions to businesses with liquidity deficit, thus making transformation of maturities, interest rates and risks. Therefore, the lending decision is the prerogative of banks.

Considering imperfect financial markets, the cost of external funding is greater than the risk free interest rate, given the existence of information asymmetry through its forms called adverse selection and moral hazard. The risk-free rate of return is the theoretical rate of return of investment with zero risk – as the government bonds.

Information asymmetry reflects the fact that the creditor does not know if the debtor is in good faith or not (adverse selection), or the debtor has chosen to invest in a riskier project than for which it received funding (moral hazard). In this case, the borrower will have to pay an additional premium to cover expected costs of the creditor, such as the risk of opportunistic behavior occurred as a result of the debtor and the costs of monitoring, assessment and collection of payment of the remaining debt.

An increase in the monetary policy rate will have a direct impact on all companies that rely on bank loans or loans of any kind as to interest rates in the money market. An increase of interest bank loans leads to lower businesses margin and increases the return expected by investors from new investment projects, which makes them less likely to engage in such projects. Interest expenses also affects inventory management costs that are usually funded by bank loans.

The credit channel implies that a segment of companies must rely on bank loan financing. If monetary policy measures end up by restricting banks' ability to give loans, the financial costs of these borrowers will tend to increase, while demand for capital will decrease (Leoveanu, 2015). In practice, a central bank influence on the real costs of financing is quite limited. In the long term, trying to push real interest rates on the capital market under their equilibrium rate - the characteristic applying an expansionary monetary policy measures - will only lead to an increase in inflation.

Unlike bank lending channel, the balance sheet channel means that the debtor's financial situation has an impact on external finance premium. Bank lending to companies, especially smaller ones like SME, are often backed assets, so a decline in asset prices may lead to difficulties in accessing loans because low prices of assets reduces net assets of the company. This effect is called the "financial accelerator". Also, the financing of listed companies is easier to achieve when interest rates are low and asset prices are high, so that the financial statements are favorable.

There are some specific issues regarding the transmission mechanism of monetary policy in Euro zone after international financial crisis that are largely

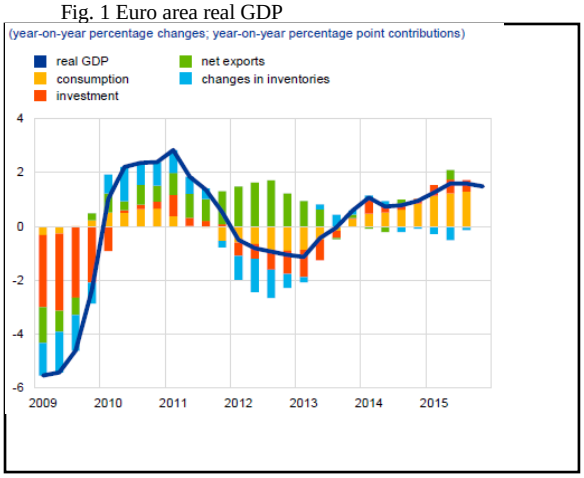
debated by economists. Peter Praet, member of the Executive Board of ECB, has shown (Praet, 2016) that in the financial crisis aftermath - characterized in Europe by banking and soverign debt crisis, deleveraging process and slow economic recovery, desinflationary shocks and challenges on the effective lower bound on the interest rate - the ECB had to require "unconventional measures with unprecedented intensity" in order to address frictions in the transmission process. Kapounek highlights that „the most important problem of monetary policy implementation efficiency is transmission mechanism heterogeneity in the Eurozone. The heterogeneity consists in different economic growth and inflation rates in individual member states" (Kapounek, 2011).

Roman (2015) shows that his research "finds a high efficiency loss in all monetary transmission channels related to fractional reserve banking, excessive EU indebtedness, or legal frameworks".

3. ECB monetary policy and investments performance in the euro area

The international financial crisis put his mark on euro zone economies also by depressing investments as a result of "uncertainty, corporate and banks'deleveraging needs and foreign direct investment abroad"(Palenzuela et al., 2016). IMF researchers finds that „despite lower nominal interest rates during the crisis, the overall decline in inflation and the zero lower bound for the nominal interest rate held up the implied real interest rates, particularly in some countries, which also may have weighed on business investment" (IMF, 2014). Since 2013 there was an economic recovery in euro zone despite a weaker global growth outlook, as shown in Figure 1.

Fig. 1 Euro area real GDP

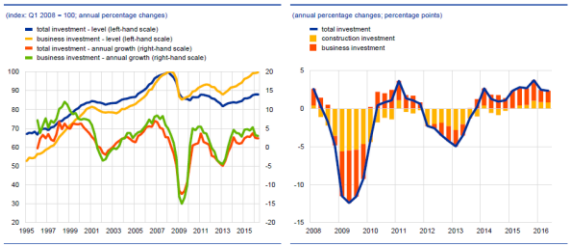


Source: ECB Annual Report 2015, p. 22

The investment recovery was based on "a combination of improving demand, profit expectations and financing conditions, as well as declining uncertainty" despite the high corporate debts and restrictive bank regulations (ECB, 2016d).

Fig. 2 Real total and business investment in the euro area

Fig. 3 Breakdown of real total investment in the euro area

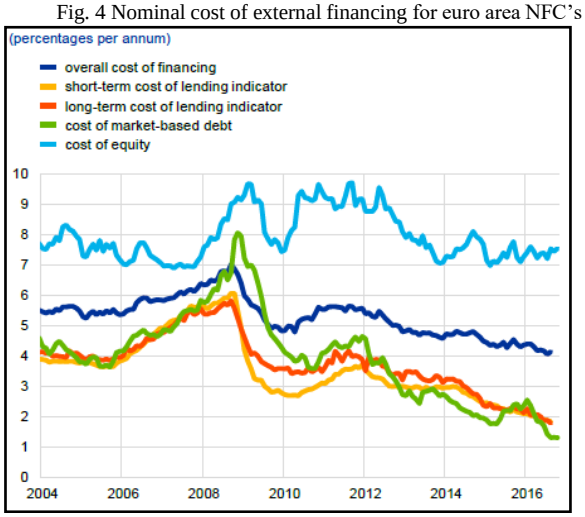


Source: ECB, Business investment developments in the euro area since the crisis, p. 2, https://www.ecb.europa.eu/pub/pdf/other/eb201607_article02.en.pdf

The Figures 2 and 3 present the evolution of real and business investment in euro area: the big falls of total investment in the aftermath of the crisis and also in 2011-2012 were followed by a general increase of total fixed capital formation since early 2013.

The expansionary monetary policy measures of ECB influenced financial costs for non-financial companies in euro zone since the crisis, but there still remain a lot of credit constraints imposed by banks in spite of their declining (Fig. 4)

Fig. 4 Nominal cost of external financing for euro area NFC's

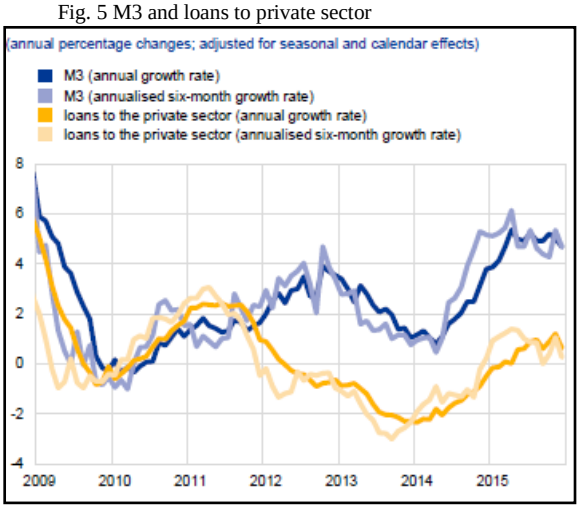


Source: ECB, Business investment developments in the euro area since the crisis, p. 10, https://www.ecb.europa.eu/pub/pdf/other/eb201607_article02.en.pdf

The linkage between monetary supply (M3) and loans to private sector is presented in Figure 5. Money growth remained robust. Credit growth recovered gradually, but remained weak (ECB, 2016e).

The future prospectives for growing development of investment in euro zone, especially business investment, rely on favorable factors like „recovering demand, accommodative monetary policy and improving financing conditions" but also "and the need to replace capital after years of subdued fixed capital formation" despite negative constraints like "deleveraging needs and a still unfriendly business environment in some countries, as well as subdued potential growth prospects" (ECB, 2016d).

Fig. 5 M3 and loans to private sector



Source: ECB, Annual Report 2015, p. 32

4. The effect of ECB monetary policy on investment decision

Monetary policy is expected to influence investment decision by modifying the rate of return on capital, remodelling the availability of bank loans to the economy, and affecting expectations and confidence on macroeconomic fundamentals.

First, the ECB monetary policy measures have an impact on financial conditions in the euro area, which in turn is coupled with the country-specific economic conditions. The effects of monetary policy are seen primarily at macroeconomic level as an ECB commitment to fulfill its primary objective of maintaining price stability and supporting the economies of the euro zone countries, what is the basis on which they form investors' expectations. In this respect, the information provided by the ECB and the transparency in communication with the public determine the credibility of the central bank and is one of the most powerful and effective monetary policy tool.

International financial rating agencies (i.e. Standard & Poor's, Moody's, Fitch) take also into account the ECB policy decisions in order to classify the countries' economies, companies and financial institutions in the euro area by risk degree. This kind of classification gives investors information on how much confidence to have about their financial performance, fulfillment on their financial obligations, as well as their more difficult or easier access to financing on international markets. Therefore, before taking an investment decision, investors will look at the rating given by international rating agencies to their economic partners in the euro zone, rating influenced by the monetary policy of the ECB.

Secondly, investment decisions are based on capital budgeting process through which the evaluation of investment projects is based on specific selection criteria, among which highlights the Net Present Value (NPV) and Internal Rate of Return (IRR).

A capital investment project is a set of fixed assets which are contingent upon each other and which are counted together. Thus, the company assets at a certain time are the amount of capital investment decisions taken over time by the company.

The investment process involves annual investment costs during construction period and annual benefits during the operation period of a capital investment. Analysis of different investment project alternatives will consider time value of money and will compare the costs as related to efforts and benefits as related to expected effects at a given moment in time. This is the method of discounting cash flows.

Future cash flows are discounted at a rate which is an assessment of the investors' uncertainty on the expected amounts and on the time of their achievement. To estimate the risk from these cash flows requires a sensitivity analysis of the income and expenses from changes in economic conditions.

The risk of an investment project is reflected in this discount rate. From the investors point of view the discount rate is the minimum rate of required return to compensate them for the risk involved. From the company point of view the discount rate is the weighted average cost of capital, i.e. the opportunity cost of capital invested in the firm. In other words, it shows how much cost the company to bring additional funding of a monetary unit of new capital. As a result of both assertions, WACC represents both the cost of capital and the minimum rate of required return for an investment project.

Thus, thirdly, the influence of ECB monetary policy is manifested on WACC components: the cost of debt and cost of equity. WACC calculation is done by adding the cost of each component of capital multiplied by the weight of the component in total funding.

$$WACC = \frac{E}{V} \times Re + \frac{D}{V} \times Rd \times (1 - T)$$

where: Re = cost of equity; Rd = cost of debt; E = market value of the firm's equity; D = market value of the firm's debt; V = E + D; E/V = percentage of financing that is equity; D/V = percentage of financing that is debt; T = corporate tax rate (Investopedia, 2016).

The cost of each component of the invested capital is calculated as below.

A. The cost of debt

Cost of debt is calculated for each credit instrument used by the company in its funding and consider the marginal rate of corporation tax:

$$Rd \times (1 - T)$$

Formula is the interest rate debt minus the marginal corporate tax as a fact that interest expense is tax deductible.

B. The cost of equity

The theoretical approach to consider cost of equity as a cost of reinvested capital is expressed by using Capital Asset Pricing Model (CAPM):

$$Re = RFR + \beta_i \times (Rm - RFR)$$

where: RFR = risk free rate; β_i = beta coefficient that measures the volatility of company's security volatility compared to the market as a whole; Rm - RFR = market risk premium, and Rm is market return.

The model shows difficulties and even limitations in estimating risk-free rate, market return or beta coefficient.

The effects of ECB monetary policy is manifested partly in determining the appropriate risk-free rate of return, due to the relative influences of monetary policy rate on yield curves. Thus, a benchmark for RFR could be the Yield-to-maturity of bonds with the lowest risk in the euro zone, for example the YTM of German bonds issued for a period of 10 years.

Among selection criteria of an investment project, there are Net Present Value (NPV) and internal rate of return (IRR) as the most important ones.

Net present value is the overall return of an investment, calculated by summing the present value of all future cash flows (positive - meaning benefits or negative - representing investment costs or losses) arising from the implementation of the project.

$$VAN = \frac{CF_0}{(1+i)^0} + \frac{CF_1}{(1+i)^1} + \frac{CF_2}{(1+i)^2} + ... + \frac{CF_n}{(1+i)^n} = \sum_{t=1}^{n} \frac{CF_t}{(1+i)^t}$$

where:

CF_t = estimated cash flows in the period t;

$CF_t = VT_t - CT_t$, where VT_t = total revenues in the period t

CT_t = total expenses in the period t including investment costs (I_t) and operating costs (C_t) ; i = discount rate; n = project lifetime.

If the project generates cash flows greater than necessary to compensate investors for the risk of the project, it will bring a higher gain than the cost of capital, increasing the company value, which reflects the positive value of net present value obtained from the project (NPV> 0). Conversely, if the project cash flows are less than needed to cover the cost of capital that will decrease the company value, as it is highlighted by the negative net present value obtained from the project (NPV <0).

NPV value depends on the discount rate value used in the calculations, which requires special attention in choosing it. Thus, if the discount rate is lower, the NPV is higher and vice versa, which has a significant impact on capital budgeting (Leoveanu, 2008).

IRR is the discount rate that makes the present value of expected cash inflows equal to the present value of estimated future cash outflows for the investment project in question. To calculate this indicator, the NPV must be equal to zero for a discount rate i = IRR, and therefore:

$$\sum_{t=0}^{n} \frac{CF_t}{(1+RIR)^t} = 0$$

When IRR is used as a criterion in the investment projects evaluation they shall consider the followings:

a) IRR must always be greater than zero (> 0), otherwise investment costs can not be recovered from benefits and the project is not accepted;
b) they accept projects with calculated IRR > demanded IRR by the investors;
c) in relation to the cost of capital, the IRR should be considered as the maximum rate to pay off the capital providers (shareholders and creditors), without the project to produce any benefit or any loss. Thus, they will accept projects with IRR > cost of capital and will reject those with IRR < cost of capital (Leoveanu, 2008).

The investment decision is reached by comparing the values of indicators calculated on different variants of investment project in contrast to the current situation without the investment project (Leoveanu, 2015)

Example

In the current international economic conditions, companies are concerned about the feasibility of investment projects developing production/services for export or replace import of such goods/services. In this respect it appears necessary to analyze several aspects: the value of currency earned / saved by the investment compared to the currency market; the extent to which this value (cost) of currency is acceptable for the investor; at what cost of domestic currency is export or import quitting advantageous by making that investment in that country. The main criterion that the investor will take into account in this case is the Michael Bruno test ratio. This indicator enables investment decisions by avoiding investments with a higher cost of foreign currency.

For computing, the necessary information are: annual inflows in foreign currency on projected export sales, respectively annual inflows in foreign currency on projected savings by reducing import; annual outflows in foreign currency on investment and operating costs; annual outflows in local currency related to the investment and operating costs.

A German investor wants to make a capital investment in Germany to manufacture products that will be fully exported to the United States. To establish the feasibility of the investment, the investor will calculate the Michael Bruno test ratio, knowing, on the one hand, the investment and operating costs in Euro and, on the other hand, the investment and operating costs, and also the operating revenues in Dollars (see tables below). Construction time is 2 years, and operating period is 6 years.

The discount rate calculation is based on the weighted average cost of capital. In this regard, it is known that the investor finances the investment in proportion of 55% by reinvesting capital, in proportion of 20% through a bank loan term at a German bank and in proportion of 25% by a suppliers' credit for equipment.

The interest rate on the bank loan for investment = 4.5%, the interest rate on the suppliers' credit = 5%, RFR = 0.31% (German Bond 10 T), beta coefficient = 1.5 and the risk premium market (Rm - RFR) = 7.8 %.

The corporate tax rate T = 18%.For the one year (16.12.2015-17.12.2016) the average euro/dollar currency rate of the ECB was 1.1084 euro/$.

Solution:

1. Cost of capital computation

Cost of bank loan:

$$Rd \times (1 - T) = 4.5\% \times 18\% = 0.0081 = 0.81\%$$

Cost of suppliers' credit:

$$Rd \times (1 - T) = 5\% \times 18\% = 0.009 = 0.9\%$$

Cost of reinvested capital:

$$Re = RFR + \beta_i \times (Rm - RFR) = 0.31\% + 1.5 \times 7.8\% = 0.1201 = 12.00\%$$

Weight Average Cost of Capital:

$$WACC = 0.55 \times 12\% + 0.2 \times 0.81\% + 0.2 \times 0.9\% = 0.07 = 7\%$$

This value of WACC represents the minimum rate of return required by investors and also the discount rate at which capital budgeting calculations are made (WACC = i).

2. Capital Budgeting

$$\text{Michael Bruno Test Ratio} = \frac{\text{PV of Total costs (euro)}}{\text{NPV (dollars)}}$$

Computation of Present Value of Total Costs (mil. euro)

Year (t)	Investments Costs (I_t)	Operating Costs (C_t)	Discount Factor $\frac{1}{(1+i)^t}$	Present Value of Total Costs $(I_t + C_t) \times \frac{1}{(1+i)^t}$
1	12	-	0.934	11.21
2	18	-	0.873	15.71
3	-	9	0.816	7.34
4	-	9	0.762	6.86
5	-	7	0.712	4.98
6	-	7	0.666	4.66
7	-	7	0.622	4.35
8	-	5	0.582	2.91
				58.03

Computation of NPV (mil. $)

Year (t)	Investments Costs (I_t)	Oparating Costs (C_t)	Operating Revenues (V_t)	Cash Flow (CF_t)	Discount Factor $\frac{1}{(1+i)^t}$	Discounted Cash Flow $CF_t \times \frac{1}{(1+i)^t}$
1	25	0	0	-25	0.934	-23,35
2	35	0	0	-35	0.873	-30,56
3	0	15	30	15	0.816	12.24
4	0	10	40	30	0.762	22.86
5	0	11	40	29	0.712	20.65
6	0	10	45	35	0.666	23.31
7	0	10	45	35	0.622	21.77
8	0	10	45	35	0.582	20.37
						NPV = 67.29

$$\textit{Michael Bruno Test Ratio} = \frac{58.03 \text{ mil euro}}{67.29 \text{ mil \$}} = 0.8624 \text{ euro/\$}$$

This result will be compared with the ECB exchange rate to see if the investment project can be accepted for the gain brought by exporting. For an average ECB exchange rate of 1.1084 euro/$ the investment project is cost-effective because it brings the dollar into the country at a much lower cost (0.8624 euro/$).

3. Conclusions

The present paper had the intention to present some important features concerning investment in real assets and the implication of monetary policy measures in investment decision in euro area based on the theoretical framework regarding capital budgeting.

As essential issues for this subject, the authors highlighted the folowing:

- the importance of the three models representing economic structures that constrain monetary authority in choosing its policy and their differencies of approach.
- the characteristics and distinctions between the interconnection monetary policy – investment in time of economic grow or recession and depression.
- the importance of ECB as main institution of the Eurosystem for euro zone economies considering its objective and its monetary policy strategy.
- the main stages of monetary policy transmission mechanism and the way ECB monetary policy could influence economic development in euro area;
- the particularities of interest rate channel, credit channel and balance sheet channel and their importance for investment trend in euro zone.
- the favorable and adverse factors that have influenced and influence investment developments in

euro area.

- what are the influences of the ECB monetary policy on the feasibility of a particular investment project in an euro zone economy?

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MANAGING THE USE OF DERIVATIVE INSTRUMENTS FOR PORTFOLIO RISK PURPOSES

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Abstract

The priority in portfolio management is a good risk assessment and management. Of great importance is the margin that an asset portfolio guarantor must use with specific expertise in certain areas of market temporal inefficiency in order to improve its management performance.
The relevant validity of the financial market and the emphasis laid on risk management carried along the development of financial instruments tailored to risk management. New derivative financial instruments have revolutionized the methods of portfolio management, of corporate treasury management, of banking management and, more generally, all financial strategies.

Keywords: *risk management; portfolio management; Treasury management; hedging; derivative structures; financial strategies; options; futures; OTC products; securities traded outside the Stock Exchange; financial leverage; PUT options; CALL options; bull spread; binomial model;*

Introduction

Major developments in financial theory after the 1980s and the positive evolution of the study and research activities of the financial market have profound implications on the financial theory in general, dealing with the corporate financial management or the financial and banking economy, and particularly with the portfolio management. It was thus developed the concept of the capital markets efficiency, exposing the most important empirical results, obtained both on the European and the American markets, and aiming at demonstrating the independence of securities rate and their behaviour analysis in relation to the occasional financial events.

Within the framework of the modern theory of capital markets it emerged the theory of new financial instruments for hedging the market risks: short-term futures contracts, options, swaps, caps, forward etc. These tools enable financial risk management depending on the particular previsions. Financial leverage brought through these tools, the flexibility in their use, association to very feasible transaction expenditure allow for a very precise risk management[1].

It aimed at putting forward the principles and new models for the valuation of derivative financial instruments, and uses of the new financial instruments, with concrete examples, which prove to be very useful as instruments of control, and especially of insurance against risks[2].

Literature review

1. Derivatives and risk control[3]

A debate on the use of derivatives for the portfolio risk management, by giving examples of methods of risk control and alternation of portfolios, is aimed to discard the beliefs according to which the derivatives are particularly risky and dangerous instruments.

The derivative structures, especially the exchange-traded options, may offer some key benefits for institutional investors and investment managers in Romania[4], such as those related to:

- **Change of assets:** The exact identification of the market evolutionary changes and monetary liquidity in such critical moments is impossible to quantify. The immediate question is: What can a manager do to avoid such a situation, or at least mitigate its negative effects that could redound upon the portfolio. It appeals to derivative products which provide a continuous cash flow, even in times of market uncertainty, at a cost

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[1] Alexandru Olteanu, Florin Olteanu "Managementul portofoliului si a riscului pe piata titlurilor financiare'', Editura Fundatiei "Andrei Saguna'', Constanta 2011.
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significantly lower than the one associated to limited non-cash.

- **Risk covering (hedging):** Options can be effectively used in a long-term hedging strategy to counter adverse market movements, with the benefit that the volatility of the structure costs is relatively small when hedging operations are initiated at the precise moment when a risk is perceived.
- **Low costs:** Losses arising as results of a fall in the cost of certain shares could be covered by the sale of CALL options. A manager who calculates the absolute profit generated by the portfolio may order the sale of options whose profits exceed that level.
- **Speculation:** The call for options can be done by participating on the moving market, without making use of a significant amount of capital, participation which may generate substantial profits if derivative instruments are used, but after understanding the mechanisms of operation and combination of effects.

Therefore, large volumes of derivative products that were globally traded on the alternative financial markets lastly are a proof of the appreciation thereof and increasingly large use in the financial community. On the one hand, 2006 - the most significant year before the crisis, has undoubtedly been a year of uncertainty, of small gains and corporate-level scandals. European stock markets closed the reporting period with losses ranging between 25% and 50%. On the other hand, it was a year characterized by growth in hedge operations and the increasing volume of derivative instruments markets.

Interestingly, the increase in the volume of traded derivatives was recorded only in the case of Stock Exchanges. The Report of the Bank for International Settlements has shown an increase in the value of derivatives, reaching the figure of over USD 700 billion. The explanation lies in the fact that the exchange-traded options have some advantages over packets (such as OTCs, securities traded outside the stock exchange via a brokerage agency or direct contract between the purchaser and the seller), making the same extremely attractive to managers.

Given the downgrade in confidence in some large financial institutions, following the triggering of the financial crisis in 2008, not surprisingly, traders prefer to avoid entering into contracts with individual parties. The exchange-traded options make possible the commitment of a central counterparty – the Clearing House. Moreover, the transparency of operations allows continuous monitoring of prices and the known number of participants generates a more competitive environment than in the case of OTC products.

The biggest drawback of the options, put forward in the past, has been the inability to absorb large volumes of issues, non-existent aspect in the case of OTCs. Although this statement could be true, it is no longer a current problem. The increased volume of the value of exchange-traded contracts and the special interest thereto prove the ability to place large volumes of issues.

2. Incorrect use of derivatives - a trap of ignorance

Derivatives are not inherently dangerous, as many commentators might believe. They are definitely not "financial weapons of mass destruction". On the contrary, for many institutional investors, the derivatives were the instruments that kept them afloat. This does not mean that derivative instruments (like many other financial products) mechanisms of operation and their role in risk management. Flexibility and the nature of options strategies require continuous monitoring of changing markets conditions, the risk and the value of the option and require a regular revaluation of financial assets. Once these conditions are met, the benefits of using derivative products, such as options (insurance against future risks), outweigh the costs.

3. Hedging strategies used in transactions with derivative instruments[5]

There are several methods whereby options can be incorporated into the portfolio. Thus, options can be used to develop hedging strategies, because it offers multiple possibilities of risk management to economic agents[6]. In this respect, in return for payment of a premium, options contracts account for a substantial protection against adverse movements in the underlying asset price, while offering opportunities to obtain some returns, this time as result of favourable changes in prices. Among the derivatives trading strategies, indicated to be used, are listed by way of example the following:

A. Covering risk hedging: example - the spread strategy[7]

A spread strategy involves taking a position on two or more options of the same type (two or more CALL options or two or more PUT options).

It is considered one of the most widely used spread strategies, namely bull spreads, which involves buying a CALL option on a futures contract with a certain strike price and selling a CALL option on the same type of contract, but with a higher strike price. Both options have the same expiration date. The investor hopes that the price of the security goes up.

[5] Bookstaber R "Option Pricing and Strategies in Investing", Ed. Addison Wesley, 1981.
[6] R. Ferrandier, V. Koen "Marchés de capitaux et tehniques financières", Ed. Economica, 1997.
[7] Black F., Sholes M 'The evaluation of option contracts and attest of market efficiency", Journal of Finance, May 1972.

Suppose, at a certain moment, a low volatility on the futures market of the USD BRM contract. A fund manager at an import-export company, analysing the commercial evolution of the last quarter of the year, reaches the conclusion that the evolution of the RON/USD ratio will suffer considerable variations, which could seriously affect the value of the portfolio. In this respect, the administrator shall order its broker on the BRM options market to purchase CALL options on futures contracts, worth USD 100,000, paying a premium of 700 u.m/USD, at a strike price of 26,000 u. m/USD and sell CALL options on futures worth USD 100,000, the premium of 200 u. m/USD, at a strike price of 28,000 u.m/USD.

The first scenario assumes an increase in futures price (S_T) up to the value of 27,000 u.m. Fully confident in his forecast, the manager expects the maturity date of the USD BRM futures contract in December. Upon the maturity date of the USD BRM futures contract in December, the settlement price is 27,200 u.m. This means a gain of 1,200 u.m/USD, out of which is deducted the premium, resulting in a final profit of 500 u. m/USD, amount covering part of the devaluation incurred by the Romanian RON.

Another possibility would have been that, on the maturity date, the manager would opt for the execution of the contract through physical delivery and thus take possession of USD 100,000 at a price of USD 26,000, once the market rate reaches the level of 27,200 u.m/USD.

The second scenario would have been the increase of the futures price up to 28,300 u. m, in which case the manager earns 1,800 u.m/USD, the final profit being 1,600 u.m/USD, profit which would maintain this level unchanged, no matter how much the futures price may increase. Such a strategy results in that, while the CALL price goes down as the strike price goes up, the value of the sold option is always less than the value of the option purchased. The volatility was thus significantly reduced, and the costs were relatively small.

B. Participation in the moving markets with the view to earn profits: example – buying a PUT option[8]

The use of such derivative trading strategy can be explained by way of an example. Thus, after analysing the futures market trend at EURO BRM contract, it is estimated a price decrease. Because the customer is not firmly convinced that this trend will manifest, he decides not to open a futures position and decides to buy a EURO BRM August 2012 PUT option at a strike price of 29,100 u.m. If the current futures price tends to rise, the premium paid for this option is small, managing to buy a PUT option against a premium of 300 u.m./EURO. For those who are in a similar position in terms of market analysis results, it is recommended buying "in the money" options or even "out of the money" options because it may be cheaper. When the futures settlement price falls below the strike price, the intrinsic value relevant for these options begins to go up and, therefore, the premium thereof to rise. At this point, the customer can proceed to obtain funds to cover the futures margin and wait for the time of exercising the option. Upon exercise, the customer will have the PUT option position cancelled and the futures selling position initiated.

Buying a PUT option is less risky than selling a futures contract, because an increase in futures quotation does not entail mark-to-market losses, the maximum loss being related to the premium paid.

Profit occurs when the futures settlement price falls below 29,000 u.m., when exercising this option causes the customer to have a futures selling position initiated at a price of 29,100 u.m. If the settlement price is 29,050 u.m., the customer earns 50 u.m. from the mark-to-market, and if the settlement price is 29,090 u.m., the same earns 90 u.m. As the futures settlement prices go down, the profit goes up.

The loss is limited to the premium paid upon registration of the transaction. If the futures settlement prices range above the value of 29,100 u.m., the buyer does not exercise his option, remaining with the loss of 300 u.m. Note that the premium paid of 300 u.m./contract must be recovered in order to record a net profit. The mark-to-market gain, resulting following the exercise of the option, must be higher than the premium paid and is registered at futures settlement prices below 29,070 u.m.

4. Selecting the use of models for the valuation of derivative financial instruments, in particular of options[9] [10]

All models for the valuation of financial instruments are derived from arbitrage reasoning between derivative instruments and the underlying securities-asset. For example, for a stock option, the arbitrage reasoning used for the capitalization of a stock and option contract is as follows: all investors can establish, by combining the purchasing of shares and options, a perfectly covered portfolio, risk-less, in other words the value is independent of the evolution of the course of stock. In such a case, the portfolio may not be reported to the risk-free interest rate during the period of ownership. Therefore, it is recommended to be used as models for the valuation of derivative financial

[8] Cox J., Rubinstein M "Option Market", Prentice-Hall, 1985.

[9] Geske R., Shastri K "Valuation by approximation: a comparison of alternative valuation techniques", Journal of Financial and Quantitative Analyses, march 1985.

[10] Geske R "The valuation of compound options", Journal of Financial Economics, 7, 1979.

instruments the One-Period or Multiple-Period Binomial Model, and the Black and Sholes Model[11].

4.1. The Binominal Model

This model has the advantage of a large simplicity. It involves checking the classic assumptions of capital market perfection and responds to the principle according to which no risk-free arbitrage may exist in such a market. The Binomial Model leads to the continuous-time model of Black and Sholes.

4.2. Capitalization of a buying option under the Black and Sholes arbitrage model[12]

For the formalization and reasoning of the arbitrage within the model proposed a certain number of assumptions are required:

- The risk-free interest rate must be continuous and constant at the period rate;
- The security price follows progress at random, with a variation of its fluctuations in direct proportion with the square of its security rate. Also, the distribution of the different possible prices of the security at the end of a certain period follows a normal logarithmic law. The variation in the rate of return is constant during this period.
- The security shall not entitle to any dividend or interest distribution;
- The option to be "European" and cannot be exercised on each due date;
- There should not be trading costs related to the security's or option's buying or selling;
- It is possible to make a loan to the daily interest rate, the security's rate faction being unimportant.

The assumptions are indispensable to the demonstration. R. Merton[13] argued, in 1973, that the original model of Black and Sholes is very robust and conditions are sufficient and much less numerous than MEDAF (the market model of H.M.Markowitz). The analyses carried out show that the model does not require any particular securities market balance. Investors may not have a homogeneous anticipation, especially in terms of the rate of return.

However, an investor can establish a portfolio of securities containing a basic security (e.g. stock) and for which the funding is provided by the sale of "n" purchase options. In this case, the value of the "V" relevant for such a portfolio is calculated as follows:

$$V = x - nw$$

Where:

V – value of the portfolio

X – value of the security

W – premium of the negotiable option (call or

It is worth mentioning that, during a small period of time "dt", the rate varies at a volume "dx", the premium of "dw"" volume and a "dv" volume portfolio calculated as follows:

$$dV = dx - ndw$$

Under the assumptions hereabove, the premium "w" is not based on the "x" rate and the due date upon the maturity of the "t" option contract, as follows:

$$W = w\,(x,t)$$

Where:

t – time;

x – represents a diffusion process that can be written as a variation of .... and depends on the variation of the basic security rate and time:

$$dw = w_1 dx + w_2 dt + \frac{1}{2} w_3 \delta^2 x^2 dt$$

where:

w_1 – w first derivative with respect to x;

w_2 - w first derivative with respect to t;

w_3 - w second derivative with respect to x.

Entering the value of "dw" shown in the equation (4), in the expression "dV" indicated in the equation (1), we get:

$$dV = dx - nw_1 dx - n\,(w_2 dt + + \frac{1}{2} w_3 \delta^2 x^2 dt)$$

where:

dx – is the only random variable of this expression.

To the extent that "n"" was selected, such as ($1-nw_1$) is equal to zero, the variation of the portfolio value becomes certain and the portfolio is risk-free. For this it is enough to get "n" equal to $\frac{1}{w}$; the portfolio will be constantly revised since w_1 varies in time:

$$dV = \frac{1}{w1}\,(w_2 dt + + \frac{1}{2} w_3 \delta^2 x^2 dt)$$

Under the penalty of arbitrage, a risk-free portfolio cannot be reported at the risk-free investment rate of the financial market, and hence the equation:

$$dV = rVdt$$

respectively:

$$dV = r\,(x - \frac{1}{w1}\,w)\,dt$$

By equalling the two equations, we get:

$$r\,(x - \frac{1}{w1}\,w)\,dt = \frac{1}{w1}\,(w_2 dt + + \frac{1}{2} w_3 \delta^2 x^2 dt)$$

and hence:

$$w_2 = w_r - w_1 rx - \frac{1}{2} w_3 \delta^2 x^2$$

We agree to translate this differential equation with the boundary conditions specific to the option considered. Hence, the following equations:

$$W\,(s, o) = s - k \text{ if } s \geq k$$

$$W\,(s, o) = 0 \text{ if } s < k$$

Thus, the value of a CALL C is resolved by this differential equation. Solving this problem is well known in mechanics. This result is given in the equation (2).

For a PUT- P the boundary conditions are:

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[11] Alexandru Olteanu, Florin Olteanu "Managementul portofoliului si a riscului pe piata titlurilor financiare'', Editura Fundatiei "Andrei Saguna'', Constanta 2011.

[12] Black F., Sholes M 'The evaluation of option contracts and attest of market efficiency", Journal of Finance, May 1972.

[13] Merton R., „Options pricing when underlying stock returns are discountinuous", Journal of Financial Economics, Jan-March 1976.

$W(s, o) = 0$ if $s > k$

$W(s, o) = k - s$ if $s \leq k$

The solution is given in the equation:

$$dw = w_1 dx + w_2 dt + \frac{1}{2} w_3 \delta^2 x^2 dt$$

The value of other European options types can be equally determined in part by this equation, adapted to the boundary conditions. However, some options lead us to differential equations, for which analytical solutions are not required.

It is worth mentioning that an American option, which is allowed to exercise at any given time, has boundary conditions at any time, and, by way of consequence, the differential equation will be solved by numerical methods.

Conclusions

The analysis showed that there are many advantages for institutional investors and financial managers of romanian companies as a result of the use of derivative instruments for hedging and profit generation, a fact attested by the growing number of participants in the market that use these products currently and growing volumes of transactions concluded through their. Properly understood and used for risk management, derivative instruments are significantly less "dangerous" than other financial products.

In the last two decades has registered an increase in the importance of portfolio strategies and especially to use derivative financial instruments for the supervision and management of financial risks. The choice of a specific portfolio strategies, the use of financial instruments and appropriate valuation models are based on the needs and desires of customers. Successful portfolio management and adequate financial instruments involve more than just coordination of some technical information. Such information is useful only to the extent that help in generating high profitableness.

Global financial crisis triggered alternative markets derivatives has led to multiple debates related to the use of these financial instruments. These debates of financial and banking analysts have different opinions on the causes and forms of manifestation of the so-called crisis of confidence".

Some analysts have put the crisis on behalf of the „interventionist role on mortgage market", which has led to a failure of markets („market failure"). Finally, the most plausible relates to the use of „toxic" financial products, in the form of CDOS and CDS (collateralized debt obligations, credit default swaps), synthetic non-regulated products respectively, and put in circulation by the major banks via the process of „originating and distributing ". Also, banks have turned to securitisation operations of bonds considering it a profitable business, to the extent that apparently eliminates the risk. They were selling securities (bonds) for some investors. But what seemed a convenient dissemination of individual risks in the entire financial and economic system resulted in a high risk amplification system.

The bottom line is that no new financial product complexity is responsible mainly for the financial crisis, but the pattern of financial innovation and financial products features that undermined what is essential for the proper functioning of markets: transparency and confidence.

Regarding the mechanisms of options contracts recently developed models and the equilibrium model of financial assets, allow endorsers of portfolios perform a rigorous manner the price of such contracts and the risks that must be covered. Tradable options market had experienced a successful culmination because it allows portfolio strategies based on speculation, arbitration or insurances, that increase profitability-risk benefit.

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TAX EVASION BETWEEN FRAUD AND OPTIMIZATION

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Abstract

Tax optimization, often called legal tax evasion is the use of methods and techniques that are within the law, in order to reduce or even cancel the tax liability. To achieve such an approach, the taxpayer or his advisers must know in depth the tax law - and by extension, the financial and administrative law - and, moreover, must be functional tax jurisdictions which allow the use of appropriate assemblies.

The recent leasks, as WikiLeaks, LuxLeaks, SwissLeaks, Panama Papers etc. on financial flows to tax havens highlight the far-reaching unprecedented evasion and tax fraud, both in the amounts involved - trillions of dollars - and sophisticated assemblies used primarily by multinational companies to the detriment of the public finances of Member territory headquarters and branches which are located and, therefore, detrimental economic and social life of those countries.

Tax evasion is based on legal mechanisms which, combined together in the montages of increasingly complex, allowing operators, mostly multinational legal entities to circumvent national tax law and not pay the taxes due.

The border between tax optimization, tax evasion and fraud is very thin, optimization using various legal methods to reduce the tax owed, whereas tax evasion using illegal means, which covered crime.

Tax evasion reveals either optimize or fraud. There is a significant international dimension of tax evasion because it is favored by multinational corporations operating conditions.

Keywords: *tax evasion, fraud, optimization, leaks, multinationals.*

1. Introduction.

Definitions of fiscal optimization, evasion and fraud

The concepts of optimization and tax fraud can be defined without interfering with each other. Thus, tax optimization are accomplished by using legal means - deductions, tax reductions, exemptions, derogatory regimes, tax niches like tax credit etc. - whose legitimacy and effectiveness can be challenged by one of the stakeholders, ie public authorities, but which nevertheless remain within the law.

Tax fraud can be identified by the two cumulative elements:

- doubtful operations identifying the tax base and determining the amount of tax liability within national involved jurisdictions;
- bad faith of the taxpayer who violated the law in order to reduce the amounts to be paid as tax.

The term "tax evasion" is vague and leaves room for interpretation, especially since generally distinguish between legal avoidance and illegal evasion, the latter being, in fact, tax evasion.

According to OECD, the international organization that develops and disseminates economic studies most often consulted, tax evasion can be defined by three features:

- taxpayer does not comply with the legislator's intention, or taking advantage of loopholes in the text of the law, whether the provisions contained therein for purposes other than those provided;
- actions taken by the taxpayer have real justification or there are justification other than the display;
- taxpayer tries not to show the procedures they used, which sometimes is even provided in the sales contract, as it is suggested by a tax adviser.

2. Optimization and tax evasion mechanisms

2.1. General characteristics of tax optimization schemes

Net revenue optimization methods that use the companies, mainly multinationals, fall into several categories:

- procedure of assignment to a category of businesses, "check the box", through which companies can choose to classify a category of companies which have the right to repatriate profits;
- transfer pricing mechanisms applied in goods trade, services, financing product between entities of the same group, used as the main form of tax optimization, but is, in most cases, a form of legal evasion;
- companies nicknamed «hybrid», functioning only as a "mailbox" for multinationals, who transfer their profits in tax havens, mostly thanks to tax conventions concluded between countries. Thus, the company resident in Ireland, with the Board in Bermuda is subject to Bermuda tax laws;
- choosing a "state tunnel", ie a state that allows the benefit of a resident company is not taxed at source and,

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thus, can be transferred in a tax haven. For example, in the European Union, a company resident in France owned by American multinational Über[1] using a tunnel Dutch firm to bill services, which would require it to pay tax in the Netherlands. Dutch company pays right to use, very high, patents Über subsidiary in Bermuda, where, however, those payments are not taxable. In this scheme, the Dutch company is only an intermediary, a "firm tunnel" to escape multinational Über the incumbent tax liability by receiving royalties from the patent.

2.2. Aggressive tax planning - a form of tax evasion

In many cases, mainly in multinational companies, tax optimization is achieved through aggressive tax planning, using abusive leaks from preferential tax law and conventions. Some examples of such techniques of tax evasion are set out below [MFP 2014]

- transfer pricing abuse. Intellectual property rights of a parent company are transferred to a subsidiary resident in a country where proceeds from these are little or no taxation. Another subsidiary, using those patents pays an overstated amount of the first branche, the whole multinational company tax on income from intellectual property rights are very low or zero;;
- the use of agreements between subsidiaries, such an understanding of price for goods or services exchanged. Thus, the acquiring company recognizes the amount to be paid as a debt, interest is deductible from the taxable base and seller company consider same amount as a financial asset that brings dividends, which are generally taxed less or not at all;
- locate a branch in a country with a permissive tax regime for certain categories of products / activities with the aim of using that subsidiary in a process of international tax optimization;
- location of the sale of assets in a country with low tax rates. Assets are bought and then sold by a subsidiary resident in a low tax country, where there are no taxes levied on capital gains from the sale of assets.

Transnational companies are able to obtain from the tax authorities in different countries capabilities that allow them to significantly reduce tax obligations they have towards those jurisdictions. These countries accept taxing some branch located on the territory of multinationals less than in accordance with the general provisions of taxation in order to attract big companies to invest directly in those countries, and therefore bring significant amounts as capital injection in their economies.

A conclusive example is Ireland[2], which granted multinational companies - such as the American IT: Google, Apple, Microsoft, etc. – the right to create resident companies in Ireland and who have, in their turn, branches in other jurisdictions (so-called mechanism "double Irish") between them can be made transfers of revenues provided from activities. Thus, profits made by an Irish resident company belonging to a multinational can be routed to its subsidiaries in a tax haven where the tax rate is about 0%. Note that Ireland does not have legal provisions related to transfer pricing, which allows international tax evasion like the one above.

For example, tax evasion scheme applied by Google in Ireland was: Google Ireland Limited company pays royalties to Google Ireland Holdings, which is the holder of patent law Google. On the other hand, Google Ireland Holdings has located its Board in Bermuda - a tax haven heavily used by multinational companies - and transferred their benefits there, where they are not taxed.

2.3. General aspects on transfer pricing

In general, in the the integrated companies composed of several entities there are indispensable exchange of goods, services and financial products. The prices of those goods and services that are traded are called transfer pricing or internal assignment. These prices occupies a place of primary importance in the financial management of companies belonging to the group, and for the entire multinational financial performance, the main causes being:

- transfer pricing is a performance management tool for companies because through them can achieve financial evaluation of the various entities in the group;
- transfer pricing allow transfer of benefits between the entities, which, when those entities are located in different national tax jurisdictions, highlights their managers skills to optimize taxation for whole society, without a close relationship with economic and / or comercial performance of their specific activity.

In the relationship between the two entities, either subsidiaries of a group or independent firms under trade relations, the transfer prices used between them determine the profit that each one obtained by sale of products or services they produce and/or sell. It follows logically that the manipulation of transfer pricing allows groups, especially multinational companies to consider increasing the margin and decide accordingly, the geographical location of its component entities in jurisdictions where the tax environment is most favorable.

Also in the international economic environment, which requires competitive relationship increasingly freer, transfer prices are of paramount importance, because using them as a tool to optimize financial management, managers society multinational can determine economic and financial performance of each entity component. In addition, analyzing the fiscal environment in which they are resident, multinational company management can achieve optimal tax planning, so that fiscal pressing from tax of the whole group to be minimal.

[1] Über American society offers its customers an application that can call taxis using a tablet or an iPhone.
[2] http://www.financialsecrecyindex.com/PDF/Ireland.pdfhttp://www.financialsecrecyindex.com/PDF/Ireland.pdf.

The correct determination of transfer prices are also a major concern for direct and portfolio investments, because the image of a business they present can reflect economic and financial reality or induce an completely false impression, stimulating or or vice versa discouraging investment.

For example, a company can buy components from its subsidiary located in another country, with a transfer price below the market price. These subsidiaries will account for less income, so a profit tax base smaller, consequently the amount of tax payment as corporate tax will be lower, which negatively affects tax public revenues in that country. Public authority in the country where is located the purchasing company - which can be even parent company - is not interested in correcting prices, because if that company issues its consumption products within its jurisdiction, the tax payable will be bigger.

The phenomenon of reducing the tax base can be, however, repeated in the case of the mother company. Multinational company creates a business intermediary enterprise between manufacturer and distributor, which locates in a state with a very small tax - so-called tax haven - or having concluded special tax arrangements. In these jurisdictions, multinationals can afford to recognize sales prices very high and very low purchase prices, resulting in a high nominal profit margin, but which will be little or no taxed.

In such a situation, it is injured including parent company tax jurisdiction, public finances being threatened by the reduction of income sources. Thus, by examining the structure of tax revenues in most states with economy based on competitive relationships It can be noted that the share of tax corporate is important - reaching over 12% of total governments revenues[3] - which makes risks observed reduction in the tax base of this tax to be perceived as real and very damaging to public sector financing in those countries.

In this context, the regulation of transfer pricing has become a necessity for all countries, especially since the process of economic and financial globalization accelerated, many countries, particularly the developing countries, are not prepared to bear the shocks the liberalization of foreign trade.

Although no recent[4], the concerns of limiting multinational companies to practice transfer prices between their component entities as they wish prompted worldwide tax authorities to adopt regulations on transfer pricing and implicitly to calculate the tax base for profit tax.

Regulation of transfer pricing between subsidiaries of multinationals must meet several basic requirements, some of which being considered essential for countries where these companies are located:

- transfer pricing must ensure the international effectiveness, manifested by facilitating foreign direct investment by multinational companies in third countries, mainly through the adoption of agreements to avoid international double taxation between the States concerned;
- transfer pricing should promote equity between countries where subsidiaries participating in the exchange of goods, services, financial products are located, so the tax base in each country to show real added value and in this way it could avoid tax evasion.

The need to regulate transfer pricing is even more acute, as the developments in recent years, very fast, have increased significantly the volume of trade and financial exchanges, in the context of expanding globalization. In addition, the polarization of the population in terms of disposable income, and thus of the quality of life, in many countries of the world, under the pressure from increasing demands on public authorities, because they produce and / or distribute more numerous and better quality social services. This, however, requires a considerable increase in the budgetary allocations for the social sector and therefore require public revenues, primarily tax increased.

The settlement and acceptance process of these regulations on transfer pricing comes out not only developed countries, that were making up after only two decades more than 80% of the international trade, but also in many other developing countries their share in trade between all contries came to exceed at the moment 40%[5].

In this context, the work of the World Forum in order to regulate transfer pricing have resulted since 2013 in a program known as "Base Erosion and Profit Shifting" (BEPS), program supported by the states participating in debates and to be finalized and implemented in the coming years[6].

OECD countries, which have joined and other non-OECD, agreed on the basic principles on these prices, primarily in the exchange of information between tax administrations, as documentation outlining the structure and specificity productive, trade and financial activities of the resident firms and methods for determining transfer pricing of component entities groups when these groups are multinational.

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[3] http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do.

[4] Since 1917, US law "War Revenue Act" provide US tax authorities the right to carry out adjustment corporate tax base.

[5] A good example are the states of the group BRICS (Brazil, Russia, India, China and South African Republic) whose importance in the global market is growing, both due to the increase of the GDP per capita and increasingly extensive penetration of international markets.

[6] Considering that tax base erosion and transfer benefits to jurisdictions applying lower taxation is a major risk facing the public finances of any country, the OECD and the G20 adopted in 2013 a plan containing 15 actions to restrict the possibilities of evasion tax.

Project BEPS aims to ensure public budgets volume of tax revenues in line with the economic development and the value newly created by a package of measures to combat the business, particularly holdings and multinationals, tax optimization through the use of any leaks the law or agreements with foreign tax administrations.

Source: *www.oecd.org/fr/fiscalite/beps.htm*

BEPS is built taking into account the principles for transfer pricing, those principles have been defined in OECD Guidelines since 1995. The most important of these principles is respect by any multinational company, the full competition determining transfer prices in transactions between its subsidiaries, or the use of prices that are comparable to those charged between independent enterprises with the same activity under similar conditions. In many cases, however, products, services or intangible assets exchanged have no equivalent on the market and therefore, transfer pricing can not be determined by comparison. To overcome this difficulty, OECD has proposed several methods that can be established and / or controlled transfer prices in compliance with the arm's length principle.

Methods for determining transfer prices proposed by the OECD Guidelines [Pellefigue J., 2016] can be divided into two categories:

- methods that calculate trading prices between subsidiaries of the same multinational company, starting estimate the share of each subsidiary involved incumbent in total profit. Share of profit or benefits can be achieved in several ways:
  - directly share net margin (TNMM Transactionnal Net Margin Method), which determines the net margin / profit per branch compared with net margin made by independent similar enterprises. This method is most often applied in calculating transfer prices because the necessary information is available from accounting reports;
  - directly share in overall profits (PSM Profit Split Method) between different branches involved, depending on the proportion participating in the product /service. The method is less used because of the complexity and the absence of specific procedures;
- flat allocation profit according to a distribution formulas (Formulary Aportionment). The most commonly used formula is known as "formula Massachusetts", which determines index distribution of profits made across multinational companies by a subsidiary "i", as a weighted average tangible AC, turnover CA and as the wages fund FS

$$i = \alpha * \frac{ACi}{\sum_{J=1}^{n} AC_j} + \beta * \frac{CA_i}{\sum_{j=1}^{n} CA_j} + \gamma * \frac{FS_i}{\sum_{j=1}^{n} FS_j}$$

Where:

i = branch concerned

n = total number of branch / subsidiary of the multinational society

$$\alpha + \beta + \gamma = 1$$

Although at the level of the OECD is considered that the method is cumbersome, the European Union is being developed proposing a Directive ACCIS[7] proposing sharing profits between subsidiaries of multinational society, according to a formula similar to the formula Massachusetts;

- methods aimed comparability of prices and / or margins achieved by independent firms to market. Among these methods are found:
- methods using the market prices of (CUP Comparable Uncontroled Price) compared with transfer pricing proposed, which are a method rarely used because it is difficult to identify products / services completely similar;
- increased purchase price method (CPM Cost Plus Method), using mainly an accepted price of the supplier to delivery or production, plus a profit margin;
- resale price method (RPM Resale Price Method), which takes into account the price that the company producing the goods / services invoiced by a selling company belonging to the same multinational, who resells the product to an independent company. The final price minus profit margin approximated the average level that it applies independent company.

The last two methods are little used because informations on profit margins practiced by the firms are difficult to measure correctly and businesses are not legally obliged to disclose such information.

3. Conclusions

Tax optimization is a goal of every company, because thereby increase financial profitability. Often, the mechanisms by which it can carry out a fiscal optimization seek to exploit leaks of national law and, in this case, talking about legal tax evasion.

Among other methods are also tax arrangements which privileged multinationals derive from host countries to their foreign subsidiaries. These practices, however, are regarded by the public authorities and / or the population of those countries as immoral because, on the one hand reduce government revenues which primarily finances social policies and, on the other hand, seriously affect competition.

Press disclosures in recent years - including the largest response was WikiLeaks, LuxLeaks, SwissLeaks and Panama Papers - they showed the huge size of the tax worldwide evasion. It is mainly evasion which goes beyond legislation, but exploiting its weaknesses, both nationally and in the international conventions.

The consequences of tax evasion are high in all countries, but the worst records in emerging economies that have a greater need for public funds to develop and, in addition, benefit little from theit own resources due to the actions of the multinational companies in their territory, usually in agreement with public authorities in host countries.

The international tax regulations need

[7] European Commission proposal for a Directive on common consolidated tax tax (ACCIS) submitted for debate and adoption by the Council of the European Union in 2016.

Tax rules on corporate tax is a constant concern and very timely for both multinational and national tax authorities where the component entities are resident. Note that if in terms of tax rates, according to international treaties[8], each national jurisdiction is fiscal sovereign, sizing trim corporate tax can be influenced by the decisions of multinational companies through transfer pricing, in compliance with the relevant legal framework

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[8] The tax system acts to collect public revenues from taxes and, in addition, guide economic growth and contribute significantly to achieving macroeconomic balance. Accordingly, in any national tax system, resident status is crucial because any resident entity is the main contributor. However, if they work in several countries or tax jurisdictions, it is difficult to identify tax residency and thus the tax burden on the entity.

To avoid double taxation of the international organizations - first OECD, and the UN - have proposed models of bilateral tax conventions to which the concerned States establish methods for calculating the tax liability for taxpayers resident in one state but which earn revenues in other State. Tax conventions play a key role in regard to taxation in the current major expansion context of globalization. Thanks to these agreements may encourage foreign investment and, consequently, can stimulate national and global economic growth. On the other hand, thanks to bilateral tax conventions the tax administrations of the concerned States can act against tax evasion and tax fraud even international.

Source : : Manuel de l'ONU relatif à certains aspects de l'administration des conventions concernant la double imposition établi à l'intention des pays en développement Édité par Alexander Trepelkov, Harry Tonino et Dominika Halka, Nations Unies New York, 2015, https://www.taxcompact.net/documents/UN-Handbook_DTT_FR.pdf.

ESTIMATION OF REGRESSION EQUATIONS BETWEEN SOME FORMAL EDUCATION INDICATORS AND GDP, IN ROMANIA

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Motto: "*Education is the most powerful weapon which you can use to change the world.*"

Nelson Mandela

Abstract

The present paper is a part of a post-PhD research entitled Assessment on the impact of education on the macroeconomic development in Romania, as compared to other EU member states. The survey starts with a short overview on the history of education and macroeconomic development in Romania, starting from the 19th century. The paper presents contextual data, indicators as well as the outcome of the research, conducted in order to identify and analyze the impact of education on the macroeconomic development in Romania. The study is based on linear regression models and, respectively, on double log regression models. The purpose is to analyze the relationship between a set of educational indicators as predictors and Gross Domestic Product as a dependent variable.

Keywords: *formal education, macroeconomic development, statistical analysis, regression models*

1. Introduction

Formal education occurs in a structured, systematic and controlled environment where students are learning together with a trained, certified (preschool, primary, secondary or tertiary) teacher, professor or lecturer of the subject.

Etymologically, the word "*formal*" is derived from the Latin *formalis* which means "official", "organized", therefore, formal education is official education. Philip H. Coombs[1] defined *formal education* as the hierarchically structured, chronologically graded education system, running from primary school through the university and including, in addition to general academic studies, a variety of specialized programs and institutions for full-time technical and professional training. Formal, official education includes social managing and evaluation, centered on the development of self-assessment capabilities learned within the formal education.

Formal education is extremely important because it provides access to cultural, scientific and artistic values, to literature and scientific knowledge as well as to social and human experience, having a critical role in shaping the students' personality, according to society and individual needs. Investing in human resources, i.e. in education, training and healthcare systems, is aimed at improving the professional and scientific abilities of trainees as well as at increasing their adaptability to cope with structural economic changes and the technological progress as well as efficiency.

Below, I intend to show that formal education plays a key role in improving living standards, leading to prosperity.

2. DEFINING CONTEXTUAL INDICATORS AND MODELS APPLIED

To analyze the impact of education on Romania's economic growth, statistical data provided by EUROSTAT and World Bank are processed in order to understand specific indicators. The three models applied are the following: *simple linear regression and log-log regression*.

Using available data, we obtain the general linear model presented below:

$$y_j = b_0 + bx_j + \varepsilon_i, j = \overline{1,T}$$

where T is time in years.

The model is used (i) to analyze the relationship between two variables, i.e. a dependent variable - Education and, respectively, an independent one – Economy, as well as (ii) to assess the relationship between the two variables during a given period of time (2001-2015).

For the analysis of panel data to be further developed, we get the following general linear model:

$$y_{ij} = b_0 + bx_{ij} + \varepsilon_{ij}, \quad i = \overline{1,N}, \qquad j = \overline{1,T}$$

where N shows the correlation between countries and T is time in years.

To interpret correctly the parameters, namely the impact of education on economic development, we use

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[1] Philip Hall Coombs (1915-2006) was a program director for education at the Ford Foundation; he was appointed by President John F. Kennedy to be the first Assistant Secretary of State for Education and Culture; he worked for UNESCO and served as vice-chair and chair of the International Council of Economic Development.

logs for variables, i.e. semi-log or log-log regression model

$$y_j = b_0 + blnx_j + \varepsilon_j, j = \overline{1,T}$$

and, respectively

$$lny_j = b_0 + blnx_j + \varepsilon_j, j = \overline{1,T}$$

Using natural logs and the real value of the dependent variable, and, respectively, natural logs for both variables x_j and y_j.

If linear regression uses variables we want to predict, i.e. dependent variables, logistic regression enables you to calculate predicted probabilities using a factor variable (i.e., categorical variable), which should be included in the model as a series of indicator variables regression. The logistic regression algorithm is developed to determine what class a new input should fall into. One of the nice properties of logistic regression is that the *sigmoid* function outputs the conditional probabilities of the prediction. A sigmoid function is a mathematical function having an "S" shaped curve, and is bounded differentiable real function that is defined for all real input values and has a positive derivative at each point. The logistic function has this further, important property, that its derivative can be expressed by the function itself. The advantage of this model is that we are not really restricted to dichotomous dependent variables and that it can be developed into one unified model.

Using the same data, we could obtain the following linear multiple regression model:

$$y = b_0 + b_1x_1 + b_2x_2 \ldots + b_px_p + \varepsilon$$

where *p* represents the number of predictors used to explain or predict the other variable *y*.

Description of the Contextual and Specific Indicators Used

The specific, educational indicators we analyzed are the predictors, i.e.[2]:

1. *School life expectancy* is the total number of years of schooling (primary to tertiary) that a child can expect to receive, assuming that the probability of his or her being enrolled in school at any particular future age is equal to the current enrollment ratio at that age. School life expectancy shows the overall level of development of an educational system taking into account the years of schooling.
2. *Total public expenditure on education* refers to combined public, private and international expenditure on education, i.e. funding by the government or education expenditure by educational institutions, as well as private expenditure.
3. *At least upper secondary educational attainment, age group 20-24 years - %* (ISCED 3) the indicator is defined as the percentage of people aged 20-24 who have successfully completed at least upper secondary education. This educational attainment refers to ISCED 3. The indicator aims to measure the share of the population that is likely to have the minimum necessary qualifications to actively participate in social and economic life. It should be noted that completion of upper secondary education can be achieved in European countries after varying lengths of study, according to different national educational systems. It reveals the efficiency of national strategies and policies in the field.
4. *Tertiary educational attainment, age group 30-34 years*, % - the indicator is defined as the percentage of the population aged 30-34 who have successfully completed tertiary studies (e.g. university, higher technical institution, etc.). This educational attainment refers to ISCED 5-6 and reveals the distribution of the respective share of population. The indicator helps us draw conclusions on the quality of human resources, being a part of the Education and Training 2020 (ET 2020) framework for cooperation. It shows the share of 30-34 year olds with tertiary educational attainment, with a view to achieving the strategic objectives under the ET 2020.
5. *Employment rates of recent graduates* - % presents the employment rates of persons aged 20 to 34 fulfilling the following conditions: first, being employed according to the ILO definition, second, having attained at least upper secondary education (ISCED 3) as the highest level of education, third, not having received any education or training in the four weeks preceding the survey and four, having successfully completed their highest educational attainment 1, 2 or 3 years before the survey. The indicator is calculated based on data from the EU Labor Force Survey.
6. *Employment by educational attainment level, annual data, age class-15-64 years, tertiary education* per thousands shows the percentage of a population aged between 15-64 that has reached a higher level of education and holds a qualification at that level, being employed. It reveals the efficiency of labor policies and is used at international level.
7. *Population by educational attainment level, sex and age* -% highlights the share of the population having completed at least upper secondary education, age class 15-64 years.
8. *Enrolment rate %* is expressed as net enrolment, which is calculated by dividing the number of students of a particular age group enrolled in all levels of education by the size of the population of that age group[3]. It is widely used to show the

[2] Source: EUROSTAT.
[3] Source: INS, TEMPO Online.

general level of participation in and capacity of education.

9. The broadest indicator of *economic output and growth* is the Gross Domestic Product or GDP[4], expressed in million of Euros, which represents the dependent variable.

To illustrate the impact of education on the medium and long term, the relationship between variables was considered as *asynchronous* (for example, there is a 12 year gap between GDP and the Enrolment rate).

3.1. ANALYSIS OF CORRELATIONS BETWEEN EDUCATIONAL AND MACROECONOMIC INDICATORS

The analysis of the sample correlation presented below clearly illustrates the moderate relationship ($r_{GDP;Public\_exp} = 0.62$), and, respectively, the strong relationship between GDP and the rest of indicators, except for the *Employment rates of recent graduates,* which is the best example for an inverse correlation ($r_{GDP;Employment\_level} = -0.42$).

Table 1. Correlations. The highlighted correlations are strong for p < .05000 N=8

	GDP	School exp	Public exp	At least upper secondary (%)	Tertiary (%)	Employ-ment rate	Employ-ment level	Population (%)	Enrolment rate (%)
GDP	1.00	0.81	0.62	0.78	0.86	-0.42	0.87	0.83	0.88
School exp	0.81	1.00	0.91	0.95	0.97	-0.82	0.90	0.96	0.96
Public exp	0.62	0.91	1.00	0.96	0.85	-0.82	0.76	0.87	0.80
At least upper secondary (%)	0.78	0.95	0.96	1.00	0.93	-0.75	0.88	0.93	0.88
Tertiary (%)	0.86	0.97	0.85	0.93	1.00	-0.80	0.97	0.99	0.99
Employment rate	-0.42	-0.82	-0.82	-0.75	-0.80	1.00	-0.71	-0.82	-0.78
Employment level	0.87	0.90	0.76	0.88	0.97	-0.71	1.00	0.98	0.96
Population (%)	0.83	0.96	0.87	0.93	0.99	-0.82	0.98	1.00	0.98
Enrolment rate (%)	0.88	0.96	0.80	0.88	0.99	-0.78	0.96	0.98	1.00

3.2. ESTIMATION OF REGRESSION EQUATION

Based on statistical data for 2001-2015, linear regression equations, and, respectively, log-log equations showing the relationship between GDP and each predictor were developed, illustrating strong correlations, along with the analysis and the regression model .

3.2.1. The impact of School life expectancy on GDP

According to Europe 2020 guidelines included in the most important strategic document drafted and promoted by the European Commission for the next 10 years, which defines education as one the top priorities and the factors that could lead to economic growth within the EU, Romania should reduce school drop-out rate (PTS), age class 18-24 years, down to 11.3% until 2020, and, respectively, increase tertiary education attainment rate, age class 30-34 years, up to 26.7%. The goal is difficult to achieve due to high school drop-out rates, age class 18-24, i.e. one child in 5 leaves primary school (17%) and 50% of students leave secondary school and fail to pass the final exam. Although reforms were implemented to improve access to education and ensure quality education, further measures should be applied and major investments should be made in this sector, to cope with the challenges faced by these vulnerable categories.

Based on the regression model, the following linear regression equation illustrating the relationship between the dependent variable *GDP* and the independent variable *School life expectancy* was developed:

$$GDP = 102259 * School\_exp - 1427211$$
$$(83816) \quad (1368881)$$
$$R^2 = 0{,}14$$

after normalization (standardized independent variable value – 0 and dispersion value – 1) we obtain:

$$GDP = 0{,}376719 * School\_exp$$

The coefficient of determination denoted $R^2(\%) = 14\%$, indicates that *School life expectancy* influence on *GDP* values is of 14%.

[4] Source: EUROSTAT - for variables 1)-7) and GDP.

At the same time, we obtain the following log-log equation:

$$lnGDP = 4{,}71454 * lnSchool\_exp - 1{,}18165$$

(2.512)(7.00)

$$R^2 = 0{,}28$$

In comparison with other EU member states, Romania's *School life expectancy* was 16.9% in 2012, according to EUROSTAT, above the UK – 16.6%, but below Sweden – 19.9%, Denmark – 19.3%, and Germany – 18.2%.

The log-log regression equation (9) shows that a 1% increase in *School life expectancy leads to a 4.71% GDP growth during the analyzed period. In the future, we can predict a 17% increase in School life expectancy*, above Denmark (19.3%) and almost equal to Sweden (19.9%), *leading at the same time to a 109.63% increase in GDP*.

3.2.2. The impact of Total public expenditure on education on GDP

According to EUROSTAT, Romania's GDP was 27% of the average EU GDP per capita (EU-28) in 2015, being the second poorest EU member state, above Bulgaria (22.8%). Romania's *Total public expenditure on education* accounts for 4.1% of the country's GDP, as compared to an average of 4.7% in Eastern Europe and, respectively, 5.4% in EU.

Since 2005, secondary and tertiary education has received more money than preschool or primary education. The education sector is strongly interconnected with public expenditure, since private funding accounted for 0.12% of the country's GDP in 2010, as compared to 0.82% in EU.

According to the UNICEF survey[1], currently, approximately two thirds of public spending on education targets two fifths of rich people (65.8%), and only 9.9% - poor people. At the same time, 61.2% of public expenditure on education targets urban educational facilities, despite efforts to reduce the gap between urban and rural areas. The two examples presented above show that there are major equality issues and that significant investments should be made to eliminate this gap between rich and poor people (for e.g., inclusive education policies).

In other words, if Romania were to progressively increase its investment in education between 2015 and 2025, i.e. from 4.1% to 6% of the GDP, economic growth would increase from 2% to 2.7% - 2.95%. On the other hand, boosting our average PISA scores would also lead to economic growth (the impact of quality education on economic development).

$$GDP = 7{,}86 * Public\_exp + 75075{,}27$$

(2.93) (20884.59)

$$R^2 = 0{,}5$$

and, respectively,

$$lnGDP = 0{,}484558 * lnPublic\_exp + 7{,}493406$$

(0.156) (1.375)

$$R^2 = 0{,}51$$

Thus, the equation (10) shows that *Total public expenditure on education* influence on *GDP* values is of 59%. A 1% increase in *Total public expenditure on education* would lead to a 0.48% increase in economic growth, while a 20% increase in *Total public expenditure on education* would trigger a 9.23% increase in GDP.

3.3.3. The impact of At least upper secondary educational attainment on GDP

This indicator aims to measure the share of the population that is likely to have the minimum necessary qualifications to actively participate in social and economic life. In 2015, it reached 82% at EU level, i.e. Croatia – the highest rate - 95.7%, followed by Ciprus – 94.3%, and Ireland – 92.7%. In Romania, it is 79.7%, which is close to the EU average.

$$GDP = 91901 * At\_least\_secondary - 6987316$$

(84242) (6623873)

$$R^2 = 0{,}11678823$$

and, respectively,

$$lnGDP = 21{,}5066 * lnAt\_least\_secondary - 81{,}9073$$

(12.30)(53.66)

$$R^2 = 0{,}25$$

Regression analysis indicates that *At least upper secondary educational attainment* influence on *GDP* values is of 11%. A 2.3% increase in the number of students graduating from secondary schools to reach EU average would lead to an 84.3% increase in GDP.

3.2.4. The impact of Tertiary educational attainment on GDP

This indicator aims to measure the share of the population aged 30-34 who have successfully completed tertiary studies. It hit 38% in 2015, at EU level, as compared to Lithuania, which held the leading position, i.e. 57.6%, followed by Cyprus - 54%, and Luxemburg - 52%. In Romania, this area experiences an upward trend, i.e. 25.6%.

$$GDP = 19449 * Tertiary - 123466$$

(23733.8) (454719.5)

$$R^2 = 0{,}069$$

and, respectively,

[1] Cost of Non-Investment in Education in Romania, UNICEF and MEN study.

$$lnGDP = 1{,}187959 * lnTertiary + 8{,}526990$$

(0.79) ***(2.29)***

$$R^2 = 0{,}20$$

According to the regression equations developed based on EUROSTAT data for 2004-2015, Tertiary educational attainment influence on GDP values is of 6.9%. A potential 12% increase in Tertiary educational attainment to reach EU average would probably lead to a 60% increase in GDP.

3.2.5. The impact of *Employment rates of recent graduates* (economically active population) on *GDP*

According to EUROSTAT, in 2015, the percentage of economically active population[2], age class 20-64 years, in Romania, was lower (66%) than EU average (70%). The government target is to reach 70% until 2020[3]. As for the economically active population, age class 30-34 years, the percentage (78%) is higher than EU average, i.e. 77.7%, for the age class 25-29 years – above EU average (72.1% as compared to 72%), while for the age class 15-19 and 20-24, the percentage is below EU average.

$$PIB = 532 * Grd\_ocupare - 519003$$

(906) *(1321651)*

$$R^2 = 0{,}41$$

and, respectively,

$$lnPIB = 2{,}44745 * lnGrd\_ocupare - 5{,}78455$$

(2.49) (18.12)

$$R^2 = 0{,}10$$

The equations show that Employment rates of recent graduates influence on GDP values is of 41%**.** *A 1% increase in the economically active population would lead to a 2.44% increase in GDP, while a 10% increase would probably trigger a 26.27% increase in GDP.*

3.2.6. The impact of Population by educational attainment level on GDP

According to the OECD survey[4], the public returns to tertiary education are substantially large, i.e. thousands of dollars (on average across OECD countries, the net public return on an investment in tertiary education was, in 2011, 91,036 dollars for a man), not to mention the new jobs created, and the economic development fueled by innovation. Moreover, European Commission's Europe 2020 strategy[5] shows that almost 16 million new jobs will be created until 2020 for young graduates, while unqualified jobs will decrease by almost 12 millions. As a result, the need to invest in higher education is obvious, since the modern society relies on education as a source of economic growth. In addition, life satisfaction level is strongly influenced by education, the survey showing that the gap between graduates and non graduates is 18%.

In addition to these benefits, higher education helps students learn to think more critically, being focused on developing students as individual thinkers in search for the best solution, establishing thus the basis for more social and economic growth. Inclusive education is very important because it supports coherent and sustainable development at social and economic levels, solving the issues faced by all social categories with the help of qualified people.

$$GDP = 53674 * Population - 405081$$

(68743) *(852371.8)*

$$R^2 = 0{,}07$$

and, respectively,

$$lnGDP = 1{,}804858 * lnPopulation + 7{,}518492$$

(1.55) *(3.88)*

$$R^2 = 0{,}14$$

The regression equation (17) shows that *Population by educational attainment level* influence on GDP values is of 7%.

The log-log regression equation (19) illustrates that *a 1% increase in the number of graduates would lead to a 1.8% increase in GDP, during the analyzed period. A potential 20% increase in the number of graduates would probably lead to a 39% increase in GDP.*

3.2.7. The impact of *Enrolment rate* on *GDP*

As for the benefits of investing in education, the same survey[6] shows that one additional year of schooling increases earnings by 8-9%, reduces the probability of being unemployed by 8% and the probability of bad or very bad health or suffering from a chronic long-standing disease by 8.2%. Secondary school graduates earn more than primary or college graduates, i.e. by 25%-31%. Tertiary level graduates earn more than secondary school graduates, i.e. by 67%. The increase in the number of tertiary level graduates from 13.6% to 19%, in 2025 would lead to an approximately 3.6% increase in GDP. Even a slight increase in the number of secondary school graduates,

[2] The percentage of economically active population.

[3] According to European Commission's *Recommendation for a COUNCIL RECOMMENDATION on Romania's 2013 national reform programme and delivering a Council opinion on Romania's convergence programme for 2012-2016* {SWD(2013) 373}, p. 4, available on http://ec.europa.eu/europe2020/pdf/nd/csr2013_romania_en.pdf.

[4] OECD, Education at a Glance 2011: OECD Indicators, OECD Publishing, Indicator A9, p. 166, 2011.

[5] European Commission, *Europe 2020 Strategy*, 2010.

[6] Cost of Non-Investment in Education in Romania, UNICEF and MEN survey.

i.e. from 58% to 59.7%, in 2025 would generate a 0.52% increase in GDP.

According to the same survey, at macroeconomic level, one additional year of schooling leads to an average 12.1% increase in GDP.

$$GDP = 18480 * Enrolment\_rate - 996358$$

(27487) (1839069)

$$R^2 = 0{,}47$$

and, respectively, the log-log equation:

$$lnGDP = 4{,}54648 * lnEnrolment\_rate - 7{,}13556$$

(3.50) *(14.7)*

$$R^2 = 0{,}15$$

The 0.47% coefficient of determination shows that *Enrolment rate* influence on GDP values is of 47%.

The log-log equation (21) can be interpreted as follows: *a 1% increase in the enrolment rate would lead to a 4.54% increase in GDP, during the analyzed period. An alleged 10% increase in the enrolment rate would lead to a 54% increase in GDP*.

4. Conclusions

To analyze the impact of education on Romania's GDP, research using statistical methods to determine specific economic and education indicators was conducted, i.e. based on EUROSTAT data. The analysis presented in this paper clearly illustrates the important role of skilled workforce on economic growth, i.e. the influence of specific educational indicators on GDP values. Thus, increasing levels of educations reduce the probability of being unemployed and increase earnings, which could lead to economic growth.

In conclusion, I believe that, in a constantly changing world, the achievement of the key goals concerning education, included in Europe 2020 strategy as well as in national policies, such as encouraging learning, reducing school drop-out rates, and improving skills, could make our dream that Romania would achieve smart, sustainable and inclusive growth come true.

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THE FUTURE OF GLOBALIZATION

Adrian-Gabriel DINESCU[*]

Abstract

Once humanity had made the necessary technological leaps for promoting fast and easy travel, the acceleration of human endeavors was inevitable. This acceleration has made possible the integration and globalization of national economies, a global economy emerging. Globalization has become a force impossibile to resist and impossible to deny. Globalization has both advantages and disadvantages. The issue that humanity must understand is it cannot be reversed, just its disadvantages reduced or made bearable.

Keywords: *globalization, isolationism, immigration, economic growth.*

1. The birth, past and present of globalization

Globalization has been seen in the last few decades as a real driving force towards social and economic integration creating prospects for the general wellbeing of human kind.

Globalization has been viewed as a force which brings people together primarily through economic prosperity, as it has been considered that economic growth naturally results in a higher standard of living which in turn would end social turmoil and bring forth a new world filled with people being able to really enjoy their lives[1].

However, this utopian viewpoint has been contested by a multitude of reputable authors and also, generally, by a wide range of people which has begun to view globalization as a force of evil.

They highlighted that globalization is not a positive force, because it does not enrich the life of the average individual, but it does only enhance the wealth of multinational and transnational companies which feed upon the needs of underdeveloped countries, depleting them of resources and then moving on, leaving them in a barren state.

Also critics of globalization have claimed that it is the main reason why humanity will lose its direction by propagating global greed and by destroying most of its subcultures, languages and traditions.

An increasing number of scientists, but also regular citizens, consider globalization as the driving force responsible for the destruction of national identity, a force which will destroy the national culture of a country, eliminating everything that differentiates them for the other peoples of the world. Indeed globalization is named by some as "Americanization" simply because many corporations, which are considered to be the first "force" of globalization, are American based. In this "globalized" world, "the strong" shall have much more influence over "the weak" simply because the latter will become more dependent on the stronger culture's products but also ideals which the stronger culture will impose on the less dominant one.

However, after the end of the oil crisis of the 60's and the revival of the neo-liberal doctrine through-out the 80's, 90's and the first decade of the current century, generally, those who supported free-trade and liberal economics were those who had the power both nationally and internationally.

In the 80's, particularly, through the Reagan administration in the US and the through the Thatcher governance in the United Kingdom, the free market became the ruling force in global economics and politics.

This tendency of the free-trade countries to rejoice once again before the spoils of unbridled capitalism, coupled with the tremendous technological discoveries in IT&C at the end of the 80's and the beginning of the 90's spurred the acceleration of global integration and rejection of all trade tariffs and other barriers put forth at the beginning and middle of the 20th century.

The world seemed to be on the horizon of a new age, embodied by a certain economic and social union: the European Union.

Though made up of diverse peoples and cultures, though having a troubled history, primarily, because of economic interest, all these countries came together under the umbrella of a Union which promised not just economic freedom, but also individual rights and freedoms: the freedom to travel without restrictions, to find work in a free manner in any country of the Union, to be able to change residence without restrictions.

Although many would like to view this Union as a result of the enlightened nature of its citizens, the truth is that a few enlightened minds realized that only by joining forces Europe can stand on its own two feet in the globalized market in which giants like the United

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[1] Ion Popescu, Aurelian Bondrea, Mădălina Constantinescu, "*Globalization – Reality and myth"*, Ed. Economică, 2004 in "Globalization in Sub-Saharan Africa", Graduation Thesis, Dinescu Adrian-Gabriel, Academia de Studii Economice, București, 2009, unpublished.

States, China, India and in a lesser degree, the Russian Federation fought for control.

Europe had to come together to avoid being assimilated by other powerful economies and become nothing more than consumer countries, which, on the long term, would lead to major economic problems.

Brilliant and visionary politicians had, thus, prevailed in stifling the isolationist and reactionary movements which tried to prevent European integration. In the last decades these politicians have managed, through no small feats, to persuade the general public, traditionally conservative, that the future of Europe lies in a general European federations.

These politicians have mastered the art of keeping under control the reactionary tendencies of humans and continued on the long road of trying to bring humans together and making them realize that the only way forward is through freedom of trade, open borders for all people and capitals.

2. Globalization : a positive force

Globalization implies that the entire world is one market, an opportunity for all countries to trade in those areas in which they are more efficient than others.

With all the national markets opened, the prices of many commodities will drop significantly and the entrepreneurs will be encouraged to raise efficiency, to create more for a smaller cost. Thus the consumers will benefit to a high extent from the liberalization of the markets. Looking for examples in the past one cannot ignore the growth of China which has opened its borders to outside investment only a few decades ago and which has resulted in a sky-rocketing economy.

Besides the obvious advantages which would result from opening of the national markets to exterior investors, globalization would effectively erase the immense cultural and financial differences between the western world and the majority of the population of the globe which live on only a fraction of the income of European or North-American citizens, most people of the globe currently living on extremely small wages and in very poor conditions.

Globalization generally brings technological development accompanied by sustainable economical growth that would greatly help the poor countries struggling to enter the informational era. Also by expanding alliances between nations and creating structures with more authority that a single state, law, order and peace will regain their rightful position in countries which hace seen terrible afflictions and war for decades in the absence of international intervention and corrupt governments or governments unable to impose law upon its citizens because of the lack of legislative tools. For example the African states (Somalia, Zimbabwe) would benefit a great deal from outside support to impose their laws, having great difficulties struggling with factions hoping to destabilize their countries. Making the country part of a greater structure will significantly increase the "force" of the state, as Francis Fukuyama[2] calls it.

Globalization is seen by many as an unstoppable force. Once set in motion at the half of the 20th century all countries will be forced to take measures to become integrated in the global economy, under pains of being left behind for good.

Lately, a lot of leaders have sought to express their regret and disbelief towards globalizations, but few of them dared to challenge its supremacy.

Most leaders who support liberal economic thought encourage the expansion of globalization because of it's the many advantages it brings forth for a nation.

Firstly, globalization creates the premise of intercultural relations, the freedom to express and share ideas. While most of the world languishes in general turmoil (most of the world still is firmly underdeveloped in relation to the west) an infusion of new ideas and approaches would be the only solution towards moving the planet along and creating an environment in which problems can be solved.

Also, getting to know other cultures encourages members of a certain society to get to know its own problems and mistakes, what sets it apart from other cultures, what it should preserve and what it should change.

Thus globalization leads to a rise in awareness of global issues which require global solutions.

Secondly, globalization promotes IT&C, facilitating the entire communication process between peoples and individuals, promoting, most of all, basic human rights.

People want to communicate with each other, they want to know other cultures. The internet, the globalization of the means of communication and the significant reduction in cost has permitted people to travel with unprecedented ease. All these advantages stem from globalization, and, at the same time, they enhance and accelerate it.

2.1. Globalization feeds itself and is unstoppable.

Thirdly, globalization has massively improved international exchange promoting the free flow of capital towards areas which most need it.

For example, after they were released from the colonial yoke the African countries found themselves with important natural resources, but devoid of money and knowledge to exploit these resources. Thus they chose either to privatize these resources or to loan the necessary funds from global financial institutions (IMF[3] etc.).

[2] Francis Fukuyama, *"Construction of states"*, ed. Antet XX Press, Prahova, 2004.
[3] In regard with the IMF policies review also : *How the IMF Promotes Global Economic Stability*, 2016, http://www.imf.org/en/About/Factsheets/Sheets/2016/07/27/15/22/How-the-IMF-Promotes-Global-Economic-Stability.

Furthermore, without the presence of international corporations which were interested in the rich pickings and cheap labor in those countries, the money lent by the international institutions could not the properly used as these countries almost always lacked the know-how to efficiently exploit the resources.

Fourthly, globalization has permitted and encouraged the "brain trade"[4] and internationalized the workforce.

The presence of an international global workforce has encouraged efficiency and collaboration between experts in all fields thus raising the standard of living of these people involved in international trade, but also improving the possibility of students to get to know important technological and economic advances[5].

Freedom of travel for the workforce is a crucial theme in globalization. Most workers come from the developing world and flow towards the developed world, but lately it seems that this trend has reversed and more workers flow towards developing nation which have attracted more and more capital[6].

Most people view this international migration as a positive force, as it allows people from all over the world to gather in extremely efficient think tanks discovering new ways to improve human lives, which, in turn, improves the lives of people left home in the mother-country which in turn gives rise to more and more scientifically astute individuals and thus increasing more and more the development of humanity.

Lastly, globalization has been a powerful force towards the democratization of governments.

Because most people prefer to live a comfortable and developed life, intellectually and economically, as globalizations brings many advantages, the ideas of democracy have entered the consciousness of many nations who don't have a democratic tradition. As capitalism seems to work best with liberal-democracy, and people seek to gain the most out of every endeavor, so more and more voices in oppressed countries have spoken against dictatorial regimes and have tried to empower democratically elected governments to implement liberty and democracy.

Thus, by indulging their egotistical desires, globalization and capitalism have led to the overthrow of authoritarian governments by peoples who sought to enter the global market by creating working competitive economies.

This has, in turn, lead to a significant rise in assuring human rights and promoting individual liberties[7].

Globalization means freedom of movement for all humanity.

Throughout the history of the world, humans tend to migrate, change place, as opportunity arises, seek the best land on which to settle min search of freedom, liberty and happiness.

The richest countries and regions in the world have been those who embraced diversity, the freedom of the individual to exchange ideas, goods and services.

This is a truth we consider to be self-evident. Humanity can only expand if people can come and go according to the interest of society or for their own individual interest.

As societies which ensure freedom of movement will see a greater technological and economic growth than those who stay closed, the latter ones, in time, will suffer economic recession as their technology will become obsolete and will not serve the needs of individuals.

Globalization cannot be reversed as the means of travel have evolved immensely after the industrial revolution. The invention of the steam engine, the internal combustion engine and the latest computer technology make travelling something pleasant, to be enjoyed, rather than something dangerous like it has been since time immemorial.

Since traveling has become such an easy and pleasant affair, many more people become involved in visiting other cultures, learning about them and discussing ideas with people across the world.

This change of ideas outweighs tendencies in the majority of people to seek isolation as these ideas make people realize that they are more alike than they thought and that they have a lot more to gain by being allies than by being enemies.

2.2. Globalization brings peace.

In such a moment of technological, economical and ideological progress, war will become not just undesired, but it will become obsolete, as its consequences will become so dire for individuals (in an increasingly individualistic world) that no one will want to fight wars and sacrifice their lives or their economic achievements.

Also, since more people will come together to discuss ideas, their differences will seem less and less important, and so the likelihood of conflict will reduce.

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[4] AnnaLee Saxenian, *"Brain Circulation: How High-Skill Immigration Makes Everyone Better Off"*, http://www.luys.am/attachments/articles/Brain-Circulation_BROOKINGS-REVIEW_2002_en.pdf.

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[6] This may be proof that the global integration of nations is fully under way. See also : Kathleen Newland, *"Migration as a Factor in Development and Poverty Reduction"*.http://www.migrationpolicy.org/article/migration-factor-development-and-poverty-reduction.

[7] R.E. Howard-Hassmann, *"Can globalization promote human rights?"*, 2010, Google Books.

3. Reactionary movements against globalization[8] and the negative side of globalization

Unfortunately, egotistical tendencies in all humans have dark sides when they are unleashed: extreme nationalism, isolationism, xenophobia.

These tendencies coupled with certain forces: the capitalistic forces of the big companies which, indirectly, have lead people to not trust conservative politicians who tried to force higher goals than just general mindless consumerism, by indulging their primordial needs of pure consumption and through the massive use of pop-culture that encourages a life lived for personal, instantaneous pleasure. Also another significant force has been represented by extremist politicians who gained a significant foothold as a result of people who have an extremely limited view of economic and social sciences, but, as it should be stated, are entitled to be upset because are situated at the painful end of capitalism.

These people feel they have suffered because of immigration, because of open borders which they feel have taken away, on the short term, their livelihood, through the forces of productivity. Also the intense speed of modern and post-modern life, accelerated cultural changes and other similar factors that have pushed people into trying to put an end to all this change.

People saw the ultra-nationalistic movements, the extremist anti-immigrant movements as solutions to complicated problems. These people can't see an end to their self-imposed or even imagined suffering and thus they romanticize the past and try to recreate simpler times.

Unfortunately, globalization, arguably, does have some unavoidable negative aspects. While some countries are able to implement policies to protect themselves again these issues, most cannot and are destined to live with significant burdens in exchange of development.

Firstly, critics of globalization claim that it increases inequality between individuals as it promotes a capitalistic-greed based system - the "get rich fast" mentality.

Countries must ensure the rule of law within their borders and must maintain a healthy judicial system.

If a state is weak then it will attract less foreign capital because entrepreneurs prefer a stable and predictable system in which to invest. A stable and predictable system curtails not only the rule of law, but also low levels of corruption.

This foreshadows a difficult area. Globalization tends, sometimes, to increase corruption in underdeveloped states.

Foreign capital, while it can be extremely beneficial towards the progress of a certain region, can bring devastation to the environment and the inhabitants of that area, when the regulatory body of that country cannot impose efficient constrains on the respective investor.

Entrepreneurs will rightfully try to maximize their investment irrespective of the environment and the locals.

Protecting the lives of people and the environment is not the job of the investor, the capitalist, the corporation which sets up shop in a new area. In the neo-liberal mindset that is the role of the state, the arbiter, to set up rules that everyone must follow under penalty of law.

If there are no rules or these rules are not followed then the capitalist has no obligation to protect either people or environment.

Since most underdeveloped countries lack the judicial system to counter the wealthy multinational companies than it is easy to see why globalization has brought destruction and misery in significant parts of the world.

For example, Nigeria, a developing country situated in the West of Africa has important oil reserves which have produced over the last few decades hundreds of billions of dollars in revenue. But, like a certain study suggests, only a tiny part of these revenues have gone into state coffers, approximately one billion dollars, the rest going to investors and corrupt government officials.

Also Nigeria, being a country full of natural resources, has seen its environment destroyed by greedy entrepreneurs who chose to profit from corruption, bypassing stringent environment regulations.

Thus, for weak states, globalization can actually accentuate poverty, greed and corruption.

Secondly, some claim that globalization represents a trap for numerous undeveloped countries. Trying to find sources of foreign investment to become competitive, these countries fall prey either to greedy investors who, taking advantage of corrupt civil servants, acquire important resources for an insignificant amount of capital, either to international creditors, like the International Monetary Fund which put forth stringent criteria for loans, as well as instating huge penalties when in breach of contract.

Some even claimed that several African countries have been bankrupted exactly by the conduct of the IMF, lending money and imposing severe economic measures which more often cause severe damage for the economy.

Thirdly, in the globalized economy the markets rule and indirectly impose their will on people through the products they promote.

If states involved in the global trade would be equal, have similar levels of development, have advanced judicial systems and state power, have peoples of similar values, then the system would be entirely functional.

[8] R Boyer, D Drache, "States gainst markets: the limits of globalization", 2005, Google Books.

But since states involved in the global trade are extremely different, ranging from small underdeveloped countries with failed economic systems to big capitalist, powerful democratic states, it is evitable that the latter will impose their will and their products.

These big states which have known unprecedented growth throughout the early 20th century now have an advanced lead against the developing world which is forced to accept its cheap products.

Also, these advanced states impose their political will against developing nations and force them to adopt standards, especially concerning environmental protection, that are almost impossible to follow by countries which are barely ”getting on their feet”. Basically, the developed countries impose strict regulations on developing states which prevent them from catching up.

These undeveloped countries are caught in a vicious circle which the developed states prevent them from breaking : they do not have the productivity to compete on the global market with their own products and need foreign investments, but these foreign investments come with a big cost as they stem from the developed countries and also, they cannot catch up as the developed world does not allow them to use high-pollution but cheap technologies which they themselves used at the beginning of the 20th century.

But more or less these voices were initially situated at the fringes of modern society, in an area where usually extremist factions used to sit.

Lately, a huge rise in these tendencies has been recorded, reaching its pinnacle in 2017, after the election by the nation with the highest GDP in the world of a leader who stated he will massively limit immigration, try to impose trade tariffs and barriers meant to “protect” national industries. In a nutshell, a return to the isolationist movement of the early 20th century, which hardly has any chance of improving people’s lives nowadays as it has coincided with an era of economic acceleration and world integration.

As this paper is being written the United Kingdom has declared that it is has initiated procedures in preparation of the withdrawal from the European Union. As the United Kingdom is composed of several states, Scotland, in which most citizens prefer to remain in the European Union, has announced that it will once again try to separate from the United Kingdom in order to remain in the European Union[9].

4. Mistrust of globalization

Thus the present confronts us? Will the European project fail as more and more countries secede? Will the United States of America become an isolationist, anti-immigrant, protectionist country, imposing harsh barriers on the world economy? Will these two major events form a barrier that will hamper world economical growth and bring forth a new form of economic stagnation that will hamper growth for decades to come?

Will globalization fail because of increasing isolationism and xenophobia?

In answering these questions I do believe that globalization is a force that cannot be stopped as humanity has never reverted back to previous states, even though it has had major ups and downs in its development.

I remain essentially an optimist, confident that humanity will always realize that it’s not walls and isolation that facilitated its accelerated growth throughout thousands of years of evolutions, but the collaboration between individuals, peoples, nations, states and federations of states.

Humanity has had its moments which seemed to herald total destruction, moments which apparently would bring the end of civilizations. For example, the fall of Rome seemed for the casual observer as the fall of civilization and it seemed that humanity would never see again the heights of development. Yet, after a long period indeed, humanity, stabilized its self and it began to create works of art even greater than before, to involve itself in technological pursuits with more passion than ever before.

Even in modern times, after the Second World War, humanity seemed on the verge of collapse. Europe lay in ruins, two atomic bombs had been dropped on Japan and bolshevism seemed to be unstoppable. Yet, after only 50 years, most major dictatorships have been overturned, Europe and Japan have reached new heights of technological development, the global GDP has seen a steady increase and humanity now enjoys a long period of peace and stability.

Without a doubt, in my opinion, this tendency of humanity to react with vigor and determination after every “wrong choice” it made is irrefutable.

In spite of the current trends I believe that globalization cannot be stopped, but it can be hampered and its negative aspects can be made to seem extraordinary.

Globalization promotes fast movement of capital around the world. It is very useful for countries who need capital to develop industries, but it is very problematic for states who have reached a certain middle ground – they are not the source of the capital investments, but they are not so underdeveloped that capital flows towards them. In other words it is the paradox of capitalism and globalization that, after the capital has been infused, once a certain level of development has been reached, and the price of the work-force has risen due to economic growth and the extraction costs of resources have become greater due to the free flow of capital, money will tend to leave the respective country and move to another one in which labor is cheaper and resources plentiful, leaving the

[9] For a detalied study on the departure of the United Kingdom from the European Union also see : BBC, Brexit: „All you need to know about the UK leaving the EU” http://www.bbc.com/news/uk-politics-32810887.

population of that respective country, more often than not, in a recession or a stagnation, increasing frustration, forgetting that, at one time, that country was the beneficiary of capital.

But, since economic growth is exponential, the movement of capital cannot be stopped and has accelerated rapidly in the latter decades of the 20th century as more and more countries open their borders seeking the riches that capitalism promises.

Since capital has made several countries extremely rich and thus has permitted unprecedented technological development, other countries which are poorer and less technologically advanced, will not be able to refuse the entry of capital as this would mean accepting technological backwardness.

Thus, the free movement of capital cannot be prevented if a certain country desires to maintain its technological development in relation to other countries.

5. Conclusion

In spite of the latest development, in my view, fears that humanity will spiral into some backward state of isolation and war are unwarranted because globalization is an unavoidable result of the permanent human desire to become part of a bigger, greater structure, as it began millennia ago with the first community and reaching the point of a "global village".

We are simply traversing a period of heightened tension become of many concurring factors: the speed of change, the complexity of change, unprecedented technological development.

Also, the perils of climate changes must not be overlooked as humanity is being presented with a unique challenge, as the consequences of actions of present generations will be felt in 100 – 200 years, a situation for which modern or post-modern man is not really prepared.

Moreover, the capitalistic based system of consumption which we created for ourselves, which must not be mistaken for globalization, cannot sustain such a huge global population, under current conditions, and thus people must impose upon themselves certain limitations. Most people will not suffer these limitations as they consider it their essential right to consume and to enjoy their lives whichever way they want.

But, the fact that humanity will have to learn to limit its desires does not and cannot equal a halting of progress, as the latter can be achieved through sustainable methods which preserve the Earth for future generations as well as satisfy the needs of the many.

This period of heightened tension – a real step backwards – unfortunately, will last 10-20 years in which humanity will try to find its equilibrium and to try to shake these isolationist tendencies as it shook its tendencies towards a communist-socialist type state, very tempting in theory, but horrible in practice.

Unfortunately, humanity does not seem to learn from its mistakes so this period will have to wear its self out. People will have to feel the consequences of their choices, but I do maintain my optimism. The European Union will not secede and the European project will continue towards political integration and the formation, in a generation or two, of the United States of Europe[10].

Also, the United States of America will realize that electing to power politicians who breed mistrust, hate, xenophobia, isolationism and protectionism will not lead to an improvement in the lives of its citizens, but the contrary. After a short experiment in "politics of hate" the American people will undoubtedly wake and realize that future will be in cooperation and globalization.

Of course, this period will cost us dearly: spoiled economic growth, lost technological opportunities and not the least, wasted human lives.

But humanity has always suffered before it realized the error of its ways and this situation will be no different.

The future will reside in a globalized economy, in a globalized humanity.

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ECONOMIC, SOCIAL AND POLITICAL FACTS AND PERSPECTIVES OF 2017

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Abstract

Following the turbulent year of 2016, with deep geopolitical changes, the new year of 2017 promises to be full of challenges in what concerns the economic, social, political and geostrategic area. The key events of the last year (the Brexit, the elections in the USA, the events in Turkey, the force demonstrations of Russia, the situation of the migration wave etc.) shall have an impact on the global economic development and on the repositioning of its main actors. This paperwork intends to analyze the main consequences of the recent events on the short term progress in what concerns the economic, social, political and geostrategic area.

We hereby intend to review the facts and the main potential progress on the economic status of this year which was so complicated, both for the European Union and for every member of it.

Keywords: *geopolitical changes, geostrategy, Brexit, economic status, crisis.*

1. Introduction

The past year represented a troubled period, full of unexpected transformations and developments. The events of 2016 determine any medium and log term assessment to become hazardous and uncertain both from the economic point of view and from the social, political and geostrategic perspective. The economic unions, governments and military alliances which seemed to be unshakable are nowadays on quicksand, making every prediction to be not only uncertain, but even risky.

The basis of good governance is represented by several defining elements, such as[1]:

- The participation of the citizens and the increase of their involvement within the decision-making system;
- The equity and fairness should be the degree by which the laws apply equally to everyone regardless of the social status.
- The decency, the scope being that the rules are established and managed without certain categories/groups of persons being damaged;
- The responsibility, the scope being that the institutional and political actors are seen as being held liable for their decisions and actions by the persons who are affected by such actions and decisions;
- The transparency, the scope being that the decisions which are made and implemented are made available to the citizens. The information has to be clear and accessible to everyone.
- The effectiveness and efficiency, meaning the carefulness applied for the use of human and financial resources.

The functional categories which can be found in every political system and the consequences of which we find reflected in good governance are the following: civil society, political society, government, bureaucracy, economic society and judiciary system. James Madison said (Federalist Paper nr.51) „If men were angels, no government would be necessary". Since we agree that humans are far from the angelic behavior, we agree that we need something or someone to lead us or at least to coordinate the activities (but we must not forget that the main reason for existence of that governance is to serve the man and the community he lives in). „For the first time in our history, in an increasingly multipolar external world, so many are becoming openly anti -European, or Eurosceptic at best", as Donald Tusk wrote in the letter addressed to the 27 leaders of the countries which will remain EU members, after Great Britain will have left the European Union. The president of the European Council proposed the subject of the „internal threat which is connected with the rise in anti-EU, nationalist increasingly xenophobic sentiment". „National egoism is also becoming an attractive alternative to integration", in addition centrifugal tendencies and „the decline of faith of the pro-European elites in political integration, as well as the doubts in the fundamental values of liberal democracy" are other subject proposed by Donald Tusk.

We live in such a society where, in the spirit of the fair political thinking, to admire someone or someone's creation is a blasphemy, because this means that the inequality among people is acknowledged. The idea of awarding prizes for certain merits is also convicted because the rewarding would mean to

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[1] www.anosr.ro/wp-content/uploads/2012/09/4-Ce-inseamna-buna-guvernare.

„insult" and to „under-privilege" other persons[2]. In his book, *„A Study Of Our Decline"*, philosopher Philip Atkinson (n. 1947)[3] stated the following: *By using the excuse of not upsetting anyone, "the political correctness" is demanding that people behave like a fool who would please everyone*[4]*. That everyone must become such a fool! All must accept the notions of the "Political correctness" as a truth. Woe to those who fail to do so! This is the same mentality that inspired the Inquisition and forced Galileo Galilei to recant. The same mentality that inspired the Nazis and lead to the Holocaust. Once the freedom of speech gets placed in the straitjacket of the official truth, then the madness that occurs in all totalitarian states is obtained. Life, both private and public, becomes a meaningless charade where delusion thrives and terror rules.*

British writer Phyllis Dorothy James (n. 1920) stated the following: *„I believe that political correctness can be a form of linguistic fascism, and it sends shivers down the spine of my generation who went to war against fascism"* The USA President, George Bush, stated that: *The notion of „political correctness" declares certain topics off-limits, certain expression off-limits, even certain gestures off-limits. What began as a crusade for civility has soured into a cause of conflict and censorship*. In a speech hold on May 2011, Camilla, Duchess of Cornwall declared: *„political correctness is as severe a form of censorship as any"*[5].

In the spirit of those already announced, we will however venture to analyze events that have already occurred, trying to take a look in the not to distant future starting from the paradigm: we are alone and maybe against all (Great Britain) or we are together in the EU (France) and then we accept. And if we accept, what is the trend and what are we heading to?

2. 2016 was a year marked by major changes

2.1. The European Union had, at least apparently, consistent and flexible public policies, which were adapted to the current situation and which were intended to enable the member states to have periods of social and economic development.

The crisis of sovereign debts and especially the financial crisis of Greece, the crisis of the migration from the Middle East to Europe, especially generated by the civil war of Syria, highlighted rigid European institutional structures, unable to make consistent and fast decisions. The response time and the bureaucracy of Brussels proved to be out of touch with political, economic and social realities, managing to widen the gap between the European citizens and governing institutions. Under these terms, the wave of scepticism towards the European constitution reached a level that has never been encountered in the 60 years since the creation of the Union.

In countries such as France, Italy, Great Britain, Poland, Hungary, Netherlands and others, the feeling of uncertainty, called Euroscepticism, towards the protection granted by the structures of the European Union reached emergency levels. The first country which, by means of its representatives, called the citizens to decide on the staying in or leaving the European Union was Great Britain. At that time, there were few analysts who predicted correctly the outcome of British referendum of June 23rd, 2016. By the time of the brexit, very few insiders were aware of the existence of article 50[6] of the Treaty on the European Union, which provides the possibility of a Member State to leave voluntarily the Union.

The waves of migration, the specter of escalation of terrorism, the economic developments, the demonstrations and protests, the vanity of the great European powers on the background of an aggressive policy of Russia[7], all made possible the well known outcome. For the first time in its history, the European Union reduces the number of members by activating article 50 of the Treaty of Lisbon, which is expected to occur by the end of March 2017 (the meeting of Rome of March 25th, 2017 for the 60th anniversary of the Rome treaties establishing the European Community).

After the Second World War, despite the eternal rivalry between France and Germany (France-Russia alliance versus triple alliance Germany, Italy and Austria-Hungary), the German people managed slightly better than the French people to integrate the refugees of Algeria and the Polish people forced to leave Ukraine. If at the beginning of the last century we talked about the concept of the "White man's burden" to civilize the societies considered primitive, nowadays Germany and France are trying together to integrate the massive wave of Arab migrants. If after the war the migrants came from countries with customs, religions or cultures which were somehow similar, nowadays we are facing a completely different situation. In Germany,

[2] Matei Vișinec, O nouă dictatură-gândirea politică corectă.
[3] Political Correctness (From 'Decline Of Ideas' part of 'A Study Of Our Decline' by P Atkinson).
[4] Political correctness and the right to freedom of speech, p. 37.
[5] The A-Z of political correctness.
[6] https://www.consilium.europa.eu/uedocs/cmsUpload/st06655-re02.ro08.doc - *articolul 50:*
(1)Any Member State can decide, according to its constitutional requirements, to withdraw from the Union.
(2) A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
[7] www.caleaeuropeana.ro.

after 20108, 5.8% of the population is represented by the Muslims, in France 7.5% of the population and in Russia 10% and the percentages have increased a lot (at least in Germany) after the wave of migrants in 2015.

What was the cause of this phenomenon? What happened with the changing of the alliances pattern or with the old rivalries? As shown in the previous CKS articles, most migrants come from countries in military conflicts. But why did a part of the Europeans hurry to receive them?

The literature[9]gives contradictory examples on the effects of the migration on the economic and social status of the host country or home country. The positive effect for the host countries would consist in the reviving of the physically and morally worn workforce. Europeans in particular, and maybe all developed countries, are facing

population aging phenomenon, both an aging in terms of the average age and also an aging of customs, traditions and lifestyle. But the negative effects of the migration for the host country would be linked to the changes in what concerns the volume and the structure of the employees and to the lowering of the minimum wage.

Another positive aspect, this time for the home countries (according to Global News Intelligence of February 3rd, 2017) would be the transfers of emigrants (of money and goods) to the home countries. Money transfers are a reliable source of external financing generating a steady income in the home countries of the migrants. Constant revenue encourages the domestic consumption and reduces poverty and increases the standard of leaving. At the same time, skilled workforce migration to more developed regions causes a significant loss of income, a slowing of the development and of the economic growth, the decrease of the productivity and the decrease of the foreign investments in the home country. Furthermore, the emigration of a large part of the workforce from a country results in the increase of the financial obligations (taxes, charges) of the workers who remain in the country, in their capacity of budget revenue supporters.

Furthermore, in conclusion, we can state that an advantage of the host country becomes a disadvantage of the home country of the emigrants, and vice versa, the advantages of leaving the home country in a state of conflict may lead to serious problems, especially security problems for the host country.

Table 1: List of countries by GDP (nominal)

	The list of the World Bank 2015*	Global GDP $ 77,507,491 mil.		The List of the United Nations 2014**	Global GDP $ 73,433,644 mi.l
position	country	GDP (in mil. dollars)	position	country	GDP (in mil. dollars)
-	E.U.	18,460,646	-	E.U.	18,518,430
1.	U.S.A.	17,946,996	1.	U.S.A.	17,348,072
2.	China	10,866,444	2.	China	10,430,590
4.	Germany	3,355,772	4.	Germany	3,868,291
5.	United Kingdom	2,848,755	5.	United Kingdom	2,988,893
6.	France	2,424,682	6.	France	2,889,192
18.	Turkey	718,221	18.	Turkey	798,414

Source: https://ro.wikipedia.org/wiki/Lista_tarilor_în_functie_de _PIB_(nominal)

* „GDP (current US$)". *World Development Indicators*. World Bank. Accessed on July 2nd, 2016.
**„GDP and its breakdown at current prices in US Dollars". United Nations Statistics Division. December 1st, 2015.

2.2. Turkey was, until the summer of 2016, the most solid Western ally in the Middle East and the most modern and developed country of the Muslim area. The proof is the 18th position among the powerful countries of the world by the size of the GDP. Furthermore, Turkey was and is still considered a democratic, secular, unitary, constitutional republic, with an old cultural and historical heritage. Given its strategic location, the developed economy and modernized army, Turkey is classified as a regional power by the politicians and economists worldwide. Turkey has become increasingly integrated by means of the western membership in organizations such as the European Council, NATO, OECD, OSCE and major economies G-20. Turkey began complete negotiations with the EU in 2005, has been an associate member of the European Economic Community since 1963 and reached the customs union agreement in 1995. Furthermore, Turkey promoted the cultural, political, economic and industrial relationships with the East, in particular with the Middle East and the Turkish states of Central Asia, by means of the membership to organizations such as Islamic Conference and Economic Cooperation Organization.

[8] www.gandul.info.
[9] Monica Roman and Cristina Voicu, ASE, Câteva efecte socioeconomice ale migrației forței de muncă asupra țărilor de emigrație, Economie teoretică și aplicativă Vol.XVII 2010 no. 7 pp. 50-65.

By maintaining its pro-Western orientation, the relationships with Europe have always been a central part of Turkish foreign policy. Another defining aspect of the external relations of Turkey was represented by its relations with the USA. Based on the common threats posed by the Soviet Union, Turkey joined NATO in 1952, by ensuring close bilateral relations with the United States during Cold War.

On July 15th, 2016 a failed coup d'etat organized by the Council of Peace, a group of soldiers of the Armed Forces of Turkey occurred in Turkey. The coup was confirmed both by the prime minister and by the president who called the people to street protests. There were certain doubts on the authenticity of the coup attempt: the coup starts in the evening and it is limited to major cities such as Ankara and Istanbul, no member of the government or of the parliament was taken hostage, and the media was not prohibited to broadcast the events. The way the Turkish President benefited from the coup attempt is noteworthy: his popularity increased and he received support in order for his function to be converted in an executive presidency. The consequences of the coup consisted of long lists of arrested persons, including over 2,000 judges, hundreds of thousands of dismissals and generally the removal of undesirable persons or persons disliked by the government.

As shown, the strategic location, the developed economy and modernized army make Turkey a great regional power which managed to stand as a safeguard against the huge wage of migrants coming to Europe. Notwithstanding, the events triggered by the coup d'etat brought forward all the relationships that Turkey hardly established with the European Union. Therefore, the accession process will be particularly difficult and will probably take decades due to the fact that cultural, religious and even attitude disagreements between Turkish citizens and European Union citizens still exist.

2.3. The election year of 2016 of the **United States of America** was initially expected to be a gallop for the health of democratic candidate Hillary Clinton. The most optimistic republican analysts estimated in early 2016 a close race between the democratic and the republican candidate but with a foreseeable victory for former Secretary of State Clinton. Throughout the preliminary elections and the direct campaign between the two final candidates, Hillary Clinton and Donald Trump, most of the polling houses believed that Mrs. Clinton could not lose the race for the White House. With few exceptions, the American media and a great part of the opinion leaders campaigned pro Clinton without anticipating the final outcome. The proof of the unexpected outcome was represented by the street protests of young Americans[10] and the shock wave that hit the planet, the immediate fall of the US dollar by 2% and the losses of Asian stock exchange. Trump drew attention on domestic policy issues, such as illegal immigration, offshoring, on the issue of the American jobs abroad, on the national debt of the United States and Islamic terrorism; all these were important subjects during his election campaign. He launched his campaign slogan "*Make America Great Again*". Furthermore, throughout his election campaign, Trump said that he contemned political correctness[11] trying to return America to its citizens.

Republican representative Donald Trump won the race for White House following the elections of 2016 although he lost the national popular vote with a difference of almost 3 million votes, namely 2.1% of the total votes. After taking over his position, on January 2017, Donald Trump becomes the oldest American president and the first president who did not benefit from a prior government or military experience. Although he is considered arrogant, conceited, populist and sometimes sexist, after a blind test conducted by a group of evaluators, Trump achieved the highest score of all Republican competitors. All those who listened to recordings of texts and speeches unanimously recognized that the use of first person pronoun, the grandness, richness, dynamics and tone, but especially informal type communication were in favor of Donald Trump. Anyway, the election of the 45th US president in the person of Donald Trump means a major change of paradigm after decades of continuity of US policy.

2.4. 2016 revealed, besides many other inconsistencies, the increase of the number of states the governments of which show real pro-Russian sympathies although they are members of the European Union and partners of NATO (Hungary, Slovakia, Czech Republic, Greece and Turkey). Therefore, by means of the presidential elections which occurred last year, Bulgaria and Republic of Moldova also entered the pro-Russian sympathies area. Therefore, the Republic of Moldova risks to move away from the pro-European and pro-Atlantic ideal. Therefore, the cohesion within the European Union and NATO are seriously questioned.

3. 2017 - a year of certainties?

3.1. As of the beginning of 2017 (January) the glooms of the analysts found their resonance in the first measures taken by Trump administration. Therefore, a series of measures were proposed for the protection of American workers and for the restoration of the security and of the rule of law: the renegotiation of the North American Free Trade Agreement, the immediate withdrawal of the United States from transpacific partnership, the claiming of China as "currency manipulator country" at the World Trade Organization (WTO), the annulment of "millions of dollars allocated for the UN " in the program on climate change control and the withdrawal of the United States from the

[10] Przybyla, Heidi M; Schouten, Fredreka (January 22nd, 2017) USA Today.

[11] this policy recommends avoiding forms of expression which marginalize or insult socially disadvantaged persons, disabled persons or those who were discriminated on grounds of gender, race, ethnicity, etc.

"Treaty of Paris"[12]. Furthermore, the limitation of the number of mandates of the officials elected in the American Congress is proposed, as well as the repeal of health insurance program "Patient Protection and Affordable Care Act" or popularly called Obamacare[13] introduced in 2010, program in which millions of Americans signed in order to get access to medical services. In fact, the program meant the existence of a redistributive system whereby young, healthy, good financial persons, who benefited from health insurance paid by the employer were bound[14] to subsidize the elderly, poor health, low income or low paid jobs persons. Furthermore, Trump administration wants the annulment of all Obama decrees. In what concerns the migrants, the new leader of the White House proposes the expulsion of the "two millions of undocumented criminals" and the annulment of the visas for the countries which refuse to take them back. Furthermore, the suspension of visas for "regions affected by terrorism", building a boundary wall on the border with Mexico, financed in full by the Mexicans and the modification of visa regulations. Other proposals provide tax cuts, introduction of customs fees in order to sanction the societies which delocalize their production, consolidation of the army etc.

The new American administration orientations can radically change the trend of liberalization of the international trade of the last 20 years with major repercussions on the upward trend of the economy of the last two, three years.

3.2. Unfortunately, the situation of France before the wave of migrants, which unhappily overlaps a growing and little integrated Muslim population, represented a rebirth of the feelings against Islamist migration, which were somehow dormant over the past 40 years. The terrorist attacks of France and Belgium made the very heart of Europe bleed. Brussels is broken in two and makes the capital of Europe itself to be an extremely unsafe city.

The French presidential elections will be held most likely in two rounds, on April 23rd and May 7th, the legislative elections for the National Assembly will take place on June 11th-18th and for the Senate on September 23rd. According to the polls Marine Le Pen has the best chance to win[15] the presidency of France. The inconsistency comes from the fact that Mrs. Le Pen is known as the leader of far-right party National Front. Mrs. Le Pen believes that the political divisions in Europe are not far-right or far-left but they are classified as "populist and globalist" and she is on the globalist side as the most occidental leaders of the Western world. Notwithstanding, the government program of Mrs. Le Pen provides the waiver of the single European currency and the organization of a referendum on leaving the European Union. The slogan used by Donald Trump which still seems to be of great interest is rephrased by Marine Le Pen: "Give France freedom back and give the people a voice" seems detached from an instruction manual for winning presidential elections.

All these problems encountered by French society which overlap Hollande government which is considered to be the weakest government in the history of the Republic, the proof of this being the data on the significant decrease of the GDP between 2014 and 2015, public deficits in 2017 (-4.7%) and in 2018 (-4.5%), appear to go in favor of Mrs. Le Pen. Another way for France could be the winning of the elections by liberal François Fillon, former French prime minister, who proposes the most drastic austerity program[16]. The former prime minister of Nicolas Sarkozy undertook that, if he is elected president in May 2017, he will implement a saving program of 110 billion Euros in public finances. A third of the expenditure reduction would be on the account of the state budget, 20% from the local collectivities, and the rest from the social security budget (by retirement at the age of 65, the reduction of health costs). In order to achieve these savings, François Fillon promises to abolish 500,000 budget jobs, to raise the retirement age at 65 in 2022, to harmonize the retirement regime, to impose a work program of 39 hours in the budgetary system. For economy recovery, Fillon promises the injection of 40 billion Euros in order to reduce tax burden on the companies and to decrease the taxes for the companies to 25%, all this being financed by an increase of two points of the VAT. The question is if the French accept at least 5 years of austerity, on the one hand, and on the other hand, the simple presence at Elysee palace of a representative of Euroscepticism and of an opponent of the European currency would generate distrust on the international financial markets. Even a potential failure of the referendum which would question the membership of France with the European Community would cause major changes on the community policies.

Regardless of the alternative chosen by the French, on the short term, a solution to the threat of terror (France is under siege as of November 2015 and the siege will be extended until July 2017) and to the risk of economic downturn deepening must be found.

3.3. As of the establishment (1993 after the Maastricht Treaty when the European Economic Community became EU) and until present, EU did not face more controversial parliamentary or presidential election than those occurring this year. Therefore, will the federal parliamentary elections of September 24th of

[12] The Treaty of Paris (the conference of November 30th – December 11th) on the climate changes came into force on November 4th, 2016.

[13] http://adevarul.ro/international/statele-unite/donald-trump-dat-startul-sfarsitului-obamacare-1_5882bdfb5ab6550cb8a304cf/index.html.

[14] The program was mandatory by applying a fine to those who failed or did not want to contribute; http://www.primm.ro/ce-ar-trebui-sa-retina-romania-din-lectia-americana--obamacare_1121.html.

[15] Calea Europeană; Added by Robert Lupitu on 04/02/2017. Saved under U.E. Tags: alegeri Franta 2017, alegeri in franta, alegeri prezidentiale franta 2017, franta, Marine Le Pen, Uniunea Europeana.

[16] https://www.dcnews.ro/fran-ois-fillon-poate-schimba-politica-fran-ei_523145.html.

Germany, bring again to the forefront the concept of "political correctness"[17]? Or will the Germans look around and ask for "a Germany only of Germans"? Germany is the economic engine of Europe's development despite all the problems it has faced in the recent years. It is the first and most powerful European country in terms of the development of macroeconomic indicators (USD 3,355,772 billion in 2015, third place after the United States of America, Japan and China), and the main promoter of migration policy.

German Chancellor Angela Merkel is considered by the German and European public opinion as the politician who opened the gates of Europe for the wave of migration and for its related hazards. The opening of the borders performed by Merkel raised major security issues both in Germany, and across Europe, problems which have not represented such a great danger even since the Second World War. Public opinion saw in these pro-migration measures a lack of analysis and predictability which is difficult to accept in case of an administration with so much experience like the administration of Mrs. Merkel. The almost total overlooking of the danger of increasing terrorist risk, the overlooking of the French experience of over 40 years on the difficulty of integrating Muslim societies in the society of Western values could not be without visible consequences in the polls of popularity of the German cabinet. The premise of Berlin cabinet on the settlement of young labor force shortage by means of Syrian refugees is fundamentally wrong. The model of German society (usually Western) and the Muslim society are and shall be in complete antithesis and their harmonization cannot fit in a reasonable timeframe and without undesirable repercussions. It is hard to believe that a Western, traditional society will easily accept to change its lifestyle and social, moral and cultural values in order to facilitate the integration of the newcomers, with more rigid concepts. It is believed that more than a half of German voters would vote for democratic social chancellor Martin Schulz (twice president of the European Parliament between 2012-2017), compared to 34 percentages for Christian Democratic Merkel. A potential defeat of Mrs. Merkel in September elections would be a clear signal given by the German society on the fact that it does not accept, even for the sake of the economic growth, to abandon its principles and values.

In this context, in full agreement with the Eurosceptics, the economic and political analysts, including the governor of the National Bank of Romania, Mugur Isărescu believe that we are facing great changes of position of the countries before the international trade treaties, which will lead to great economic, political and geostrategic disturbances. The US elections, the British vote for leaving the European Union and the elections which will occur in France and Germany marks the end of globalization, as perceived by now, or at least its orientation to new position, a significant process of the last quarter of century.

Conclusions

A careful historical analysis reveals that as of the French Revolution (1789-1799) and until present, our evolution met in every century an average of three inflection periods which strongly influenced the mankind, changing its horizon of expectation. French Revolution was followed by the decline of the Napoleonic area of 1815, the European revolutions of 1848 and the Franco-Prussian War of 1870, which marked the 19th century. The beginning of the 20th century brings to the fore the First World War (1914-1918), considered a mistake[18], with global repercussions, due to poor decisions made in crucial moments. American author John Stoessinger, global diplomacy professor, considers that the outbreak of the First World War was the direct result of bad decisions made by influential people in key positions at that point in time[19]. People in important areas lacking of empathy and trapped by self-deception made unreal decisions, according to the same author. Later, the Second World War (1939-1945) was marked by the growing of nationalism, racism, German Nazism, Italian fascism and Japanese militarism. The expansionist policy of Germany and Italy, the revisionism of states such as Germany, Soviet Union, Hungary or collective security system promoted by the League of Nations represented elements of instability across Europe. The reconfiguration of the global map (Tripartite Pact, Axis 1936), the decline of Western democracies led to the breaking in two of the Eastern Europe by signing the non-aggression treaty between Germany and USSR of 1939. The next are the revolutions of 1989 which changed the world, by the transfer of power in Eastern Germany (the fall of Berlin wall), Poland, Czechoslovakia, Hungary, Bulgaria and Albania. The violent transfer of power in Romania, the collapse of the Soviet Union, the war in Yugoslavia and the bloody repression of the demonstrations in China meant a return of the people to primitive times, by fault of the world great powers.

The events meant powerful transformations with devastating impact on the economic, political and social life. If we think about the changing of the communist totalitarian regime in the Eastern Europe and the modification of all state structures caused by the establishment of the democracy, privatization of state owned enterprises, private property establishment, the emergence of small business, the change of the commercial partnerships and the attempts to establish a state of law, all these meant several years of failed attempts for a number of states. All these events which

[17] Lind, William S.; Dîrlău, Andrei; Bazon, Irina: *Corectitudinea politică. "Religia" marxistă a noii ordini mondiale*, 314 p, Rost Publishing House, 2015.

[18] Henry Kissinger, Diplomația, BIC ALL Publishing House 2003.

[19] John Stoessinger Why Nations Go to War edition XI, Cengage Learning Publishing House, 2010.

are clearly cyclical make us believe that the history keeps repeating and that we are caught in the whirl of events heading towards something. Furthermore, a recent Freedom hause*20* report points out that in the recent years the European and global democracy has been in real danger due to the accession to power of populist and nationalist groups in countries such as Poland, Hungary, Slovakia, Czech Republic or Serbia. The report stresses potential adverse evolutions, throughout 2017 in Czech Republic, Denmark and USA.

The economic and social environment cannot develop without a strong rule of law, which has no political, social and legislative stability. Domestic investors, and especially foreign investors, expect seriousness and predictability from the decision making bodies of the areas where they want to invest. Militant populism and nationalism can offer neither stability, nor predictability, but unfulfilled promises, major budget deficit and uncertainty. In conclusion, the biggest certainty of 2017 is the uncertainty.

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AMOR FATI: LOVE THYSELF BY BECOMING WHAT YOU ARE! NIETZSCHE ON THE FREEDOM OF THE WILL

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Motto: "*There is no reality except the one contained within us. That is why so many people live such an unreal life. They take the images outside them for reality and never allow the world within to assert itself. You can be happy that way. But once you know the other interpretation you no longer have the choice of following the crowd.*"[**]

Abstract

Nietzsche's distinction between the master and the slave moralities is certainly one of his most notoriously famous moral and political notions. To claim that there are two main perspectives on the world, one belonging to the accomplished, the other to the unaccomplished side of humanity and, moreover, that the last two millennia of European alleged cultural progress constitute, in fact, nothing more than the history of the progressive permeation of our entire Weltanschauung, of our very values, thoughts and feelings by the so called slave morality, while all the more finding the virtue of this process in a future self-demise of this entire decadent cultural and human strain, is something that has shocked and enraged most of the ideological philosophers ever since. As such, at a certain moment, despite their substantial doctrinaire differences, almost everybody in the ideologized philosophical world, would agree on hating Nietzsche: he was hated by the Christians, for claiming that "God is dead", by the socialists for treating their view as herd or slave mentality and denying the alleged progressively rational structure of the world, by the liberals much on the same accounts, by the 'right wingers' for his explicit anti-nationalism, by the anarchists for his ontological anti-individualism (i.e. dividualism), by the collectivists for his mockery of any gregarious existence, by the capitalists for his contempt for money and the mercantile worldview, by the positivists for his late mistrust in science and explicit illusionism (i.e. the notion that illusions are a necessary fact of life). However, being equally resented by all sides of the political, moral, theological and epistemic spectra might indicate that one is, if not right, or unbiased, at least originally and personally biased. Any view that coherently achieves such form of specific equal contestation, especially one that has so robustly continued to do so for more than a century, deserves some consideration.

Keywords: *Nietzsche, ideology, Will, power, individualism*

Tellingly Nietzsche did not write systematically or, if he did, not in the manner long established by the rationalist-empiricist tradition. As Heidegger would later on put it, there is as much to be considered about what Nietzsche did not write, but can be read between the lines, as it is about what he did write[1]. Nietzsche leaves many of his tracks of thought partially unspoken, thereby allowing his reader to complete and fulfill them for him-/herself. I take it to be some sort of show of respect on his part in allowing his reader to partake in the making of the *thought-trail,* i.e. becoming an author him-/herself. *To each his own!* and as *there are no facts, only interpretations*, there are only *definite,* but no *definitive*, *stone carved* writings.

Nietzsche writes aphoristically and, many times, all the more, in riddles. I think this is a good starting point, given that *the way* he writes, that is *exposes* himself to his reader, offers a most concrete and intimate glimpse into the meaning of *what* he has to say about things such as the Self, the will, freedom, character, fate, responsibility.

Why didn't Nietzsche write *systematically*, that is within a fixed, explicit, closed, coherent and, supposedly, all-encompassing logic-argumentative structure? Basically because he thought that much of what comes to one's mind is determined by how one feels. In other words, how one views things, *the matter and its points*, so to say, depends on a set of circumstances which, for the most part, are beyond the reach and control of consciousness, but that, on the other hand, greatly reflect upon what is being thought and, ultimately, expressed. I am talking here not only of our so called *inner*, *deep* unconscious thoughts, feelings, or bodily states, but also about *outer* stuff such as the room in which we happen to be in, the weather and, ultimately, the immediate state of the world into which, again, we (or rather *I*) happen to be in. In nuce, what takes part in my every thought? - everything which affects and affected me in one form or another, at one time or another, that is *everything that I am*! Quite obviously, our ability of taking into account everything that determines us *when doing the thinking* and, all the more, consciously and explicitly integrating it into what is being thought and expressed is greatly limited, to say the least. We cannot *think* and *speak the Whole*, as Hegel would want it, at least not according to Nietzsche.

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[**] Hesse, Hermann, *Demian*, Fischer Verlag, 1923.

[1] Heidegger, M., „Wer ist Nietzsches Zarathustra?", Gesamtausgabe B7, (Frankfurt am Main: Vittorio Klostermann), 2000, pp. 99-126.

"With regard to the superstitions of logicians, I shall never tire of emphasizing a small, terse fact, which is unwillingly recognized by these credulous minds – namely, that a thought comes when 'it' wishes, and not when 'I' wish; so that it is a perversion of the facts of case to say that the subject 'I' is the condition of the predicate 'think'. *One* thinks; but that this 'one' is precisely the famous old 'ego', is, to put it mildly, only a supposition, an assertion, and assuredly not an 'immediate certainty'. After all, one has even gone too far with this 'one thinks' – even the 'one' contains an *interpretation* of the process, and does not belong to the process itself. One infers here according to the usual grammatical formula – 'To think is an activity; every activity requires an agency that is active; 'consequently…'[2].

Psychological considerations

As such, consciousness is, along with its every thought, a product of its circumstances and, as long as it cannot wholly calculate and determine them, it cannot honestly claim to think and express itself beyond such circumstances, much less beyond and above any circumstances whatsoever, as traditional rationalist-empiricist systematic philosophy would have it. Acknowledgedly, everything is, according to Nietzsche, a *matter of perspective*:

"In prison – My eye, whether it be keen or weak, can only see a certain distance, and it is within this space that I live and move: this horizon is my immediate fate, greater or lesser, from which I cannot escape. Thus, a concentric circle is drawn around every being, which has a centre and is peculiar to himself. In the same way our ear encloses us in a small space, and so likewise does our touch. We measure the world by these horizons within which our senses confine each of us within prison walls. We say this is near and that is far distant, that this is large and that is small, that one thing is hard and another soft; amid this appreciation of things we call sensation – but it is all an error *per se*! According to the number of events and emotions which it is on an average possible for us to experience in a given space of time, we measure our lives; we call them short or long, rich or poor, full or empty; and according to the average of human life we estimate that of other beings, - and all this is an error *per se*!

If we had eyes a hundred times more piercing to examine the things that surround us, men would seem us to be enormously tall; we can even imagine organs by means of which men would appear to us to be of immeasurable stature. On the other hand, certain organs could be so formed as to permit us to view entire solar systems as if they were contracted and brought close together like a single cell: and to beings of an inverse order a single cell of the human body could be made to appear in its construction, movement and harmony as if it were a solar system in itself. The habits our senses have wrapped us up in a tissue of lying sensations which in their turn lie at the base of all our judgments and our 'knowledge' – there are no means of exit or escape to the real world! We are like spiders in our own webs, and, whatever we may catch in them, it will only be something that our web is capable of catching"[3].

On the other hand, to say that we lack complete control over the determinant circumstances of our thought process is not to say that we completely lack control over them. We can, to some extent, choose the way we *react* to our circumstances. To what extent? To the extent we have one or several perspectives thereon. In other words, given that each new set of circumstances provides a new perspective, the more diverse the circumstances we go through, the more diverse the perspectives and therefore the wider the scope of our potential reactions - the more diversified the circumstances, the broader our perspectives and ways of reacting to them.

Moreover, if it is *the habits of our senses* that *have wrapped us in a tissue of lying sensations which in turn lie at the base of all our judgments and knowledge*, coming to know those habits and their eventual change can lead us to a more self-aware perspective on things. I think we can understand Nietzsche's notion of *character* precisely in this sense, i.e. as a set of *habitual perspectival proclivities derived from one's recurring biographic, ontogenetic, genealogic and ultimately phylogenetic circumstances*. I furthermore hold that this is also his understanding of the ancient notions of *Moira* (gr.) or *fatum* (lat.), i.e. *fate* - characterial quasi-predetermination of one's perspectives on things, but with an auto-recursive twist: *the eternal recurrence*. But let us not get ahead of ourselves.

One of the many passages which could support such an interpretation is the following:

"Feelings and their descent from judgments – 'Trust your feelings!' But feelings comprise nothing final, original; feelings are based upon the judgments and valuations which are transmitted to us in the shape of feelings (inclinations, dislikes). The inspiration which springs from a feeling is the grandchild of a judgment – often an erroneous judgment ! – and certainly not one's own judgment! Trusting in our feelings simply means obeying our grandfather and grandmother more than the gods within ourselves: our reason and experience."[4].

So, basically, according to Nietzsche, circumstances determine our perspectives, i.e. thought process, both directly, through their *in situ* influence on the thinking subject's body and psyche and indirectly through his/her innate or inured perspectival proclivities (*character*). More specifically, according to my reading of Nietzsche, we mostly react to the *in situ* circumstances on the basis of the *characterial*

[2] Nietzsche, Fr., "Beyond Good and Evil", CW 12, pp. 24-25/Aph. 17.
[3] Nietzsche, Fr., "The Dawn of Day", CW IX, pp. 122-123/Aph. 117.
[4] Idem pp. 41/Aph. 35.

circumstances (which generate a more or less specific *perspective*). The former are mostly undeterminable or, at best, *underdeterminable* with respect to consciousness, i.e. they evolve *behind its' back,* that is without its' being able to notice or control them, the latter, either inherited or inured, are again quasi-uncontrollable with respect to consciousness, given that they are the ones actually making it up and consequently pulling the strings from behind the scene. What room remains there for consciousness and its' so called *personal freedom*? Well, in my opinion, not much, but *some very important some*, which is definitive of the quality of each of our individual destinies.

More to the point, according to my reading of Nietzsche, though inherited, our character is not a fixed, immutable structure of concomitant actual psychological patterns, but a semi-structured bundle of inchoate personal potentialities, each coming to the forefront, i.e. *becoming actual* depending on the *in situ* circumstances. I shall call the former *pseudo-personalities* and the latter *situations*: therefore, each particular (type of) situation evokes a particular pseudo-personality. Each interaction between such situations and pseudo-personalities generates a certain *perspective* which feeds back into the loop. Consequently the more diverse the circumstances, the richer the array of pseudo-personalities revealed and the broader the perspectives *of our Self on itself*. That is why, in fact, I have preferred the apparently odd writing *(in)dividual* when referring to Nietzsche's notion of selfhood, stressing the fact that, to him, each so called *individual* is by no means an undividable unity but rather a *motley bundle* of semi-structured, power driven impulses, inclinations and urges greatly dependent on contingent circumstances.

As such, according to my reading of Nietzsche, our freedom would lie in (i) acknowledging this fact (avoiding self-delusion), (ii) mindfully taking hold of oneself along this process, i.e. *knowing one's character* in its' specificity, (iii) letting it happen, i.e. accepting one's character in its specificity and (iv) potentiating it, i.e. allowing for new, or even fringe circumstances to take place in order to evoke new pseudo-personalities and consequently new, *broadened* perspectives. In so doing, one eventually *edifies one's character* in both meanings of the word, i.e. *illuminates* and, at the same time, *builds* it. Apparently, for Nietzsche, just as for Robert Frost, *freedom lies in being bold*: the boldness in exposing oneself to the waves of contingency and, in the midst of such turmoil, taking hold of and affirming oneself in one's *uncanny peculiarity*. When all this becomes second nature, a fifth, very special aspect of freedom may supervene i.e. that of choosing, to a relatively limited extent, one's circumstances and incumbent perspectives. In fact, I understand Nietzsche's notion of Overman [Übermensch] precisely as such a being (*and way to be*) in the case of which the possibility of choosing both circumstances and perspectives is maximally developed. However, the emergence of this fifth aspect of freedom is something by no means certain, only probable, at best, that moreover, once attained, can always be lost and which, in fact, at some point or another, usually is. By no means, according to Nietzsche, can freedom be viewed as some innate (and therefore inalienable) feature of individuals – correspondingly, it is not something that can be protected, or guaranteed by a law, much less by one based on *generic equality*, as the liberals would have it. More on this later on.

I think Aphorism 119 in *The Dawn of Day* is especially revealing in this respect:

"EXPERIENCE AND INVENTION. – To however high a degree a man can attain to knowledge of himself, nothing can be more incomplete than the conception which he forms of the instincts constituting his individuality. He can scarcely name the more common instincts: their number and force, their flux and reflux, their action and counteraction, and, above all, the laws of their nutrition, remain absolutely unknown to him. This nutrition, therefore, becomes a work of chance: the daily experiences of our lives throw their prey now to this instinct and now to that, and the instincts gradually seize upon it; but the ebb and flow of these experiences does not stand in any rational relationship to the nutritive needs of the total numbers of the instincts. Two things then, must always happen: some cravings will be neglected and starved to death, while others will be overfed. Every moment in the life of man causes some polypous arms of his being to grow and others to wither away, in accordance with the nutriment which that moment may or may not bring with it. Our experiences, as I have already said, are all in this sense means of nutriment, but scattered about with a careless hand and without discrimination between the hungry and the overfed. As a consequence of this accidental nutrition of each particular part, the polypus in its complete development will be something just as fortuitous as its growth.

To put this more clearly: let us suppose that an instinct or craving has reached that point when it demands gratification, - either the exercise of its power or the discharge of it, or the filling up of a vacuum (all this is metaphorical language), - then it will examine every event that occurs in the course of the day to ascertain how it can be utilized with the object of fulfilling its aim: whether the man runs or rests, or is angry, or reads or speaks or fights or rejoices, the unsatiated instinct watches, as it were, every condition into which the man enters, and, as a rule, if it finds nothing for itself it must wait, still unsatisfied. After a little while it becomes feeble, and at the end of a few days or a few months, if it has not been satisfied, it will wither away like a plant which has not been watered. This cruelty of chance would perhaps be more conspicuous if all the cravings were as vehement in their demands as hunger, which refuse to be satisfied with imaginary dishes; but the great majority of our instincts, especially those which are called moral, are thus easily satisfied, - if it be permitted to suppose that

our dreams serve as compensation to a certain extent for the accidental absence of 'nutriment' during the day. Why was last night's dream full of tenderness and tears, that of the night before amusing and gay, and the previous one adventurous and engaged in some continual obscure search? How does it come about that in this dream I enjoy indescribable beauties of music, and in that one I soar and fly upwards with the delight of an eagle to the most distant heights?

These inventions in which our instincts of tenderness, merriment, or adventurousness, or our desire for music and mountains, can have free play and scope – and every one can recall striking instances – are interpretations of our nervous irritations during sleep, very free and arbitrary interpretations of the movements of our blood and intestines, and the pressure of our arm and the bed coverings, or the sound of a church bell, the weathercocks, the moths, and so on. That this text, which on the whole is very much the same for one night as another, is so differently commented upon, that our creative reason imagines such different causes for the nervous irritations of one day as compared with another, may be explained by the fact that the prompter of this reason was different to-day from yesterday – another instinct or craving wished to be satisfied, to show itself, to exercise itself and be refreshed and discharged: this particular one being at its height to-day and another one being at its height last night. Real life has not the freedom of interpretation possessed by dream life; it is less poetic and less unrestrained – but is it necessary for me to show that our instincts, when we are awake, likewise merely interpret our nervous irritations and determine their 'causes' in accordance with their requirements? That there is no really essential difference between waking and dreaming, that even in comparing different degrees of culture, the freedom of the conscious interpretation of the one is not in any way inferior to the freedom in dreams of the other ! that our moral judgments and valuations are only images and fantasies concerning physiological processes unknown to us, a kind of habitual language to describe certain nervous irritations? That all our so-called consciousness is a more or less fantastic commentary of an unknown text, one which is perhaps unknowable but yet felt?

Consider some insignificant occurrence. Let us suppose that some day as we pass along a public street we see someone laughing at us. In accordance with whatever craving has reached its culminating point within us at that moment, this incident will have this or that signification for us; and it will be a very different occurrence in accordance with the class of men to which we belong. One man will take it like a drop of rain, another will shake it off like a fly, a third person will try to pick a quarrel on account of it, a fourth will examine his garments to see if there is anything about them likely to cause laughter, and a fifth will in consequence think about what is ridiculous *per se*, a sixth will be pleased at having involuntarily contributed to add a ray of sunshine and mirth to the world, - in all these cases some craving is gratified, whether anger, combativeness, meditation, or benevolence. This instinct, whatever it may be, has seized upon that incident as its prey: why that particular one? Because, hungry and thirsty, it was lying in ambush.

Not long ago at 11o'clock in the morning a man suddenly collapsed and fell down in front of me as if struck by lightning. All the women who were near at once gave utterance to cries of horror, while I set the man on his feet again and waited until he recovered his speech. During this time no muscle of my face moved and I experienced no sensation of fear or pity; I simply did what was most urgent and reasonable and calmly proceeded on my way. Supposing someone had told me on the previous evening that at 11 o'clock on the following day a man would fall down in front of me like this, I should have suffered all kinds of agonies in the interval, lying awake all night, and at the decisive moment should also perhaps have fallen down like the man instead of helping him; for in the meantime all the imaginable cravings within would have had leisure to conceive and to comment upon this incident. What are our experiences, then ? Much more what we attribute to them than what they really are. Or should we perhaps say that nothing is contained in them? That experiences in themselves are merely works of fancy?"[5].

Generally speaking, there are two main attitudes one can have with respect to such a state of affairs: one can either acknowledge and *work with(in) it*, or one can deny, or rather cover it up.

As previously mentioned, *working with(in) it* requires one to mindfully acknowledge the supervenience of one's consciousness on circumstances (be it *in situ* or characterial): i.e. to (i) accept it, (ii) to come to know oneself along it, (iii) to potentiate it and to (iv) shape oneself accordingly. The aim of such self-education is *arête* (gr. *excellence*), that meaning, in Nietzsche's interpretation, becoming the best version of one's own specific nature (i.e. character) beyond *common acceptances*. In other words, we cannot create our character, but we can shape, or at least polish it. But in order to do so we must know and accept ourselves, and it is to this process of self-discovery and -assertion to which we should dedicate our efforts (and not to the artificial complacency in various general public models). Why? Because trying to live up to some general, *borrowed* standards of *how one should be* without knowing how someone actually *is*, is first, *imitative*, i.e. *unoriginal*, second, *self-denying*, i.e. fake and third, *futile* as *one cannot* really *be(come) that which one is not*. Not accidentally, one can draw a parallel between such process of *self-realization* and Nietzsche's esthetic ideal of *Apollonian sublimation of the Dionysian*: one has to become the best version of oneself just as a painter in front of the canvass, or, maybe better put, a sculptor working with his wood or

[5] Nietzsche, Fr., "The Dawn of Day", CW IX, pp. 124-128/Aph. 119.

stone: an experienced sculptor does not try to *make anything out of anything*, but, au contraire, suits his envisioned figure to the material at hand by carefully studying the specific underlying configuration of webs and crevices before bringing it to light - accordingly an *accomplished self-seeker* tries to know his/her own fabric before shaping it. Michelangelo famously held that he did not create his David, in the sense of *out of nowhere bringing into existence something which hadn't been there*, but only disclosed and laid bare that which the block of marble had contained in its depths all along - the same goes for Nietzsche's *self-edification of the Self*. As Robert C. Solomon[6] puts it, with Nietzsche it is always the aesthetic perspective which takes the lead: in human Self-edification, just as in art, being unoriginal, fake and impersonal is the worst.

Moral considerations

This is what Nietzsche's project of *self-edification of the Self* would amount to. Esthetically I have characterized it as an Apollonian sublimation of the Dionysian. On moral terms, this would amount to an, again, sublimated, that is *metaphorically transposed* version of the master morality. I think the correspondences are quite obvious:

"There is master morality and slave morality; - I would at once add, however, that in all higher and mixed civilizations, there are also attempts at the reconciliation of the two moralities; but one finds still oftener the confusion and mutual misunderstanding of them, indeed, sometimes their close juxtaposition – even in the same man, within one soul. (…) The noble type of man regards himself as a determiner of values; he does not require to be approved of; he passes the judgment: 'What is injurious to me is injurious in itself'; he knows that it is he himself only who confers honor on things; he is a creator of values. He honors whatever he recognizes in himself: such morality is self-glorification. In the foreground there is the feeling of plenitude, of power, which seeks to overflow, the happiness of high tension, the consciousness of wealth which would fain give and bestow: - the noble man also helps the unfortunate, but not – or scarcely – out of pity, but rather from an impulse generated by the superabundance of power. The noble man honors in himself the powerful one, him also who has power over himself, who knows how to speak and how to keep silence, who takes pleasure in subjecting himself to severity and hardness, and has reverence for all that is severe and hard. (…)"[7].

Quite obviously, there is an important connection between Nietzsche's master morality and his notion of Overman. I think the link between them is his aesthetic ideal – in fact, I hold that Nietzsche's Oveman is the Apollinically sublimated version of his Dionysian master, i.e. one that by knowing, accepting and potentiating one's *character* achieves the freedom of choosing different perspectives on the world and their corresponding circumstances. Of course that, concretely speaking, this is an insurmountable task, but in this, as in very few cases, the struggle *is* its own reward as it illuminates and builds one's character, while at the same time expressing it in forms which are ever more *delicately robust*, that is *essentalized*. Just as a work of art, each Overman is unique and *perpetually unfinished*.

There is however, according to Nietzsche, another form of morality and corresponding psychology: the slave morality and its incumbent *tschandala*[8] character. Being born out of a congenital lack of individual life resources, it is:

1. *self-denying*, i.e. derived from lack of self-respect;
2. *resentful*, i.e. stingily spiteful and envious;
3. *self-dissimulative* i.e. it purports, both to others and itself, to be something other than it is: *objective* morality instead of *will to power* (as it resents master morality for being);
4. *gregarious*, i.e. undiscerningly favoring the common over the specific with respect to both human beings and culture;
5. *exocentrically comparative* i.e. the point of reference of its comparisons (and judgments) is the others, while master morality being *endocentrically comparative* i.e. having as comparative and judicative point of reference the Self – in short, according to my reading of Nietzsche, while the master is preoccupied what *he/she* thinks of him-/herself, the slave's main concern is what the *others* think of him/her. Correspondingly, slave morality has a collective and impersonal notion of *alterity*, while master morality an individual and personal one – in other words, while the master tends to regard the Other as an *other*, as a specific individual, the slave tends to relate to the Other as an *others*, that is as a collective and anonymous entity.

In what follows, two (of the many) relevant paragraphs in this respect: the first from Nietzsche's *Will to Power* regarding the psychological distinction behind the master and the slave moralities (i.e. *the strong* and the *weak will*), the second from *Beyond Good and Evil*, an essentialized analysis of the slave morality (counterpart to the previously quoted passage on the master morality):

"46. Weakness of the will: that is a metaphor that can prove misleading. For there is no will, and consequently neither a strong nor a weak will. The multitude and disgregation of impulses and the lack of any systematic order among them result in a 'weak will'; their coordination under a single predominant impulse results in a 'strong will': in the first case it is

[6] Solomon, Robert, C. & Higgins, Kathleen, M. *What Nietzsche Really Said*, (New York : Schocken Books), 2000.
[7] Nietzsche, Fr., "Beyond Good and Evil", CW 12, pp. 228-229/Aph. 260.
[8] The name of the lowest Indian caste.

the oscillation and the lack of gravity; in the latter, the precision and clarity of the direction."[9].

"260. (…) Supposing that the abused, the oppressed, the suffering, the unemancipated, the weary and those uncertain of themselves, should moralise, what would be the common element in their moral estimates? Probably a pessimistic suspicion with regard to the entire situation of man will find expression, perhaps a condemnation of man, together with his situation. The slave has an unfavourable eye for the virtues of the powerful; he has a skepticism and distrust, a refinement of distrust of everything 'good' that is there honoured – he would fain persuade himself that the very happiness there is not genuine. On the other hand, those qualities which serve to alleviate the existence of sufferers are brought into proeminence and flooded with light; it is here that sympathy, the kind, helping hand, the warm heart, patience, diligence, humility, and friendliness attain to honour; for here these are the most useful qualities, and almost the only means of supporting the burden of existence. Slave-morality is essentially the morality of utility. Here is the seat of the origin of the famous antithesis 'good' and 'evil': - the power and dangerousness are assumed to reside in the evil, a certain dreadfulness, subtlety, and strength, which do not admit to being despised. According to slave-morality, therefore, the 'evil' man arouses fear; according to master-morality, it is precisely the 'good' man who arouses fear and seeks to arouse it, while the bad man is regarded as the despicable being. The contrast attains its maximum when, in accordance with the logical consequences of slave morality, a shade of depreciation – it might be slight and well-intentioned – at last attaches itself even to the 'good' man of this morality; because, according to the servile mode of thought, the good man must in any case be the safe man : he is good-natured, easily deceived. Perhaps a little stupid, *un bonhomme*. Everywhere that slave-morality gains the ascendency, language shows a tendency to approximate the significations of the words 'good' and 'stupid' – A last fundamental difference: the desire for freedom, the instinct for happiness and the refinements of the feeling of liberty belong as necessarily to slave-morals and morality, as artifice and enthusiasm in reverence and devotion are the regular symptoms of an aristocratic mode of thinking and estimating. (…)"[10].

In other words, according to Nietzsche, the fact that the *tschandala* lacks individual resources does not derogate from the finality of his/her will as *will to power* – but he/she will try to make up for this precariousness by adopting a gregarious and dissimulative strategy in this respect: the tschandala develop together an average model of humanity, a common notion of *what it means to be human* thereby covering any (in)dividual specificity and preoccupation therewith: *Human nature is such and such and it must be chosen and willed upon anything calling itself human!*. Obviously, this brings about a process of progressive homogenization of (in)dividuality – basically, the history of this process is, according to Nietzsche, the entire post-Platonic European history: each *human* being, irrespective of any preoccupation with its own specificity, must live up to a certain borrowed set of standards of humanity. This is what I have somewhere else called the *personalist* or *Apollinist* model, basically amounting to the post-Cartesian understanding of humanity according to which each of us is provided *a priori* with the same generic structure: we have a consciousness that is both essentially unitary and immutable which observes and records *outside things and states of facts* (its own body and sensations, events of the world etc.) through its cognitive apparatus. Once *making up its mind* about such things and facts this consciousness has the ability to choose some or other of their potentialities and *will them into existence* by determining its attached body to act in certain ways. In other words, our (common) consciousness determines the world on three levels: bodily, personal and social. Fact of the matter is: history is a product of conscious choice or, if it is not, should become so by eliminating and subjecting everything unknown, indeterminate or pre-given to the rational will of consciousness (which, again, is essentially the same for any human)[11]. All the more, history was also reinterpreted as if it had always been a product of human choice or, more extremely, as inherently and immutably directed towards this goal (as with Hegel). As said, there is no room for anything unknown, mysterious or (in)dividually specific in such a world, no self-search or –discovery – all humans must do is comply to specific, commonly prefabricated standards of *how one should be*. And the trickiest part is that all this is done under the pretense of the so called *ontological aprioricity of human freedom as choice*:

"Error of Free Will.—We no longer have any sympathy nowadays for the concept 'free will': (…) I shall give here simply the psychology behind every kind of making people responsible.—Wherever responsibilities are sought, it is usually the instinct for wanting to punish and judge that is doing the searching. Becoming is stripped of its innocence once any state of affairs is traced back to a will, to intentions, to responsible acts: the doctrine of the will was fabricated essentially for the purpose of punishment, i.e. of wanting to find guilty. The old psychology as a whole, the psychology of the will, presupposes the fact that its originators, the priests at the head of ancient communities, wanted to give themselves the right to impose punishments—or give God the right to do so ... People were thought of as 'free' so that they could be judged and punished—so that they could become guilty

[9] Nietzsche, Friedrich, *The Will to Power* (New York: Vintage Books), 1968 pp. 28/Aph. 46.
[10] Nietzsche, Fr., "Beyond Good and Evil", CW 12, pp. 230-231/Aph. 260.
[11] Approximately along similar lines with what Heidegger would later on call *Ge-stell* (*Enframing*) i.e. the *calculatory preemptive progressive securization of the world* (which he would, though partly, still unjustly, at least in my opinion, impute precisely to Nietzsche).

consequently every action had to be thought of as willed, the origin of every action as located in consciousness (—thus the most fundamental piece of counterfeiting in psychologies became the principle of psychology itself)"[12].

In other words, with the *rise of the tschandala*, freedom was taken for granted as an inborn feature of any human being, with consciousness as its' a priori source. As such, any humanly conceivable action and deed was taken as freely chosen, therefore intentional, therefore *responsibilizable* i.e. as potential ground and rationale for moral reprehension and punishment. Of course that it wasn't necessarily used so with every given occasion, but only with respect to such (in)dividuals which, for one reason or another, did not comply with the standard model of humanity at the time. *In nuce*, the *freedom of the will* as a *doctrine*, constituted a *castigative pretext* rather than an actual expression of the alleged inherent liberty of any human (in)dividual.

Political considerations

Therefrom Nietzsche's critique of all political ideologies supervenient on the doctrine of the freedom of the Will: institutionalized Christianity, liberalism and socialism. In short, his argument points out the fact that all these apparently alternative, but actually collateral, ideological views, along with their correlative political arrangements are equivalent expressions of the so called *herd mentality* typical to the *tschandala* psychology we have previously discussed. The most obvious symptom thereof is that in all their discussions, arguments and debates, individual freedom is made dependent on equality, and that is *universal equality*, which is just another word for *ubiquitous the-same-ness* or, otherwise put, *individual identity*. Contemporary *democratic* society has no room for self-search, -edification and specificity; through its stress on equality reduces any (in)dividuality to the identikit of the *institutionalized individual*.

In brief, the nodal points of his argument are the following:

1. The atomistic generic notion of individual self, understood as individual identity (i.e. *personality*) is by no means a metaphysical truth, but a mere *cultural artifact* historically generated in specific and contingent socio-political circumstances in order to (unconsciously) dissimulate, manifest and legitimate the *power interests* of a certain group within humanity, i.e. the *tschandala*.
2. All of our so called *individual* features and faculties are the byproduct of a long civilizational (pre)history: in particular, the doctrinaire pair individual freedom – individual responsibility is actually the product of the secular disciplination of the (in)dividual through (slave) moral coercion.
3. One's actual *being a person* (especially the capacity for more or less autonomous reflection and action) is, according to Nietzsche not something *a priorily given*, but quite the contrary, involving, as we have seen, constant self-scrutiny, - search, - discovery, - acceptance and – exercise. If one does not go through this, he/she cannot become an (actual) person and, if not constantly continuing to do so, he/she can always lose his/her personhood. As you probably remember, earlier on I have called this *Self-edification*. Such Self-edification depends, among other contingencies, on social practices: the latter can either impair, or potentiate it. They can potentiate it by promoting the preoccupation with and respect for authenticity (including its conflictual aspects, at least to some degree): self-curiosity, - awareness, - honesty, courage and resoluteness. They can impair it, obviously, by instituting *the cult of the common* i.e. *conformism* and the best way to do so is by convincing everybody of *the generic aprioricity of their personhood* i.e. first that they are necessarily born as persons and they do not have to do anything about it, second that the structure of their personhood is the same as all the others' and, consequently, that precisely such common aspects are worth keeping and cultivating.

Which of the two alternative types of social practices characterize contemporary society is quite obvious. Imitative mass education and culture are obvious both symptoms and causes thereof. Besides them, another social feature that is greatly efficient in instituting conformism is the utilitarian cult of money and property, or, in other words, the mercantile worldview which gained ever more ground with the ascent of modern bourgeoisie:

"Danger in wealth. -Only someone who has spirit should possess property: otherwise property is dangerous to the common good. The proprietor, that is, who does not understand how to make any use of the free time that his property could provide for him, will continue forever to strive for more property: this effort becomes his entertainment, his stratagem in the battle with boredom. Thus in the end real wealth is produced from a moderate property that would satisfy someone with spirit: and, to be sure, as the glistening result of spiritual dependence and poverty. But now he appears to be completely different from what his impoverished lineage led us to expect, because he can adopt the mask of cultivation and art: he can buy masks. He thereby awakens envy among those who are poorer and less cultivated -who basically always envy cultivation and do not see the mask in the mask-and gradually prepares the way for a social revolution: for gilded coarseness and histrionic selfinflation in the supposed 'enjoyment of culture' gives them the idea that 'it is simply a matter of money' -whereas it is somewhat a matter of money, of course, but much more a matter of spirit"[13].

[12] Nietzsche, Fr., *Twilight of the Idols*, (New York : Oxford University Press), 1998, pp. 31-32/Aph. 7.
[13] Nietzsche Fr. *Human All too Human II* CW4, pp. 119-120/Aph. 310.

Money is quantitative and therefore excessive preoccupation therewith *quantitatively homogenizes* any form of qualitative (in)dividual specificity: freedom, exclusively understood as acquisitional liberty does neither reflect, nor promote (in)dividual authenticity (given that *as money*, everything and everyone is the same). Furthermore, by instituting the cult of the ontological freedom of human will and consequently denying, or rather *covering up*, any form of predetermination, be it destinal (*Moira*) or just characterial, modern European culture and civilization, in all its political alternatives, (i) precludes any preoccupation with and discovery of actual (in)dividual specificity and, at the same time, (ii) annuls from the very start any eventual (in)dividual confrontation with and potential liberation from such predetermination.

As such, I do not think Nietzsche is necessarily a fatalist – as you have seen, the adequate attitude provided, freedom is, to some extent, possible (including as *choice*). However, this is something that is (in)dividually gained at the end of much turmoil and not something to be commonly and gratuitously found at the beginning of each existence. As such reducing it to the status of a homogenous inborn feature of humans, along with an eventual correlative political right that is supposed to guarantee and protect it, is about the surest way to lose it:

"My Idea of Freedom.—The value of a thing sometimes depends not on what we manage to do with it, but on what we pay for it—what it costs us. Let me give an example. Liberal institutions stop being liberal as soon as they have been set up: afterwards there is no one more inveterate or thorough in damaging freedom than liberal institutions. Now we know what they achieve: they undermine the will to power, they are the levelling of mountain and valley elevated to the status of morality, they make things petty, cowardly, and hedonistic— with them the herd animal triumphs every time. Liberalism: in plain words herd-animalization... While these same institutions are still being fought for, they produce quite different effects: then they are actually powerful promoters of freedom. On closer inspection, it is war that produces these effects, war waged for liberal institutions, which as war allows the illiberal instincts to persist.

And war is an education in freedom. For what is freedom! Having the will to be responsible to oneself. (…) The free man is a warrior.—How is freedom measured, in individuals as well as nations? By the resistance which must be overcome, the effort it costs to stay on top. The highest type of free men would need to be sought in the place where the greatest resistance is constantly being overcome: a short step away from tyranny, right on the threshold of the danger of servitude. This is psychologically true, if one understands here by 'tyrants' pitiless and terrible instincts which require the maximum of authority and discipline to deal with them—finest type Julius Caesar—and it is also politically true, if one simply takes a walk through history. The nations which were worth something, became worth something, never did so under liberal institutions: it was great danger that turned them into something worthy of respect, the kind of danger without which we would not know our instruments, our virtues, our defences and weapons, our spirit—which forces us to be strong... First principle: you must need to be strong, or else you will never become it.—Those great hothouses for strong, for the strongest kind of people there has yet been—the aristocratic communities such as Rome and Venice—understood freedom in exactly the same sense as I understand the word freedom: as something which one can have and not have, which one can want, which one can conquer..."[14].

I agree with Robert C. Solomon's[15] warning that we shouldn't succumb to the temptation of taking Nietzsche's belligerent language too seriously and include him in the *typical warmonger mentality*[16]. To do so would be to miss the entire point: Nietzsche's is an inner, not an outer war – it is a war between the various inchoate power driven pseudo-personalities within human Self and for the sake of (in)dividual Self-edification. It is greatly different, or even opposed to, actual *army war*. And I ask those who would disagree to consider the following point: Nietzsche's war is a quest for (in)dividual specificity and there is no mass army or mass army war based upon individual specificity, but quite the contrary (the individual dissolves itself in the homogenous mass of the *unit – corp – country*). Nietzsche prefers such language, I think, in order to evoke the tension and turmoil of this inner conflict that demands, ultimately, the same kind of contradictory characterial virtues as *outer war* does: courage, resoluteness, honesty, acceptance, empathy.

Now, aside from that, where does Nietzsche stand politically? Well, first of all, I think it is very ironical that he, being one of the fundamental political thinkers *for* the 20th century, was very skeptical about the capacity of politics in addressing the important issues of *(in)dividual Selfhood*. Now, with that being said, I think his attitude changes over time from some sort of *epistemic aristocratism* to sheer anarchism (though he would most certainly have resented such qualification). Aphorism 318 in *Human, All too Human* is relevant in the former, *aristocratic*, respect:

"Of the mastery of those with knowledge. -It is easy, ridiculously easy, to set up a model for electing a legislative body.

First, the honest and trustworthy people of a country, those of them who are also masters and experts in some field, would have to separate themselves out, by having a nose for and reciprocally acknowledging one another: from them, in turn, in a narrower vote, those who are the experts and knowledgeable people of

[14] Nietzsche, Fr., *Twilight of the Idols*, (New York : Oxford University Press), 1998, pp. 64-65/Aph. 38.
[15] Solomon, Robert, C. & Higgins, Kathleen, M. *What Nietzsche Really Said*, (New York: Schocken Books), 2000.
[16] As for example Bertrand Russell does.

the first rank in each individual area would have to select themselves, likewise by reciprocally acknowledging and guaranteeing one another. If the legislative body consists of them, then, finally, only the votes and judgments of the most specialized experts must decide each individual case, and the sense of honor of all the others must be large enough and have simply become a matter of decency, to leave the vote to the former alone: so that in the strictest sense the law would proceed from the understanding of those who understand the best.

At present, parties vote: and for every such vote there must be hundreds of people whose consciences are ashamed-those who have been badly taught or are incapable of judgment, those who repeat others' words or follow along or are carried away by passion.

Nothing degrades the dignity of a new law as much as the blush of dishonesty that adheres to it under the pressure of every party-vote. But, as I said, it is easy, ridiculously easy, to set up something like this: no power in the world is strong enough at present to bring about anything better-unless, that is, the belief in the supreme utility of science and of those with knowledge were finally to enlighten even the most malevolent and to be preferred to the now-reigning belief in numbers. Mindful of this future, let our watchword be: 'More respect for those with knowledge! And down with all parties!' "[17].

I think the passage is explicit enough no to require any further clarification. The only point I want to make in this respect is that it is, again, ironical that despite his explicit anti-Platonism, Nietzsche's political regime, at least at that phase of his thought, resembled Plato's precisely in its most fundamental aspect: *epistemic aristocratism*. And if so, it is precisely Nietzsche's arguments against Plato that could be adapted against this type of political view. One of the arguments could go as follows: provided that Nietzsche is right and the last two millennia or so of European history constitute nothing more than a long process of permeation of our entire worldview by the slave morality, it would be naive to think that this wouldn't take its toll on the epistemic world as well. Consequently, the so called *experts* Nietzsche is talking about, the members of this epistemic aristocracy to which political participation should allegedly be limited, would be in fact none other than the most accomplished representatives of the slave mentality, i.e. those that excelled at assimilating and promoting the tschandala Weltanschauung. This would be even worse than the current state of facts.

It is maybe such considerations that led later Nietzsche to a somewhat more *anarchist* position:

"On the New Idol. Somewhere still there are peoples and herds, but not where we live, my brothers: here there are states. State? What is that? Well then, lend me your ears now, for I shall say my words about the death of peoples. State is the name of the coldest of all cold monsters. It even lies coldly, and this lie crawls out of its mouth: 'I, the state, am the people.'

This is a lie! The ones who created the peoples were the creators, they hung a faith and a love over them, and thus they served life. The ones who set traps for the many and call them 'state' are annihilators, they hang a sword and a hundred cravings over them. Where there are still peoples the state is not understood, and it is hated as the evil eye and the sin against customs and rights.

This sign I give you: every people speaks its own tongue of good and evil – which the neighbor does not understand. It invented its own language through customs and rights. But the state lies in all the tongues of good and evil, and whatever it may tell you, it lies – and whatever it has, it has stolen. Everything about it is false; it bites with stolen teeth, this biting dog. Even its entrails are false. Language confusion of good and evil: this sign I give you as the sign of the state. Indeed, this sign signifies the will to death! Indeed, it beckons the preachers of death!

Far too many are born: the state was invented for the superfluous! Just look at how it lures them, the far-too-many! How it gulps and chews and ruminates them!

'On earth there is nothing greater than I: the ordaining finger of God am I' – thus roars the monster. And not only the long-eared and the shortsighted sink to their knees!

Oh, even to you, you great souls, it whispers its dark lies! Unfortunately it detects the rich hearts who gladly squander themselves! Yes, it also detects you, you vanquishers of the old God! You grew weary in battle and now your weariness still serves the new idol! It wants to gather heroes and honorable men around itself, this new idol! Gladly it suns itself in the sunshine of your good consciences – the cold monster! It wants to give you everything, if you worship it, the new idol. Thus it buys the shining of your virtue and the look in your proud eyes. It wants to use you as bait for the far-too-many! Indeed, a hellish piece of work was thus invented, a death-horse clattering in the regalia of divine honors!

Indeed, a dying for the many was invented here, one that touts itself as living; truly, a hearty service to all preachers of death!

State I call it, where all are drinkers of poison, the good and the bad; state, where all lose themselves, the good and the bad; state, where the slow suicide of everyone is called – 'life.'

Just look at these superfluous! They steal for themselves the works of the inventors and the treasures of the wise: education they call their thievery – and everything turns to sickness and hardship for them! Just look at these superfluous! They are always sick, they vomit their gall and call it the newspaper. They devour one another and are not even able to digest themselves. Just look at these superfluous! They acquire riches and

[17] Nietzsche, Fr., *Human, All too Human*, CW4, pp. 121-122/Aph. 318.

yet they become poorer. They want power and first of all the crowbar of power, much money – these impotent, impoverished ones! Watch them scramble, these swift monkeys! They scramble all over each other and thus drag one another down into the mud and depths. They all want to get to the throne, it is their madness – as if happiness sat on the throne! Often mud sits on the throne – and often too the throne on mud. Mad all of them seem to me, and scrambling monkeys and overly aroused. Their idol smells foul to me, the cold monster: together they all smell foul to me, these idol worshipers.

My brothers, do you want to choke in the reek of their snouts and cravings? Smash the windows instead and leap into the open! Get out of the way of the bad smell! Go away from the idol worship of the superfluous! Get out of the way of the bad smell! Get away from the steam of these human sacrifices! Even now the earth stands open for great souls. Many seats are still empty for the lonesome and twosome, fanned by the fragrance of silent seas. An open life still stands open for great souls. Indeed, whoever possesses little is possessed all the less: praised be a small poverty! There, where the state ends, only there begins the human being who is not superfluous; there begins the song of necessity, the unique and irreplaceable melody. There, where the state ends – look there, my brothers! Do you not see it, the rainbow and the bridges of the overman?"[18].

One way to reconcile the two positions would be to say that the former, aristocratic one, was for the human, while the latter, anarchist one, for the Overman. In order to clarify this point we have to filter this passage through his main thesis in the *Will to Power*, namely that traditional (tschandala) European culture is essentially life-denying. In being life-denying it is also bound to ultimately undermine itself. Nihilism is not so much the cause, as the symptom of such self-undermining. However hurtful, such self-undermining is a beneficial event in that it brings about the breakdown of an irrecoverably crooked and distorted mode of existence (i.e. thinking, feeling, valuing, acting) along with all its individual representatives. This is not necessarily to be understood as a physical disappearance, but more like some sort of complete depersonalization on their part, leaving behind precisely those who were, or became, independent of such Weltanschauung (or *existential horizon* as Nietzsche calls it). However, everybody needs a Weltanschauung, but in the latters' case they have the capacity for (in)dividually generating their own Weltanschauung, or, in other words, their *perspective on existence*. As you might have guessed, these are the (specifically different) representatives of what Nietzsche calls the Overman: one who can create/choose and self-induce oneself one's own existential horizon, ability gained precisely through such process of self-edification which I have discussed in the earlier part of the paper. In nuce, according to my understanding of Nietzsche, only those who already *became themselves* can survive (as persons) the imminent self-dissolution of the European Weltanschauung. However, given that one's such Weltanschauung is the profound expression of one's actual (in)dividuality and one's (in)dividuality is dependent on one's specific character (and way of coping with it), such (in)dividual Weltanschauungs will also be mutually exclusive. In Nietzsche's vision of the future, each Overman will be *on its own*, that is in its own world: mutual contacts will not be necessarily impossible, but most probably avoided[19]. As such, Nietzsche's Overman is a profoundly (in)dividualistic notion – each Overman is unique, *a species in a world of its own*, this making any eventual notion of an *Overmen community* (be it social, political or racial) a sheer abuse and misinterpretation of Nietzsche's philosophy.

As mentioned earlier, for Nietzsche *Overmanhood* is neither inborn, nor collectively developed, but something (in)dividually, and possibly only provisionally, gained: it is something that one earns on one's own, difficultly and loses easily. This is precisely what sets Nietzsche apart from the anarchists of his time as they, on either side of the political spectrum, share an *a priori*, almost Cartesian, understanding of individuality; according to them one is born an individual, i.e. an unitary island of rational self-awareness and precisely therefore one is entitled to certain inalienable rights that usually societies and states tended to neglect or infringe upon. In Nietzsche's view, this is basically the same argument we can find with both the liberals and the socialists, that postulates the *aprioricity* of individual identity, thereby understood as *universal the-sameness* of all human beings, from which it derives the essential equality of all supposed individuals: no one may be treated differently as everybody is the same – the basic principle of the *herd mentality*.

Nietzsche on the other hand could be called an *a posteriori contingent dividualist*. As we have seen, for him, (in)dividuality is, at least initially, just a *contingent motley bundle of semi-structured power driven tendencies* each seeking to assert itself over the others. However, depending both on the inborn resources of each of these *power drives* and on the general *outer circumstances,* in time, a relatively stable *inner* hierarchy of such drives crystalizes. This is what Nietzsche calls *character*, and consciousness, though still important, is just a tiny fraction of it. Once crystalized, character is rather difficultly changed, at least consciously – this is not to mean that character doesn't change but only that if it does, it mostly does so not by virtue of direct conscious will but rather according to a *will of its own* resulting either from the

[18] Nietzsche, Fr., *Thus Spoke Zarathustra*, (New York: Cambridge University Press), 2006, pp.34.

[19] I think Hermann Hesse's character Harry Haller from his 1927 short novel *Steppenwolf* could be taken as an approximate example in this respect.

inner balance of power among its various drives, or from contingent outer circumstances, or, most probably, from a combination of the two. As such, consciousness can still steer the tide of these inner drives, at least to some degree, precisely by choosing, as much as possible, the aforementioned contingent outer circumstances that feed one drive or another. Basically, this is what Self-education as self-discipline amounts to for Nietzsche. However, in order to achieve it, one must first come to know and accept the making of one's own character and one cannot do so if occupying one's entire existence with the strive for complying with a prefabricated generic model of individuality. This is what Nietzsche has to impute to all the major post-Illuminist ideologies of his age: nationalism, conservatism, liberalism, socialism, (classical) anarchism.

Conclusions

Now, to sum up, our discussion revolved mainly around Nietzsche's notion of character, thereupon focusing on his correlative moral and political view. Obviously, as any conceptual reconstruction, it involved some measure of personal rearrangement of his claims, but in so doing I have attempted, and hopefully succeeded, in remaining (critically) true to his spirit.

To that end, I have devised three sets of interlocked considerations, loosely organized along three axes: psychological, moral and political.

With the psychological considerations I have attempted to provide an account of his notion of character *per se*. I have set about from Nietzsche's particular, i.e. *aphoristic-riddlish*, way of writing, claiming that we can find therein an expression of his specific understanding of selfhood: as the contingent product of two sets of circumstances – (i) *genealogical* and (ii) *in-situ*, both of which remain largely outside the direct control of self-awareness and conscious will. *In nuce*, I think Nietzsche understands selfhood not as an atomic unit of rational self-awareness (as in the Cartesian and post-Cartesian tradition), but as a motley bundle of loosely-interlocked, mostly discordant, power driven vital forces and impetuses that are actualized depending on contingent *in-situ* (i.e. *outer*) circumstances. For the sake of concision I have called the former pseudo-personalities and the latter situations, basically claiming that each (type of) situation evokes a corresponding pseudo-personality that generates a particular *perspective* – the *great absenter* in this game is the traditional *immutable nucleus of self-awareness, or*, in other words, the ego. Its lack however, does not mean the impossibility of any (in)dividual selfhood – though initially lacking, one can be created by a process of, what I have called, Self-edification, involving the long term (in)dividual discovery and cultivation of one's character. What this amounts to, in other words, is the creation of a network between the aforementioned pseudo-personalities precisely through the personal *trial and error* exploration of a wide variety of situations. Nonetheless, this involves, (i) the discovery, acceptance and potentiation of one's specific characterial configuration, mostly irrespective of common preconceptions, be them moral, epistemic or esthetic and (ii) their long term creative cultivation (through human interaction, literary and artistic creation and so on). With some notable exceptions, both these aspects mostly lack, and have actually always lacked, in the European paideic and cultural model, fact leading to the mass creation of impersonal individuals and the imminent breakdown of European culture. The exploration of the causes behind this takes us to the next section of the paper.

Acknowledgedly, according to Nietzsche, the most direct and hurtful expression of the aforementioned individual homogenization is the so called *slave morality*, having behind a particular kind of character and power psychology: the *tschandala* (the ancient Indian name for the lowest caste). Synthetically, the *tschandala*, designates those lacking individual resources, or, in more lay terms, *personality*. As such, despite its subsequent ideological appropriation and abuse, the term was used by Nietzsche not so much as an apriori (racial) label, but rather more harmlessly, namely as referring to the individual unpreoccupied with its own selfhood-specificity, but rather with *fitting in*, i.e. being *commonly accepted*. Based upon my reading of several (partially quoted) corresponding passages, I have determined five generic (interlocked) features, Nietzsche ascribes to slave morality (and tschandala psychology): (i) it is *self-denying*, i.e. derived from lack of self-respect; (ii) *resentful*, i.e. stingily spiteful and envious; (iii) *self-dissimulative* i.e. it purports, both to others and itself, to be something other than it is: *objective* morality instead of *will to power* (as it resents master morality for being); (iv) *gregarious*, i.e. undiscerningly favoring the common over the specific with respect to both human beings and culture; and (v) *exocentrically comparative* i.e. the point of reference of its comparisons (and judgments) is the others (while master morality being *endocentrically comparative* i.e. having as comparative and judicative point of reference the Self).

As such, according to Nietzsche, despite its lack of individual resources, the tschandala psychology is still will to power, only that, given its *personal* precariousness, it resorts to a (self-)dissimulative and gregarious strategy in this respect: it develops a common model of humanity, i.e. of *what it means to be human*, which then it imposes, or rather *institutes*, upon all individuals. The widest cultural expression of this project is the doctrine of the *aprioricity of human personhood* and the freedom of the Will, in other words, that we are all born with the same structure of personality that unmediately manifests itself as freedom in our apparent ability to choose: we are all born as persons, in the same way, and, essentially, there

is nothing we have to do, *no particular choices we have to make*, in order be, or remain, so. Obviously, what the general acceptance of this model precludes is precisely specific Self-cultivation. According to Nietzsche, this is a subjacent dogma of all modern political ideologies (including anarchism), which takes us to the next section of the paper.

In the third section of the paper I have tried to develop a political argument for the previous claims. In other words, I have attempted to provide a Nietzschean interpretation of the major political ideologies of the modern age as alternative avatars of the same homogenization process based upon the interlocked *dogmas* of the (i) aprioricity of human personhood and (ii) the freedom of the Will. In so doing, I have set about from offering an account of Nietzsche's criticism of the mercantile worldview: *Money is quantitative and therefore excessive preoccupation therewith quantitatively homogenizes any form of qualitative (in)dividual specificity: freedom, exclusively understood as acquisitional liberty does neither reflect, nor promote (in)dividual authenticity (given that as money, everything and everyone is the same).* Moreover, the act of buying does neither motivate, nor educate or discharge the creative power of (in)dividuality. As such, *aprioricizing* individuality as (i) rational consciousness and (ii) ontological freedom of the will and then institutionalizing it as (iii) acquisitive option is about the surest way to lose it. And these assumptions constitute, in one way or another, the reference system of all (post-)modern political ideologies, both favorable and opposed to the mercantile worldview. The consequences are clear enough not to require any further clarification.

Nietzsche's opposed project is the Overman, which, despite its ideological appropriation and abuse, is by no means an a priori (racial) label, but a designation for the preoccupation with and achievement of (in)dividual specificity through Self-curiosity, -experimentation, - discipline and cultivation (through both cultural and direct inter-individual interaction) as opposed to homogenizing mass-institutional education and existence. This takes Nietzsche's later view close to post-modern anarchism, maybe closer than even he would have wanted to.

What about Nietzsche's *mistakes*? Well though there is a certain amount of truth to the accusations regarding his misogynism and anti-Semitism, I do not think they form an inextricable part of his thought, but, au contraire, they can be extricated precisely on the basis of his general principles of thought, i.e. by *further Nietzscheanizing Nietzsche*. Despite his radicalism, he most certainly fell prey to some of the common preconceptions of his time and place, but who doesn't? One's incapacity of thinking completely beyond one's existential horizon is, after all, one of his central themes. On the other hand, disregarding and ignoring Nietzsche on such grounds, would mean to deprive ourselves of a most profound and original thought-tool which, among other things, could proof useful precisely in training us to avoid such *uncritical, commonplace truths* to which he himself, though trivially, still unfortunately, succumbed. *…The errors of great men are venerable because they are more fruitful than the truths of little men…*[20].

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CRITICAL THINKING BETWEEN THEORY AND PRACTICE

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Abstract

The paper entitled "Critical Thinking between Theory and Practice" has primarily a theoretical character for it aims at conceptually clarifying several terms whose meaning, though different, overlaps both in common language, as well as in specialized literature. Our paper clarifies the following concepts: "critical thinking", "critical spirit" and "criticism". The first chapter of the paper, besides these conceptual clarifications, also identifies individual and social benefits of critical thinking - when applied in social and political spheres. The second chapter briefly analyses several "corrupted" forms of criticism as we identified them in the Romanian public space, while also pointing out the causes that generate them. The third chapter debates upon the need and strategies to educate critical thinking in Romanian society, as well as the art to protest and to accept justified critics.

Keywords: *critical thinking, criticism, aggression, protest.*

Critical thinking and its benefits

Motto:

The secret of intellectual paramount is the critical spirit; it is the independence of thinking. This generates difficulties that appear impossible to get over to any form of authoritarianism. The authoritarian human being will generally select those who obey, who believe and are sensitive to his/her influence. By doing so, the authoritarian one will surely select mediocre persons because those who protest and doubt will be left over". (K.R. Popper "Societatea deschisa si dusmanii ei'' - [The Open Society and Its Enemies])

Critical thinking: a brief multidisciplinary perspective

Critical thinking has been assiduously tackled in specialized literature because it has drawn the attention of philosophers, logicians, psychologists, sociologists, specialists in philology and politics, etc. However, in social practice, critical thinking is so insignificantly present that it could almost be perceived as nonexistent.

One of the meanings of critical thinking is "the capacity to compare ideas, examine their significance, subject them to a polite skeptic analysis, to weigh them in relation to other opposite points of view, to build argumentation systems that would support and give them coherence and to adopt a position on the basis of these structures. It is a complex process of creative integration of ideas and resources, of re-conceptualization and re-framing concepts and information. It is an active process of knowledge that simultaneously runs at several levels"[1].

Critical thinking does not refer to the accumulation of information, but to the development of the capacity to process information. It is a process which implies analysis, synthesis, and evaluation on the basis of criteria and values – which are assumed by an individual and practiced with art and efficiency (Benjamin Bloom); it also is a way of dealing with and solving problems and it is based on convincing arguments that are coherent and logical, as well as rational. Its main attributes are: clarity, rationality and freedom.

The concept of "critical thinking" firstly imposed itself in the USA and it was apparently used for the first time in 1941 by Edward Glaser in his coursebook: *An Experiment in the Development of Critical Thinking*.

Recently, considering that the term "thinking" is too general and even a bit vague to describe the process of critical thinking, the following terms have been suggested as synonyms: *critical reasoning* or *critical argumentation*; the former attempts to offer reasons for certain convictions and for the evaluation of actions through the ordinary logical means[2] the latter could be applied as a form of critical thinking, which mainly aims at identifying and evaluating daily arguments[3]. The latter does not rely on symbolical, thorough forms of thinking, but rather on the practical aspects of logic; it is a form of logic applied to ordinary thinking, perhaps a sort of training for the argumentative aspects of daily life; it is a logic adapted to the requirements of daily reasoning, as well as to the reasoning process characteristic of certain sciences since "it is an

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[1] OUR CHILDREN AND CRITICAL THINKING: GUIDE FOR PARENTS, p.5; This guide is an adapted form for parents of a set of eight guidelines developed by J. Steele, Meredith K. Ch. Temple and was conducted within the project Grundtvig Learning Partnerships "Linking European families - me, you, us" , funded Socrates National Agency.

[2] Anne Thompson, Critical Reasoning: A Concise Guide, Routledge, London, New York, 2002, p.2, cited .: Marius Dobre, critical thinking. A few guidelines, [PL.vol XVI]. Pdf.

[3] Douglas Walton, Fundamentals of Critical Argumentation, Cambridge University Press,2006, p. xi.

instrument that could be efficiently used to correctly analyze human theoretical activity in any domain in which it would be applied"[4].

Critical thinking does not identify itself with logic – the science of good reasoning/good interference – but it implies logic. "However, critical thinking is more comprehensive in comparison with logic because it does not merely imply logic, but also the true or false nature of utterances, the evaluation of arguments and proof, the use of analysis and investigation, the application of several competences that help us decide to believe or to do something"[5]. Critical thinking interacts with philosophy, psychology, pedagogy, etc. It interacts with philosophy in a dual mode. "Thus, while focusing on argumentation, philosophy acquires the statute of critical thinking, while critical thinking becomes applied philosophy"[6]. "The main characteristic of philosophy, which makes it different from science, is its critical nature. It critically examines the principles applied in science and in daily life; it reveals any inconsistency that might exist in relation to these principles and it accepts it only if the critical investigation did not produce any ground to reject it"[7].

Critical thinking is the main requirement for psychological theories. The American Psychologists Association ("APA") states that arguments or interference are always used when dealing with psychological problems and they make psychologists examine the source of information within a reasoning, even if they are not uttered.

Critical thinking, called by some authors "informal logic", has actually a pedagogical dimension for it is meant to enhance reasoning abilities[8].

In our opinion, the term "critical thinking" is frequently used by specialists in pedagogy (educators) and by the theoreticians of literature. "To many educators, critical thinking means superior thinking; the word "superior" usually refers to the high position occupied in Bloom's taxonomy of cognitive abilities. (...) To the theoreticians of literature, criticism is a thorough approach of a literary text, the analysis of the ideas and especially of the sent message"[9].

Since 1989 specialists in artificial intelligence have become interested in critical thinking, which is based on the logic of argumentation, and have started to make research work, which they coined "non-monotonic logic", whereby they refer to a new operating program for the future computers[10].

Critical thinking, as it is defined in philosophy and social sciences, is clearly different from person-oriented criticism. In the former case, criticism aims at contesting ideas, theories and problem-situations, etc., whereas in the latter case, criticism aims at criticizing a person, a fact which we consider unacceptable. Most often responses given to criticism, labeling, humiliation and condescension are: interruption of communication and relationship, verbal aggression and higher tension. In a society based on the respect for human dignity, person-oriented criticism is unacceptable. We can criticize an action, an idea that another person shares, but we cannot criticize a person for all that he/she is!

Unfortunately, the way in which DEX defines "criticism" does not make this distinction, thus generating real confusion. I am going to give the DEX definition for this terms: "to criticize = "to reveal the shortcomings, errors and imperfections of a person, a work or some situations (revealing the causes and the means to repair them); to appreciate the ethical and artistic value of a work, etc.; to point out in a mean way (or in an exaggerated manner) the weaknesses of a thing or of a person; to comment in a mean way, inventing shortcomings and errors; to gossip"[11]. Since the first meaning of the verb "to criticize" is "to reveal the shortcomings, errors and imperfections of a person …", are we surprised why in informal language, in social practice, criticism seems to have nothing to do with critical thinking? Are we surprised why criticism is mistakenly regarded as a form of person-oriented criticism, defamation, verbal aggression and the humiliation of the rival, etc.?

The benefits of critical thinking

Democracy is a complex world that requires the large participation of citizens in the decision-making process. In my opinion, the development of critical thinking abilities is a *sine qua non* condition for an effective and efficient participation of citizens, who must be able to critically examine social and political contexts, correctly evaluate alternatives and participate in the decision-making processes as persons who are fully aware of their acts. In other words, the large number of persons who adopt a critical (free and responsible) perspective over social and political realities can decisively contribute to the consolidation of democracy through their participation and deliberation, thus leading to the actual democratization of the Romanian society.

The control of those who govern by those who govern remains formal if they lack the ability to process information or to deal with social and political

[4] Petre Bieltz, Fundamentals of Critical Thinking Course distance learning, Maiorescu University, 2005, p. 10.
[5] Lewis Vaughn, The Power of Critical Thinking, Oxford University Press, New York, 2005, p. 4., , apud. Marius Dobre, Gandirea critica. Cateva repere, [PL.vol XVI]. pdf).
[6] George Clitan, Critical Thinking. Micromonograph Publishing Eurobit, Timisoara, 2003.p. 88-89.
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[10] Petre Bieltz, Marius Dobre, critical thinking in psychology, Maiorescu University of Bucharest, 2013, p.12.
[11] DEX '09 (2009) added LauraGellner, https://dexonline.ro.

problems, while using convincing, sensible, logical and coherent arguments. Deliberative democracy comes up with the best debates in order to ensure the best decisions. "The better the quality of a debate, the more legitimate and efficient the decisions are"[12].

Moreover, critical thinking discourages stereotypes, prejudice, discriminating behavior, authoritarian attitudes, while encouraging the responsible information and participation of citizens in social-political life. In other words, the development of critical and free thinking opens the path to the manifestation of the non-discriminating democratic spirit.

Critical thinking brings benefits not only in political life, but also in the economic one. Companies recognize that critical thinking and problem-solving abilities are assets that significantly enhance professional performance. That is why the large companies do not hesitate to invest important sums of money in developing active listening techniques, as well as critical and creative thinking techniques at the workplace.

Last but not least, critical thinking abilities help one understand scientific concepts and theories – no matter the domain that they represent. Besides creativity, critical thinking is crucial for innovation, research and development.

Developing critical thinking abilities is not only a social asset. It is primarily an individual one. To an individual, critical thinking is an essential quality both in private and in professional and civic life. Critical thinking helps a person select information, evaluate it, perceive it critically and creatively, reject irrelevant or false information or decide what is and what is not important, connect different ideas, theories, place in contexts new ideas and knowledge. Critical thinking helps us find solutions to different problematic situations, no matter where they emerge from. Gheorghe Clitan appreciates that "benefits which result from the exercise and development of critical thinking abilities may be identified in at least three domains: persuasion, knowledge and cooperation. Logical abilities which make us accept a belief on the basis of solid argumentation or on the basis of obvious proof may protect individuals from the collateral effects of persuasion (commercials, mass-media manipulation, political promises, etc.). Practicing logical abilities may also lead to enhancing knowledge through reasoning: by inferring new information (conclusions) from previous knowledge (premises), i.e. not by making general and vague assumptions or by producing slogans, common places and thinking stereotypes"[13].

We could state – without exaggeration – that critical thinking helps a person to remain informed while protecting oneself from the information bombing, to develop oneself as a psycho-social being and to discover the ways in which one can capitalize his/her assets in a world which is continuously and rapidly changing.

Corrupted forms of critical thinking in Romanian society

In our collective mentality, there persists a belief according to which one should be critical in his/her relationship with the others, and if one person is not critical, particularly in social and political life, he/she is perceived as being weak, coward, passive and/or naive. On the other hand, a critical attitude is associated with know-how, courage, responsibility, discernment and democratic spirit. If a critical attitude is the result of critical thinking, it is desirable to be used, apart from the situation in which criticism becomes too excessive. As we have already mentioned, unfortunately, in our society there are a lot of persons, i.e. the majority, who associate criticism with critical thinking. Actually, they do not know what critical thinking means, and, if they do, they do not apply it either in social-political life or in their personal relationships. In social-political life, criticism appears as an enemy of critical thinking, as an aggressive way to destroy an enemy. A brief reference to the content of the articles published in the press, of TV talk-shows, street disputes etc., all creates the images of a society that is overwhelmingly full of a negative, offensive and defamatory form of criticism. This form of criticism often becomes a person-oriented attack, while taking different forms like: contesting, defamation, insult, intimidation, media lynching, cyberbullying or Internet harassment, etc.

We are going to make reference to the last two forms of criticism, which, in our opinion, have become quite concerning within the Romanian public sphere.

"Media lynching is a non-journalistic, extremely aggressive, complex and long-lasting action, which is promoted by one or more media institutions that could act separately or not and that act with intention or with vengeance against an individual who is usually a public figure in order to compromise his/her position, to destroy his/her credibility and reputation. The purpose and motivation of a media lynching is the elimination from the public sphere (or simply from a certain position, structure, etc.) of a person who blocks or hinders the satisfaction of a certain interest, be it a private or a group interest; the lynched person may have become a public enemy out of different reasons or interests or simply accidentally"[14].

Media lynching is a media technique that dominates public communication in our country and it is radically different from civilized and respectful dialogue; media lynching is born out of a defamation culture, it is characterized by disrespect for man and

[12] James S. Fishkin, Democracy and Deliberation: New Directions for Democratic Reform , New Haven and London: Yale University Press, 1991; paperback edition, 1993.
[13] George Clitan, Critical Thinking. Micromonograph Publishing Eurobit, Timisoara, 2003, p. 56-57.
[14] Ion Novacescu, Policy sphere, http://www.sferapoliticii.ro/sfera/174/art14-Novacescu.php.

truth and for the diabolic promotion of personal and group interests.

"*Authors of defamation acts*, social agents and actors (famous persons, conscience directors, opinion leaders, journalists, etc.), are a particular category that resort to degrading techniques, whereas *the victims of defamation* are those who refuse to resort to such ignominious acts while remaining the favorite targets of the former ones"[15].

A society in which the authors of media lynching (famous persons, opinion leaders, journalists) continue to "preserve their statute within public life is a society without any direction, in which moral values, reputation and public image are not actually considered civic values"[16].

As to cyberbullying authors (Internet harassing persons) and the above-mentioned media technique, we appreciate that its presence in Romania is really worrying.

Cyberbullying or abuse and harassment via Internet may be found in different forms: verbal aggression, defamation, personal data theft; this is the latest and most serious form of person-oriented attack. Its consequences are devastating, leading to suicide cases, as it happened with some teenagers[17].

Studies have revealed that in Romania the Internet harassment instances amount at one of the highest levels in Europe. Thus, the European average for Internet harassment (cyberbullying) is 19% for children, while in Romania it has reached 41%, i.e. very close to the highest level (which has been recorded in Estonia:43%)[18].

Person-oriented attacks, from contesting a person to media lynching and cyberbullying have in common verbal aggression and/or image distruction.

Verbal aggression is not harmless at all. Psychologists warn about its negative effect, which may amount at the seriousness of a physical or sexual abuse, leaving inner stigmata for good. "Victims of verbal aggression may have a low level of self-esteem, may suffer from anxiety and depression or may have the tendency to harm themselves (…), have attachment issues, feel that nobody understands them, doubt their intelligence, psychical health or even the ability to communicate, may become addicted to alcohol or drugs (…) find it difficult to make decisions, etc."[19]

Specialized literature brings into evidence not only the large range of "malign", "far-fetched" forms of criticism, but also the premises (causes) of criticism, which generate these forms. Without having the intention of exhaustively presenting the causes of these malign forms of criticism, I would like to enumerate the most visible of them.

a) Self-sufficiency criticism. One feels that he/she is all-knowing and that he/she is in possession of the supreme truth, a fact which gives him/her the right to judge everything and everyone. Actually, this is a "malformation of the critical spirit, which results from its manifestation as a form of intelligence. The one who feels smart hits hard!"[20].
b) Criticism results from one's ideological belonging to a certain group or from sharing a certain view: thus, one criticizes anything that those who do not agree with his/her political orientation do or say. In this case, one's only concern is to monitor his/her opponent's presence in public, to exploit their vulnerable points, to put them in an unfavorable situation by misinterpreting their discourses, to destroy their public image and to manipulate public opinion to one's own advantage.
c) Criticism generated by hatred, envy and vanity. A concluding example is offered by the literary critic Alex Stefanescu. In an interview, he refers to the violent reaction and the "devastating" hatred that some of his colleagues manifested after he published "The History of Romanian Contemporary Literature". The discontent of some of these critics – the author says – "was caused by the fact that he did not write about them or that he wrote little about some of them or that he did not praise enough their books. Others were discontent because although he praised their books he also praised writers who were their enemies"[21].

The conceited considers that the system is wrong and must be modified if he is not sufficiently appreciated or if the system does not bring him at the top of the hierarchy.

d) Citicism – an expression of incompetence, ignorance.

Quite often the most ignorant ones happen to be more critical and exigent, intolerant, noisy and self-confident. The noisy incompetent criticizes the others because he is afraid to be criticized. He is the one who starts criticizing. By attacking the first he wants to avoid being criticized. He tries to annihilate the critical spirit of his competitors, letting them dis-incriminate themselves, find proof of his innocence. Unfortunately, the noisy ignorant happens to control the situation, according to the principle: "The one who cries louder

[15] Sergiu Simion –Diary of a psychologist, https://sergiusimion.blogspot.ro/2013/10/mic-tratat-despre-teoria-si-practica.html.
[16] Ibidem.
[17] http://nation.time.com/2013/10/16/a-florida-tragedy-illustrates-rising-concern-about-cyber-bullying-suicides/).
[18] http://www.sigur.info/news/latest/hartuirea-si-abuzul-pe-internet-cele-mai-intalnite-probleme-online-in-romania.html.
[19] Mihaela Gheorghe, How to defend ourselves from verbal aggression, Psyhologies, July 9, 2016, http: //www.psychologies.ro/cunoaste-te/cum-sa-ne-aparam-de-agresivitatea-verbala-2153479.
[20] Andrei Plesu - Sound and the Fury, October 3, 2016, adevarul.ro/news/societate/zgomotul-furia-1.../index.html.
[21] Interview with Alex Stefanescu, http://adevarul.ro/cultura/carti/interviu-alex-Stefanescu-critic-literar-m-am-retras-viata-amoroasa-fost-barbat-1_5286258fc7b855ff56fbcb25/index.html.

is right.". You cannot fail to wonder why competence fails when dealing with incompetence and ignorance. "The well-known effect *Dunning-Kruger* functions in this situation: the ignorant suffers from an illusory superiority, he has no dilemma, while the competent one tends to doubt himself and believe that what he does can be simply done by another person, too"[22]. When the competent one "thinks, doubts and tries to find solutions", the noisy and self-confident ignorant, who has no dilemmas, succeeds in being the first.

A different type of competition (illegitimate, of course) has come up: the one who criticizes the first, no matter if he has arguments or not, no matter if they are grounded or not, appears to be right. Sometimes mass-media plays this game, too.

e) Snobbish criticism. The "Dada spirit" is obsolete, it is cool to criticize, destroy, be against something or someone. These persons, "who appear to be innocent, are <<against>> something or someone because it seems to them that it is <<funny>>: we play a game, we avoid being quiet in the bourgeoisie spirit and we avoid being enlisted. These are the malign forms of the critical spirit''[23].

These reactions are, according to Andrei Plesu, "omnipresent in public life". Finally, agreeing, saying yes to what others say/do is not fun! Not even when what they do or say proves to be of value, especially then. When you are not able to produce, to build something, what else is left to you than criticize what the others have done? How can such a person distinguish himself/herself if not denying the ones that create? They praise themselves by denying the others!

f) Criticism generated by frustration and personal discontent that is oriented against the others. It is more comfortable to criticize the others or to find someone who is "guilty" than to recognize your own failures (wrong choices, insufficient involvement, wrong management of resources, etc.), thus protecting the image you have created about yourself.

g) Criticism – as an expression of intolerance: if you are not like me, if you are different, you are not good, you are "wrong".

h) "The critical spirit is often manipulated as an expression of freedom (…). We have won the right to self-sufficiency and to the arbitrary, we have won the right to care about no rules. I can judge all the others because there is nothing to win or to lose. There are no limits to the language and attitude that I can adopt, so I can capitalize my aggression and nerve"[24].

The right to freedom is seen here from an invalid perspective: it lacks responsibility, respect, virtue and politeness.

Without pretending or intending to deal with this presentation exhaustively, I close here the list of the so-called corrupted manifestations of criticism, as well as of the causes that generate them.

Conclusions:

At the opposite pole: "the art to criticize''and the rules of civilized polemic

In conclusion, we find that, in Romanian society, the dialogue on critical thinking has not yet become common practice. Most often, criticism is manifested as personal attacks, offensive, defamation, harassment so that the enemy of critical thought. This represents a serious obstacle in the way of communication, organizatioale affiliation, problem solving, strengthening participatory democracy. . For this situation to change, it is necessary that the education system to put in the center of its objectives, critical thinking and creative development of children.

Children need to learn early ,, art " to protest, to formulate critically reproofs and the rules of civilisd polemics. If they do not know this ,,art'', even if their criticism is objective and entitled it can generate conflicts, tensions, breaking relationships. Or, if honest criticism, it aims to reduce tensions and not amplification.

The art to criticize – according to Jeanne Signard – means to respect the following rules of behavior: talk to the person you criticize directly and not to another person; talk privately first and only then in public; avoid making comparisons because they may generate, as the case may be, indiference or irritation; protest verbally and not by using mimic, because the latter may be wrongly understood; avoid ironies – sources of annoyance and aggression; be prompt, do not let mistakes accumulate in order not to aggravate a situation; do not mention complaints without solutions repeatedly; do not say you are sorry: when you make a complaint you are not guilty; servilism is not a virtue in our epoch; do not use emphatic words like "always" or "never" because by criticizing you hope to make things right; be straightforward and precise; shape your critics and limit them to what can be changed; describe facts in a concrete manner, without interpreting or trying to identify hidden intentions; describe the negative effects of unsolved complaints; this description does not have to be false or threatening; refer to the system of values that your colocutor has; potential solutions have to show up as positive values to the person whose actions are criticized; bring into evidence the positive aspects

[22] Marcel Cremene, Critical thinking and values selection, 2015 http://www.contributors.ro/cultura/gandirea-critica-%C8%99i-selec%C8%9Bia-valorilor/.

[23] Andrei Plesu - Faces of criticism, The truth, October 19, 2015, http://adevarul.ro/news/societate/chipuri-spiritului-critic-1_56243428f5eaafab2ccd1e90/index.html.

[24] Andrei Plesu - Sound and the Fury, October 3, 2016, adevarul.ro / news / society / noise-anger-1 ... / index.html.

of the situation, as well; do not ask the criticized person to make things that are impossible to him/her and identify an acceptable solution without creating the impression that it is the only one or the best one.

To support our argumentation we also recommend the book *Rules of Civilised Polemics*, published at the Oxford University Press in 1890.

"In any scientific, social and politic polemics, the discussion should confine to the change of ideas and only to those ideas which have affinity with that issue. The parties in polemics use as arguments either scientific theories or concrete facts, relevant in respect of the problem discussed.

The parties do not have the right to bring into discussion the opponent's character, temperament or past, as those neither confirm, nor invalidate the validity of the ideas they assert. The parties do not have the right to discuss the reasons which determine the opponent's ideatic attitude, as he diverts the discussion from the issue itself.

Labeling the opponent by mentioning the thinking school, professional organization or political party he belongs to constitutes a violation of the polemics rules and proves the lack of arguments and weakness.

In a civilized polemics it matters only the arguments brought by the opponent as a person and not as member of a school or organization. You are not right because you are a materialist thinker, an owner or a worker, but only if your arguments are convincing or not."

We have quoted this text with the hope that at least a part of the concepts it presents are going to be considered in the polemics that the Romanian public sphere will witness in the future. We are positive that this will happen thanks to the introduction in the Romanian school of a key objective: the development of critical and creative thinking. As to this objective, we intend to approach it in a future article.

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INNOVATIVE APPROACHES OF PHYSICAL EDUCATION AND SPORT IN CONTEMPORARY SOCIETY

Maria LULESCU[*]

Abstract

In the current era, physical education and sport know similarities, as well as differences to the previous historical periods, but also new, substantial elements, mainly in technology, information and culture. The theoretical background we start to discuss innovative approaches in physical education and sport carried out in educational institutions starts from the outline of essential functions of physical education and sport (Petecel 1980; Carstea 1999; Dragnea 2002).
What are the current aspects and the direction of actions in the coming years? Can we find innovative methods in the pedagogy of physical education, which could turn into basic approaches in schools and universities? This paper examines a series of opportunities of action, taking into account the social and informational changes in contemporary society, covering innovative approaches focused on higher interaction, complementarity and physical education for life.
In conclusion, it is only with the support of new, interdisciplinary pedagogy that we can sustain the modernization and implementation of physical education and sport programmes in the current academic system

Keywords: *physical education and sport, nonformal education, motivation, social interaction, complementarity.*

1. Introduction

People have considered, from immemorial times, that physical education supports a healthy life style. Along many centuries, physical education was necessary to man in his accomplishment of economic or domestic works, as well as cultural ones. Starting with the Industrial Revolution, the case gradually changed, many of the physical works performed in various professions being replaced by increasingly complex machines, tools and devices.

Education represents learning facts, information and getting certain skills; being a complex process, it implies assimilating and understanding elements which the society thinks necessary for the existence in a certain culture and community, both to carry out different occupations and professions, as well as for preserving people's health in general. The culture of this society confirms the values one learns or rejects those which contradict the basic principles of the community each individual lives in. The result is a certain pressure to initiate young member, members of the society, in the element which provide a selective environment, of a clear educational benefit, during their whole life, but not necessarily covering all information which they will continue to get.

Sport knew in the last couple of decades an unprecedented development for the earlier period, after WWII, many of its functions remained constant during this time, even if they were influenced by the historic and social changes brought by modernity. Despite this, we can notice that sport and physical activity new a modernization of its core values, functions or roles it plays in our society.

The current paper tries to find the answers to the following reflection points for an education aiming to have impact upon one's whole life: what are the current specific elements and the directions of actions for the coming period? Can we find innovating directions which turn into fundamental approaches in schools and universities?

Our analysis starts from the main aspects of pedagogy in this area, to which we will explore a few lines of action needed in finding innovative working means. The theoretical background of the paper is based on key contributions provided by researchers such as Stela Petecel who presents elements of tradition coming from the Greek and Roman antiquity (1980), and Adrian Dragnea who details physical education and looks at the role of sport addressing all individuals (2002). The literature to be used in order to bring forward proposals for interactive methods includes, but does not limit to, contributions brought by specialists such as Dan Banciu (2005), Ion Ștefan (2005), Gheorghe Cârstea (1999), Virgil Tudor (2005), Adina Glava (2009) and Monica Stănescu (2013).

2. Key functions in Education and Physical Education

Physical education and sport are part of a long system of traditions and activities which place man in the area of harmony between mind and body, in order to build, educate and shape it for performance, for also in the perspective of lifelong learning, conservation of energy and biologic potential, of techniques specific to individual sports and the ability to cooperate in a team. Through such activities, the individuals preoccupied by sport on a regular basis (speed, resilience, strength,

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spring, mobility and fitness) manage to build a profile during their professional and personal life, to develop cognition skills (perceptions, representations and thinking), as well as volitional ones (courage, initiative, decision, perseverance and patience), coupled with affective ones (feelings and emotions). All of those build one's personality and temperament, shape the psychic and develop needed competencies for a demanding life styles, increasingly stressful for today's man.

Before we explore the way in which education and sport mix with a series of pedagogic perspectives, mainly innovative ones, it is vital to outline the main directions which this activity brought to mankind from the perspective of the functions it plays:

a) Physical functions, particular to this activity compared to other human subjects. Starting from Aristotle, according to whom "It is not necessary to ask whether soul and body are one, just as it is not necessary to ask whether the wax and its shape are one, nor generally whether the matter of each thing and that of which it is the matter are one. For even if one and being are spoken of in several ways, what is properly so spoken of is the actuality"[1] or the idea to take care of the body before one thinks about the soul[2].

b) or the many authors demonstrate the real effects on body and intellect. A related function is the sanitary one. Starting from the age of the Reform, various works of medicine and biology point out the benefice effects of physical education on one's health (such as stimulating growth for children, improving the blood circulation and digestion etc.) In the contemporary age, after WWII, rigorous studies undertaken by Anglo-Saxon researchers in the fifties and seventies proved that people practicing sport are less likely to get an illness and live longer compared to sedentary individuals. Also in the seventies, according to studies done by American researchers, it came out that physical activity can lead to curing certain affections such as tuberculosis, schizophrenia, and others.

c) Cultural function. Physical education and sport have a serious impact on individuals. From the perspective of sport, it makes use of the popularity of sport celebrities to influence people in society, which renders a cultural value, symbolic for this area. Secondly, sport has a demonstrated ability to support social integration and inclusion, from individuals spending their free time within a community where the person can perform physical exercises with other individuals sharing similar interests. Physical education and sport manage thus to make people become friends, or may lead to personal aversion. For the case of higher education, young people manage through the mere participation to physical education to become integrated not only in the group they are assigned to, but in other groups of activities as well, such as fun and entertainment. In addition, physical activity shapes one's body, which provides an aesthetic stimulus and serves human interest to display a harmonious body in front of their community. Modernity transformed the beauty of one's body through physical education in a prosperous economic activity of high impact in society, so that young people are more and more attracted to fitness centres, exercises building their muscles and aesthetically appealing body.

d) Economic function, which could also be named an industrial one, since physical education and sport cannot stay outside the economy of any nation. Physical tasks and sport support the economy of states and are regularly supported through governmental subsidies. This function occupies three main directions: spending, production and labour force. From the perspective of finances, there are both investments, as well as substantial profit from the production of sports items, body building cosmetics and equipment, as well as promotional materials associated to celebrities. Such activities occupy a clear range within a national economy, encouraging young people to take part in activities made popular by local and international stars from professional sports or those who work in bodybuilding, relaxation and physical welfare.

As physical education continues to develop and develop area by encouraging people to work their body, the number and range of research themes in this field significantly widened. Despite such developments, the changes in the way of thinking the teaching and practice in the classroom has not known a smooth route, without obstacles. Taking into consideration that physical education and sport coexist on the two fronts of work – kinesiology and educational research – the work of specialists exploring this area in higher education managed to impact both fields. Physical education remained closed to the pedagogy of adults. Moreover, the pedagogy of physical education and sport in European higher education currently broadens its own profile literature, influencing the class practice in state and private universities[3]. This reference framework is

[1] (De Anima ii 1, 412b6–9) in Stephen Menn, "Aristotle's Definition of Soul and the Programme of the De Anima", Oxford Studies in Ancient Philosophy, v.22, Summer 2002, pp. 83-139.

[2] Stela Petecel, *Antichitatea greco-romană despre sport*, (Bucharest: Editura Sport-Turism, 1980), p. 19.

[3] Educația fizică și sportul în școlile din Europa – Raport Eurydice, Agenția Executivă pentru Educație, Audiovizual și Cultură EACEA, Comisia Europeană, 2013.

united as an educational approach under the concept of "sport for all" used by Adrian Dragnea[4], a motto essential in training students, as well as teachers and instructors of physical education.

3. Pedagogy in Adult Physical Education and Sport

Physical education and sport are at present looked upon as a constitutive component of school education, but also in training adults. From this perspective, specialists have analysed the role of formal education in building positive skills, but also the specific, increasing role of nonformal activities outside the classroom. In addition, recent studies have highlighted the characteristics of methodology and organization in physical education curricula in the Romanian education system[5]. Other researchers[6] note that physical education is integrated as a means to support accessibility and continuity, a social trend with economic and moral impact[7]. Pedagogy, in terms of etymology, comes from the Greek *paidagogia*, which is made of: *pais* = child and *agoge* = to lead, to guide. Pedagogy therefore holds the meaning of "leading a child, or guiding him." Pedagogy is, broadly speaking, the art to support the child towards his own training, to shape personality, according to patterns established by the society.

As a component of education, pedagogy refers to:

- The core and features of education;
- The aim and tasks of education;
- The values and its limits;
- Its content;
- Its principles;
- Its educational process.

In terms of innovation possible in the current educational systems of higher education in various European countries, there are a number of issues meant to enhance the following directions of research and practice:

1. **Interaction between physical education and psychology.** There are numerous researchers who claim that physical education needs the constant support of psychology, that the way in which physical activity takes place has a serious impact not only on the child, but that it will impact the future personality as we desire. The shared space of physical education and psychology places under detach the role of cognition in social sciences, the theory-research-practice approach in institutions of higher education, the role of interventions aiming to stimulate the individual and the perception of motric experience. Such a direction implies the understanding of factors which influence the psychologic and social activity of a person, his/her health development, the leading role of parents, mentors and trainers, as well as working for an objective evaluation[8]. We cannot speak about education solely, but approach the sciences of education which appear as the effect of cross-disciplinary interactions, within which the following disciplines are included: biology (neurologic and physiologic conditioning of child development), psychology (psychologic processes included and impacting learning), anthropology (cultural-historical expressions influencing a human), sociology (conditions and social impact of education), politology (relationships and functionality of educational policies at a certain moment). Thus, the above-mentioned disciplines interact with pedagogy through the set-up of disciplinary constructs. They include, but at not limited to: pedagogic psychology, sociology of education, pedagogic axiology, school hygiene, culture of physical education, international policies across national standards and curricula. They are undoubtedly reflected upon physical education and sport. Some of these connections have been observed several decades ago, but only in the last three decades researchers and practitioners focused their attention in research carried out in institutions with an educational profile, as well as on the debate, resulted from the research, of reflecting on the changes necessary and demanded by the educational environment.
2. **Education and social justice.** Along this direction, recent studies developed the concept of physical education as social interaction. In addition, during competitions for amateurs as well as professional athletes, experts observed that athletic activity leads to building civic skills, in the spirit of fair-play and fairness. This also applies to participants in physical education tasks in higher education institutions, willing to support each other. Those involved in physical activity are generally willing to express their opinion about the way this is designed, communicate in an open way with teachers, and are interested to promote sport among their friends. This new type of individual profile acknowledges the complex relationships operating in sport, become aware of social responsibility and get involved in active ways to spend their recreational time. It is about a number of people with an income from medium to above average who are interested to support deprived people in their community, trying to get a social role in civil society. Physical education as a phenomenon of civic support, of equality, tolerance and anti-discrimination are values fully

[4] Adrian Dragnea, *Teoria educației fizice și a sportului*, ediția a 2-a, revăzută, (Bucharest: FEST, 2002), p. 111.
[5] Monica Stănescu, *Didactica educației fizice*, (Bucharest: Editura Universitară, 2013), p.54.
[6] Gheorghe Cârstea, *Teoria și metodica educației fizice și sportului*, (Bucharest: Editura AN-DA, 2000), pp. 80-81.
[7] Ion Ștefan, *Introducere în sociologia educației fizice și sportului*, (Brașov: Editura Universității Transilvania, 2005), pp. 79-96.
[8] Virgil Tudor, *Măsurare și evaluare în cultură fizică și sport*, (Bucharest: Editura Alpha, 2005), pp. 162-163.

contributing to counteract delinquency and criminality. From this point of view, specialists debated the role of criminality in contemporary society[9], and physical education is one means able to back educational programmes in secondary education and tertiary institutions in order to support a generation able to reject such phenomena.

3. **Education in the modern digital world**. From this perspective, physical education is placed on two main directions: play as physical activity needed to man, as well as the holistic approach. Physical education is no longer cultivated per se, isolated, but adapts to the current needs of people, takes into account stress factors, the impact of daily communication in online media, the willingness to relax, to socialize, but also to support family and extra-family relationships. Physical education in gyms placed in institutions of higher education is enhanced by communication activities and those taking place in fitness gyms and relaxation centres, combined with a healthy caloric consumption and healthy diet, the consumption of fibres and outdoor activities.

The most challenging issue of today's society is the unprecedented technological development, at an explosive rate compared to previous historical eras, in the last two decades, when the revolution of the communication means and digital applications turned into a new revolution. Considering that so much from the life of individuals takes place with the support of the mobile, of computer and software installed on such devices, the interest of people for physical activity, especially outdoor, faced a serious decline, the interest of children and youth going in the area of communication, online communication and games played online. At present, almost all educational systems acknowledge that it is difficult to face this issue, but there are teachers and researchers who look for an answer to the question: what kind of motivation factors can we find, how can we stimulate the interest of children and young people to have physical exercise? Is the national system able to change school and academic curricula, and certain aspects in the pedagogic practice to match this challenge?

The solutions for such a direction presuppose following action lines such as those proposed below:

- *Higher interaction.* From this point of view, a solution consists of using physical tasks that do not aim for top performance, but aim at involving rather equally all participants. The teacher or instructor is thus preoccupied to actively engage students, namely to become a mentor for some activities carried out together. Instead of simply pointing and describing the kind of tasks which students are to apply and perform, especially during examinations, the teacher turns into a guide, a mentor with the mission to open the interest and keep up the willingness to engage in sport.
- *Complementarity*. Physical education does not have to exclusively take place in schools and universities: the subjects of the learning process are encouraged to carry out activities outside traditional education, aspect which can be useful in the assessment of a teacher for a semester. This implies that teachers can even take into account the participation of their students in related activities performed by the students they examine, such as dance, drama, volunteer work involving physical work at a more intense pace than in labs or gyms. Moreover, complementarity also implies a constant dialogue with all those involved in the educational process: first of all students and teachers, but also students part of the same group, or teachers in the same department/institution, between students representatives and academic management, that is for various layers of the formal and nonformal communication. The goal of this dialogue is not only to inform the other(s) on one's own opinion, but to permanently explore and continue to cooperate, to find directions of action leading to benefits for physical works, feedback methods, and ways to improve methodology, and ultimately educational policies. This direction is far from easy, there are elements with a clear level of difficulty for teachers and mentors: during 10-15 years, there are changes not only on the labour market, with an increasing demand for humanities and informatics, but there are within sport competitions and in the economic area new types of physical activities. For the moment, the infrastructure and the current national training cannot but offer a limited range of physical education practice in universities, such as football, basketball or handball and athletics. However, the interest of the young generation goes to the area of newer activities, both for winter, as well as for summer (surfing, diving, rollerblades, snow rafting, snowboarding, mountain cyclism, or kangoo jumping or parcour, to name only a few).
- *Physical education for life*. Together, teachers and students find the means to accomplish daily physical activities, at work and at home, in what we call lifelong learning. Participants are encouraged to discuss in informal clubs, to explore and use a healthy life style, in a holistic approach. Young people are encouraged to find what kind of food and beverages contribute to stress, how they can give up or diminish smoking, what are the risks of alcohol or drugs addiction, as well as simple yet effective means to enjoy nature, to take daily walks, to have regular trips, to spend summer or winter holidays doing sport activities specific to each season.

Starting from the need of physical education as a holistic-based activity, it is necessary to ask what kind of results we might achieve if we can appeal more to creativity and inventivity in the classroom. The two types of questions we launch for reflection are: a) what directions could physical education adopt in the future?

[9] Dan Banciu, Ecaterina Balica, „Tendințe ale criminalității violente în comunitățile rurale. Evaluarea și percepție publică", în *Revista Română de Sociologie*, serie nouă, anul XX, nr.1-2, București, 2009, pp.154-163.

And b) how can teaching and learning about health have a higher role in the physical education curriculum to underline the vision of a body which exists as a biological, naturally given, but which remains after years spent in higher education under the influence of the society and of the culture of which the individual is a member further on?

To put in practice such ideas, a new rethinking, a renewal of the physical education practice and sport in formal and nonformal education is a must. How can we reach such a goal? It is first necessary to assess and rethink the training of teachers, who need to understand better the social and technological changes with an impact in the whole contemporary society, as well as an ongoing modernization of curricula, in line with the demands of the labour market and the European framework of projects addressing youth. Moreover, the types of activities planned for in the current practice ask for innovative approaches, for example keeping groups of girls and boys in the same type of physical activity, instead of splitting them and engage in isolated tasks, whenever this is possible. Their participation in the same group does not imply that girls will have the same performance as boys, but that interaction will be better for both groups, the interest for a shared activity can stimulate all. From this perspective, the approach to get the interest of all students is *physical education as a form of movement*. In addition, to put in practice any kind of new approach, it is vital to understand who the "subjects" of this process are. In this case, the subjects are not students only, but also teachers of physical education and sport, those with a decision role in writing curricula, defining activities, but also their implementation, namely other members of the academic body in each institution and stakeholders of educational policies from higher education institutions and agencies, governmental bodies coordinating public policies in education.

Such approaches do not work in isolation. The academic body in the whole educational system needs to find the kind of approaches suitable for all students, to set learning objectives and examination items in cooperation with decision-takers in each institution and preserve an attitude of cooperation and permanent learning in each school or university. In what concerns the relationship with students, teachers and mentors aim, to put in practice such approaches, certain types of activities meant to motivate, open mind and use body to new elements, encourage children and youth to adopt an active life style which is to support them for their whole personal and professional life. All the directions proposed above are aligned in an academic learning as a complex process, as defined by Adina Glava[10], listing the laws based on which this process takes place: motivation, reverse connection, repetition and transfer, debating them in the perspective of an effective education.

4. Conclusions

Analysing the topics presented in this paper, it results that physical education and sport in European higher education face substantial changes in the last couple of decades. Current theoretic frameworks place the functions of physical education in a new light, underlining elements of interest and impact in the current age. We further explored a few innovative directions which are started to be discussed, based on a cross-disciplinary vision which requires the need of correlating knowledge in this area with that in other fields: psychology, sociology, justice and information technology.

To support such approaches, the author proposes a few lines of actions as innovative approaches, using the principles of interaction, complementarity and lifelong learning. To close on an optimist note this plead for rethinking physical education and sport in the current educational system, we think that we can wrap up by using a quote provided by Jean Giradoux, a French writer, essayist and diplomat: "Sport is about delegating to the body a few of the strongest virtues of the soul: energy, audacity, and patience." (Le sport consiste à déléguer au corps quelques-unes des vertus les plus fortes de l'âme: l'énergie, l'audace, la patience.)[11].

Along this vision, physical culture needs to be looked upon in a wider cultural context as a vital section of each person's life, being about the development of the potential naturally provided and biologically inherited by each person, but also by the cultural potential from the social environment we live in, while this instils certain behaviours and main values which dominate the physical, social and moral environment, in such a way that it preserves health and welfare for each person, but also for activities performed in a group.

Any new knowledge, at the moment of learning, need to be designed from the assumption that they are valuable and benefice for the subject of learning. The teacher has thus the mission to prepare the conditions of sustainability and durability of each acquired element, of any ability practised in the educational environment. What is gained by a student at one moment is going to be used later in practice or to be correlated with other kind of knowledge, to apply them in either intellectual or material work. The durability and consistency of learning are provided by the learning ways and the nature of the teacher-student relationships, by the way in which teachers manage to influence students to use the same techniques outside a

[10] Adina Glava, Glava. *Metacogniţia şi optimizarea învăţării: aplicaţii în învăţământul superior*, (Cluj-Napoca: Casa Cărţii de Ştiinţă, 2009), p.26.

[11] *Le Figaro*, online edition, http://evene.lefigaro.fr/citation/sport-consiste-deleguer-corps-vertus-fortes-ame-1331.php, accessed 15 Dec. 2016.

formal educational background and to preserve and generate the acquired information in the context of new experience. The interconnections of knowledge can take place based on project work or assessment moments, when recap or practising what has been learned turn into compulsory conditions, an essential opportunity to reassess the acquisitions, to have a synthesis, to get connections between various cognitive layers and practical abilities. Practice leads thus to full assimilation of knowledge in the very intellectual and biological being of any individual, supporting him/her to continue his/her life with the support of learned content. Later practice simply helps him/her to evaluate what has been learned and re-structure and validate the abilities and accumulated information at the level of school and university this person is educated in.

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THE NATIONS OF EUROPE BETWEEN IMPOSED GLOBALIZATION AND THE NEED OF AUTHENTIC

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Abstract

In the present consumer society, we are alike creators as well as addressees, of an impressive number of options. Of these, we need to choose what is relevant to their own social needs. At the same time appears the necessity to understand and of developing the concept of authenticity from the sociological point of view. This is the reason the confidence, naturalness, truth, warranty, has became in our research, tools of verification of social attitudes in the context of socio-political events, caused in their turn by global geostrategic policy.

Keywords: *authenticity, trust, social choice, genuine need, consumerism*

1. Introduction

The Globalization, as we already know, is basically a multicausal process. The aim of that process is achieved by the action to globalize. In turn, the action itself is a phenomenon of transforming the world into a unit, and this is manifested world-wide through specific means. This can be explained by the fact that a number of events taking place in an area of the globe have repercussions increasingly wider on people and social problems in other parts of the globe.

Generally, we can say that we are dealing among decision makers, with pro-globalists and anti-globalists. Those who are positioned in anti-globalist camp characterize globalization in relation to certain criteria[1]:

1. The Globalization is a conspiracy of large transnational corporations against small countries;
2. The Globalization united the market power in the hands of those who leading a small number of huge corporations;
3. The Evil genius of globalization is information technology;
4. The Globalization means companies uncontrolled by law;
5. The Globalization is the cause to lowers jobs;
6. The Globalization undermines cultural diversity;
7. By globalization, lowers the standard working conditions, workers being transformed gradually into a kind of slave;
8. The Globalization destroys the environment;
9. The Globalization involves the flourishing of the multinational corporations, at the expense of smaller corporations and consumers;
10. The Globalization deepens the gap between rich and poor.

It needs to mention that between the two world wars, the Europeanism, as socio-cultural paradigm, contained a high moral dimension. This was illustrated in the products of culture, generated by culture people: writers, artists, etc. Today, the generation of writers who ensure literary authentication no longer exists as a whole. She was fragmented over time, against the background of consumism which in turn, it was amplified chaotic, because of the education deficiency about selection. Also, the consumism is one of the factors who,on the one hand has attacked the authentic, and on the other hand, later in time, has triggered the need at authentic. But it all depends on education, an issue which positions us back into culture. The question is: how it looks the culture after this repositioning? This is a question which require the analytical ability and selection of the individual.

2. Content

2.1. The fight for the mastery of information

The Interdependence who exists as a result of human development, represents the engine which drives the configuration of increasingly deep of human global society. Certainly, as species, the human has evolved within a society which he had created, through its actions, through his mind and soul. But this society it had distinct features along its becoming and development, referring to the territoriality, faith, culture, etc. We are talking here about nations, each with her identity.

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[1] Richard D. McCormick, *10 Myths About Globalization*, 2000; Robert J. Holton, *Some Myths About Globalization*, 1997, *apud* https://vladhogea.wordpress.com/2013/09/16/restituiri-vlad-hogea-statele-nationale-in-contextul-globalizarii-breviar-de-curente-si-teorii-2005/.

The idea of human society organized and tidy as one global social system is not new. What is new, is materialized in the new world order, a corollary of globalization, as its ultimate supreme effect of these. That state for interdependence is manifested by the ties of socio-economic and more recently cultural category, existing between individuals. Necessarily, these ties exceed the borders of states, a secondary effect being one by mixture of the nations of point of view territorial, family, cultural and emotional.

There are voices who claim that in present all social actors, in various forms (individuals, groups, interests, corporations, etc.), are on the social scene and acting. There is also a scenario. His artists are more or less visible, some in the foreground, the others in the background. Their scenario has in center the eternal struggle for power. The tendency on seizure of the power through the takin g into possesion of territories and their resources is the manifestation framework for the magnates of these times.

The instrument used for this planetary purpose is the information. The fight for dominion of information, already has triggered conflicts between individual and group interests on the one hand and between national and cosmopolitan interests on the other hand.

For those few powerful of the world, the individual is an element that serves their to the extent that they consume anything, no matter as much as posible. The individual is not the social person, endowed with moral and creative capacity, but simply a executor.

The existence and specificity of the global market favored new forms of circulation of various forms of capital. The economic dimension has escalated in these conditions the states borders, in a form and unprecedented speed. At such movement, the forms of governmental organization have not been able to adapt in timely and this has endangered the economies of nations. The pattern under that appeared the circulation of capital, oriented to consumism, took its name of multinational corporation. In these conditions there is a certain dichotomy that targets a perverse form something which decades ago made reference only to the unit in the making: society and the individual.

From now, the society appears as an external entity, even if essentially is the result of his becoming, of the individual. We are in the situation where the quantity is in action over quality. This happens because the individual is forced to conduct actions depending on the conditions imposed by this entity. She is increasingly more hostile to the man and is called generic, society. Increasingly more, the human society call themselves in a form of consumism at global scale. That being said we may consider we have reached at the essence of globalization.

Malefic forces that govern at global scale have acted with a dexterity hard to imagine at the end of the XIX century in such a way that the whole (society) that exist and it works only trough its elements (individuals), now is to the opposite pole of existence and beingness of their. Paradoxically, but the globalization has like ultimate goal the increasing of the degree of union of the global population and not anyway, but in conditions of high standards. However, the uniformization about we are talking, annihilates the individual as well as identitary element and once with this, the power of continuous regeneration of society. In this way was created a socio-spatial gap between the individual and society: already we assist on a conflict sparked between merger and division.

The direction in which it goes the fight for the global power seems to have as the end point something no sense. This seems to be the finality of the relationship between globalization and individual identity, which undoubtedly leads to the crash the national identity of peoples. We have shown here in brief and as can be simple as possible as it appears the relationship between globalization and identity, without going into details of economic and especially political.

In political terms, the situation is much more transparent. The globals protagonists dictates without hindrance a policy of their global purpose, which he apply obligatory and unfiltered to the peoples, without to hide, almost without using the manipulation. They do this because they do not respect the people and do not hesitate to infringe on face the basic human rights. They get a reliable help in this endeavor right from the individuals who they promotes their interests and which are infiltrated into governments. They act together with the corporations and for corporations. The corporation has replaced the factory, the farm, etc.

2.2. The Group

Must nevertheless to mention that the idea of a world government has captured attention of the great public, from its beginning. Why? Because major world powers promised (and also do still so) welfare and happiness for everyone. Was put emphasis on the cooperation in all fields, on the progress of science and technology, all in the service of the individual happiness. But it turned out that the realy plan was watching just the implementation of a new world order, through coercion and satisfaction of some interests. These interests have been shown ultimately to be in favor of a small group of people who hold absolute power and immense wealth. These people have already entered in the public consciousness as the Group. Through his Ambassadors, the Group promised and asks. As promise, promise the same things for decades, as requirement, request always something else, more and more. What else? Because the group receives it all, as it asks. The population receives nothing, that's why they is promise permanently same advantages, that have remained at stage of desideratum.

In these conditions it is observed that populations, especially from the united Europe, the EU, they started to wake up from the mirage of promises. As international organization, the European Union is mostly an ambassador of the group. Natural and human

resources, finance, environment, everything has gone in a few hands, with the agreement of governments, even if these riches belong to the peoples, in joint property. We believe that a government should not alienate in any way an asset that belongs to the people. Government should be the guarantor of the people who appointed him, in the relationship with foreign forces. This comes in the situation in which the government is independent of foreign interests of the nation. But the Group, through his intermediaries, took care to monopolize the independence and freedom of the governments. And this, we feel it pretty clearly here in Europe. The promises of European's Commission, of european leaders in the idea that we will live at high standards, members of the Union , were shattered.

How did it get here? How have ventured the G8 (Group) to start an avalanche of forces capable of annihilating conscience and soul of European nations? How they managed?

These are questions that involve a very careful analysis. Marshall McLuhan[2] is one of the leading experts in communication that promoted the idea of the global informational village. In the strict sense,this it was the idea of a global community without borders as regards of communication.

Of course, the dynamic element of such a purpose it was the Internet. The Internet it represented the tool that breaks any obstacle to human communication way. Nothing wrong up here. But such progress in communication, was anticipated to become used also for negative purposes. Always, great discoveries that might have been lead to the happiness of humanity were used in dual purpose: positive and negative.

Returning to the idea above, it should be mentioned that the global village has served and serves the interest at uniformity the human individual under all aspects, from all points of view. And the first step was made: the individual is in the global village, but he no more has command about the fullness of his quality of social actor. It's just one element of a whole, a component also similar the others. His consciousness has lost of its importance. It is trying to blur the past, for interrupting the contact with the ancestry. Among other things, the tradition must disappear and with it the positive social values. Everything related to authentic is introduced into a process accelerated by nihilism. For this shall be destroyed values, like: respect, friendship, love, kindness, compassion, mutual help, sharing of feelings, emotional support etc. This standardization aims uniformity. The uniformity in this situation is built on chaos. It results from the mixture of everything and all, without logic.

From this moment, disappears the social order that govern the human society. Why she disappear? Because she, the social order, was built by human throughout its evolution, through education, by establishing values, norms and social sanctions. We are talking about social control that involves all regulatory mechanisms of social order. The social control is coordinated by the free individual which respect and also impose limits. All is the result of historical life of the human individual. But the history carries with it memories. The memories means past and roots. The past is the anchor that bind us of the moment of birth, of family, and by the experience from which we, the humans, have learned and that keeps us constantly connect at authentic. In a word, we're talking here about quality in society. This is exactly what is intended to be annihilated. To a certain measure it has succeeded and look at us we are pushed in the paradigm of social quantity.

2.3. The quantitative man

The quantitative man is by excellence a free man. Free even by itself. No longer in the affective community with the others. This leads to a form of independence which has an essential feature: the falsity. In the global village, independent means solitude and addiction. Of course, the addiction manifests itself depending on what offers the Group, on which occasion he master, oppresses, uses and conditioning what was the social actor - the person. All that what it is promotes, is named convenience, luxury, easiness, equality, in sense of copy of one with the other, etc. On this path, the false independence destroys the individual's identity, his membership to tradition, people, nation, national culture. Destroy everything who belongs of social morality. It have existed boldness during this action because it has resorted to the sensitivity of frustrated individuals. They are not socialized with desirable social values, they do not have qualities who propelling them on the orbit of respect and admiration of the fellows. Therefore, they have accepted unconditionally a leadership position, from which to execute orders to whom he owes an undeserved social status. All these individuals are carriers of negative social values. They promote the social undesirables, non-value. They form the new elites, positioned in responsible functions, social statuses from serving more or less directly, the Group's interests. All these individuals are carriers of negative social values. Thus, the non-elites have been formed, bearing of non-values. By attitude and actions, these performers, killers of the authentic, have contributed and contribute to creating a rift in society about human value, at the individual's quality. This rift it was deepened and chronical such an extent that we can speak of a necrosis of values.

This is how the things stand in this moment. But, how resurrect from ashes the spark, at the same might happen in Europe. Here, the nations have a millennial history, a exceptional culture, here the peoples have benefited from a healthy education either in democratic regime, either totalitarian. The traditional family as the social core, remain steadfast.

[2] Marshall McLuhan, Galaxia Gutenberg, Ed. Nemira, București, 2015, p. 216.

2.4. The identity - an anomaly of the future

We have discovered from day to another that we miss the old man, most of us we do not wish the new man. We do not want to be the new peoples, for the purpose that the global artisans they want him. The old man carries with itself the past, he is authentic. The new man is a counterfeit item, a being who thinks he lives. However, he only exists.

That is why the peoples have started to move. In legislation the focus is on the traditional family. In Romania, a legal norm existing in the Civil Code, specifically Article 48, was elevated to constitutional rank. This article states clearly and unequivocally that in Romania, the family is founded on marriage; al.1.1 specifies that marriage can be concluded only between man and woman, these having the aged over al least 18 years. By this measure it put a limit against one of the issues that you raise total freedom. We us refer here by total sexual freedom. Suddenly, people begin to understand that the so-called open mind does not mean total acceptance, she means selection. And they began the selection calling upon of education and tradition. Gradually, we are witnessing to the rejection of some pseudo-values on which the Occident has forced us to accept them and that was sure we would not discard them.

But here is how the Christian morality, the social consciousness, the European peoples roots, have awakened from numbness and want go out of chaos. Anyway, in rural areas especially, certain liberties will not never success. This is because in rural area, the social life is conducted according to rules more strongly conserved. The tradition, faith, moral rules, are deeply anchored in the social life. The new, catches easier in big cities, there where the degree of homogeneity of the population is much lower than in the province, especially in rural areas.

3. Conclusions

The struggle for preservation and conservation of identity is unquestionably a necessity. This struggle is the essence of authenticity both at macrosocial level in terms of nations also at microsocial level in terms of human individual. The problem is looming especially at European level. The European Union is transformed in accelerated rhythm in a united Europe. Or this is desired by the Group, which is quick to establish the new world order. This united Europe would actually be one state without borders between member states, without national police and army, with a single religion, etc. Might the peoples of Europe them to be engaged in this puzzle, as a pilot project in the great opera of achieving the new world order. It may be that the artisans of the great global project they were to follow the effect of their action on the European peoples, then continue elsewhere with identical actions, or to make changes, to obtain one's object.

It seems that citizens they felt what happens to them so they started shy now, to seek, to regain and promote their origins, traditions. This is the search of the authentic, in an artificially constructed world in which man is forced to thinking into turn artificially. It only remains for us to observe the battle between the regular citizens and the global artisans, more exactly the results that will arise from the conflict between the need of authentic and desire of globalization.

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A NEGOTIATION MODEL FOR COLLABORATIVE ACTIVITIES

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Abstract

This paper proposes a collaborativ system to model and support parallel and concurrent negotiations among organizations acting in the same industrial market. The underlying complexity is to model the dynamic environment where multi-attribute and multi-participant negotiations are racing over a set of heterogeneous resources.

Keywords: *Negotiation, Collaborative Activities, Multi-agent system, Web components*

1. Introduction

To be able to perform, enterprises need to exchange information, whether this exchange is internal (among departments of the enterprise), external (between the enterprise or part of it and an external party), or both. Enterprise Interoperability (EI) is thus defined as the ability of an enterprise to seamlessly exchange information in all the above cases, ensuring the understanding of the exchanged information in the same way by all the involved parties[1]. Large enterprises accomplish this by setting market standards and leading their supply chain to comply with these standards. Small and Medium Enterprises (SMEs) usually don't have the empowerment to do so, and are therefore more sensible to the oscillations of the environment that involves them, which leads them to the need to constantly change to interoperate with their surrounding ecosystem. Sustainable EI (SEI) is thus defined as the ability of maintaining and enduring interoperability along the enterprise systems and applications' life cycle. Achieving a SEI in this context requires a continuous maintenance and iterative effort to adapt to new conditions and partners, and a constant check of the status and maintaining existing interoperability[2].

Given this general context, the objective of the present paper is to develop a conceptual framework and the associated informational infrastructure that are necessary to facilitate the collaboration activities and, in particular, the negotiations among independent organizations that participate in a Network Enterprises.

The concept of "Virtual Enterprise (VE)" or "Network of Enterprises" has emerged to identify the situation when several independent companies decided to collaborate and establish a virtual organization with the goal of increasing their profits. Camarinha-Matos[3] defines the concept of VE as follows: "A *Virtual Enterprise (VE)* is a temporary alliance of enterprises that come together to share skills and resources in order to better respond to business opportunities and whose cooperation is supported by computer networks".

The negotiation process was exemplified by scenarios tight together by a virtual alliance of the autonomous gas stations. Typically, these are competing companies. However, to satisfy the demands that go beyond the vicinity of a single gas station and to better accommodate the market requirements, they must enter in an alliance and must cooperate to achieve common tasks. The manager of a gas station wants to have a complete decision-making power over the administration of his contracts, resources, budget and clients. At the same time, the manager attempts to cooperate with other gas stations to accomplish the global task at hand only through a minimal exchange of information. This exchange is minimal in the sense that the manager is in charge and has the ability to select the information exchanged.

In Section 2 we are describing the architecture of the collaboration system in which the interactions take place[4]. In Section 3 we define the Coordination Components that manage different negotiations which may take place simultaneously. In Sections 4 we present the negotiation approach that can be used by describing a particular case of negotiation, and, finally, Section 5 concludes this paper.

2. The Collaborative Negotiation Architecture

The main objective of this software infrastructure is to support collaborating activities in virtual

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[1] M.-S. Li, R. Cabral, G. Doumeingts, and K. Popplewell, "Enterprise Interoperability Research Roadmap," no. July. European Commision - CORDIS, p. 45, 2006.

[2] R. Jardim-Goncalves, A. Grilo, C. Agostinho, F. Lampathaki, and Y. Charalabidis, "Systematisation of Interoperability Body of Knowledge: the foundation for Enterprise Interoperability as a science," Enterprise Information Systems, vol. 6, no. 3, pp. 1-26, 2012.

[3] Camarinha-Matos L.M. and Afsarmanesh H.,(2004), *Collaborative Networked Organizations,* Kluwer Academic Publisher Boston.

[4] Cretan, A., Coutinho, C., Bratu, B., and Jardim-Goncalves, R., NEGOSEIO: A Framework for Negotiations toward Sustainable Enterprise Interoperability. Annual Reviews in Control, 36(2): 291–299, Elsevier, ISSN 1367-5788, 2012, http://dx.doi.org/10.1016/j.arcontrol.2012.09.010.

enterprises. In VE partners are autonomous companies with the same object of activity, geographically distributed.

Taking into consideration, the constraints imposed by the autonomy of participants within VE, the only way to share information and resources is the negotiation process.

Figure 2 shows the architecture of the collaborative system:

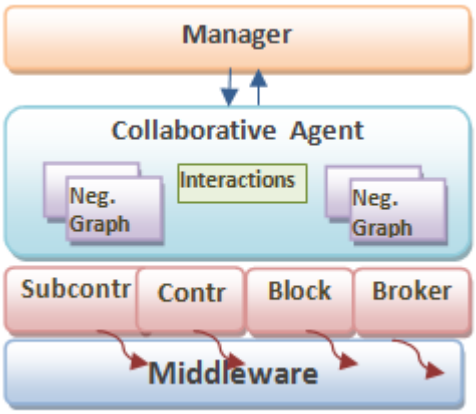

Fig. 2 The architecture of the collaborative system

This infrastructure is structured in four main layers: Manager, Collaborative Agent, Coordination Components and Middleware. A first layer is dedicated to the Manager of each organization of the alliance. A second layer is dedicated to the Collaborative Agent who assists its gas station manager at a global level (negotiations with different participants on different jobs) and at a specific level (negotiation on the same job with different participants) by coordinating itself with the Collaborative Agents of the other partners through the fourth layer, Middleware[5]. The third layer, Coordination Components, manages the coordination constraints among different negotiations which take place simultaneously.

The initialization step allows to define what has to be negotiated (Negotiation Object) and how (Negotiation Framework)[6]. A selection of negotiation participants can be made using history on passed negotiation, available locally or provided by the negotiation infrastructure (Zhang and Lesser, 2002). A Collaborative Agent aims at managing the negotiations in which its own gas station is involved (e.g. as initiator or participant) with different partners of the alliance.

Each negotiation is organized in three main steps: initialization; refinement of the job under negotiation and closing[7].

In the refinement step, participants exchange proposals on the negotiation object trying to satisfy their constraints (Barbuceanu and Wai-Kau, 2003). The manager may participate in the definition and evolution of negotiation frameworks and objects (Keeny and Raiffa, 1976). Decisions are taken by the manager, assisted by his Collaborative Agent (Bui and Kowalczyk, 2003). For each negotiation, a Collaborative Agent manages one or more negotiation objects, one framework and the negotiation status. A manager can specify some global parameters: duration; maximum number of messages to be exchanged; maximum number of candidates to be considered in the negotiation and involved in the contract; tactics; protocols for the Collaborative Agent interactions with the manager and with the other Collaborative Agents (Faratin, 2000).

3. Coordination Negotiation Components

In order to handle the complex types of negotiation scenarios, we propose different components[8]:

- *Subcontracting* (resp. *Contracting*) for subcontracting jobs by exchanging proposals among participants known from the beginning;
- *Block* component for assuring that a task is entirely subcontracted by the single partner;

Broker: a component automating the process of selection of possible partners to start the negotiation;

These components are able to evaluate the received proposals and, further, if these are valid, the components will be able to reply with new proposals constructed based on their particular coordination constraints[9].

From our point of view the coordination problems managing the constraints between several negotiations can be divided into two distinct classes of components:

Coordination components in closed environment**:** components that build their images on the negotiation in progress and manage the coordination constraints according to information extracted only from their current negotiation graph (*Subcontracting, Contracting, Block)*;

Coordination components in opened environment: components that also build their images on the negotiation in progress but they manage the coordination constraints according to available information in data structures representing certain characteristics of other negotiations currently ongoing into the system (*Broker).*

Following the descriptions of these components we can state that unlike the components in closed environment (*Subcontracting, Contracting, Block)* that manage the coordination constraints of a single negotiation at a time, the components in opened environment (*Broker)* allow the coordination of

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[9] Vercouter, L., *A distributed approach to design open multi-agent system.* In 2nd Int. Workshop Engineering Societies in the Agents' World (ESAW), 2000.

constraints among several different negotiations in parallel[10].

The novelty degree of this software architecture resides in the fact that it is structured on four levels, each level approaching a particular aspect of the negotiation process. Thus, as opposed to classical architectures which achieve only a limited coordination of proposal exchanges which take place during the same negotiation, the proposed architecture allows approaching complex cases of negotiation coordination. This aspect has been accomplished through the introduction of coordination components level, which allows administrating all simultaneous negotiations in which an alliance partner can be involved.

The coordination components have two main functions such as: i) they mediate the transition between the negotiation image at the Collaboration Agent level and the image at the Middleware level; ii) they allow implementing various types of appropriate behavior in particular cases of negotiation. Thus we can say that each component corresponding to a particular negotiation type.

Following the descriptions of this infrastructure we can state that we developed a framework to describe a negotiation among the participants to a virtual enterprise. To achieve a generic coordination framework, nonselective and flexible, we found necessary to first develop the structure of the negotiation process that helps us to describe the negotiation in order to establish the general environment where the participants may negotiate. In the next sub-sections we will describe the *Subcontracting* and *Contracting* components.

3.1. Subcontracting Component

The *Subcontracting* component is the main component of a negotiation. The automatic negotiation process is initiated by creating an instance of this component starting from the initial negotiation object. Further, this component must build the negotiation graph by following the negotiation requirements (i.e., assessment and creation of proposals and coordination rules). The component meets these requirements by manipulating the Xplore primitives [14].

Besides these functionalities, the *Subcontracting* component has to interpret and check the negotiation constraints, which are set up in the following two data structures : *Negotiation Object* and *Negotiation Framework.*

The information provided by the structure of the Negotiation Object on the possible values of the attributes to be negotiated allow easily the *Subcontracting* component to check whether the proposals received concern the attributes negotiated in the current negotiation and if they are associated to the values of the intervals specified.

For example, assuming that the Negotiation Object requires that the price should be (*cost <= 10k),* the *Subcontracting* component can stop the continuation of the negotiation in the phases associated to the white nodes where the proposals are outside the interval.

Also, by using the *partner* coordination attribute, the *Subcontracting* component can make known to the other components the participants imposed by the Negotiation Object or whether other components instantiate this attribute. In this regard, the *Subcontracting* component can easily check if the associated value confirms the constraints imposed by the Manager.

At middleware level, the *Subcontracting* component has also the function of administrating the transactional aspect of the negotiation. This component is seen like a *coordinator* and has the role to conclude an agreement among the component instances participating in the same negotiation.

Another *Subcontracting* component functionality is to interpret and execute the tactics specified in the Negotiation Framework structure by connecting a combination of different instances of the other components.

Thus, the *Subcontracting* component as well as the *Contracting* component described below are those connecting the aspects specified at the Negotiation Agent level and their implementation at the coordination components level.

3.2. Contracting Component

The *Contracting* component manages the negotiation from the organization side deciding to accept a task proposed in the collaborative networked environment, with some functionalities similar to those of the *Subcontracting* component.

The differences come from the fact that this component does not have a complete picture on the negotiation and that, at the beginning of the negotiation, it has no information about what is negotiated or about the constraints of its Manager.

Therefore, looking to the differences, we can say at first that the image of the *Contracting* component on the negotiation graph is limited to the data referring only to its direct negotiation with the *Subcontracting* component or with another component negotiating for the organization having initiated the negotiation.

Secondly, unlike the *Subcontracting* component, which, from the beginning, has constraints specified by the Manager within the data structures of the *Negotiation Object* and the *Negotiation Framework,* the *Contracting* component has a close interaction with its own Manager on the new aspects required in the negotiation.

Thus, depending on attributes required by the negotiation initiator the *Contracting* component is able to progressively build the data structures describing the Manager's preferences on the negotiation object and on the negotiation process.

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4. Negotiation Approach

In the proposed scenario, a conflict occurs in a network of enterprises, threatening to jeopardize the interoperability of the entire system. The first step consists in identifying the Enterprise Interoperability issue. The following steps refer to analyse the problem, evaluate possible solutions and select the optimal solution. The proposed solution for conflict resolution is reaching a mutual agreement through negotiation. The benefit of this approach is the possibility to reach a much more stable solution, unanimously accepted, in a shorter period of time.

The design and coordination of the negotiation process must take into consideration:

1. Timing (the time for the negotiation process will be pre-set);
2. The set of participants to the negotiation process (which can be involved simultaneous in one or more bilateral negotiations);
3. The set of simultaneous negotiations on the same negotiation object, which must follow a set of coordination policies/ rules;
4. The set of coordination policies established by a certain participant and focused on a series of bilateral negotiations[11];
5. Strategy/decision algorithm responsible for proposals creation;
6. The common ontology, consisting of a set of definitions of the attributes used in negotiation.

The negotiation process begins when one of the enterprises initiate a negotiation proposal towards another enterprise, on a chosen negotiation object. We name this enterprise the Initiating Enterprise (E1). This enterprise also selects the negotiation partners and sets the negotiation conditions (for example sets the timing for the negotiation) (Schumacher, 2001). The negotiation partners are represented by all enterprises on which the proposed change has an impact. We assume this information is available to E1 (if not, the first step would consist in a simple negotiation in which all enterprises are invited to participate at the negotiation of the identified solution. The enterprises which are impacted will accept the negotiation) (Kraus, 2001).

After the selection of invited enterprises (E2 … En), E1 starts bilateral negotiations with each guest enterprise by sending of a first proposal. For all these bilateral negotiations, E1 sets a series of coordination policies/rules (setting the conditions for the mechanism of creation and acceptance of proposals) and a negotiation object/framework (NO/NF), setting the limits of solutions acceptable for E1. Similarly, invited enterprises set their own series of coordination policies and a negotiation object/framework for the ongoing negotiation.

After the first offer sent by E1, each invited enterprise has the possibility to accept, reject or send a counter offer. On each offer sent, participating enterprises, from E1 to E2 ... En follow the same algorithm.

The algorithm is shown below: Pseudocode representation of the negotiation process

Inputs: Enterprises E1...En; NO(*Negotiation Object*); NF(*Negotiation Framework*)

Outputs: The possible state of a negotiation: *success, failure*

```
BEGIN
on receive start from E1{
    send initial offer to partner;
}
on receive offer from partner{
    evaluate offer;
    if(conditions set by the NO/NF are not met){
            offer is rejected;
            if(time allows it){
                    send new offer to partner;
            }else{
                    failure;
            }end if;
    }else{
            send offer to another partner;
    }end if;
    if(receive an accepted offer){
            if(offer is accepted in all bilateral negotiations){
                    success;
            }else{
                    if(time allows it){
                            send new offer to partner;
                    }else{
                            failure;
                    }end if;
            }end if;
    if(receive a rejected offer){
            if(offer is active in other bilateral negotiations){
                    failure in all negotiations;
            }end if;
    }end if;
}
END
```

5. Conclusions

This paper proposes a collaborative e-platform for sustainable interoperability by modeling and managing of parallel and concurrent negotiations, which aims to open the market to broader discovery of opportunities and partnerships, to allow formalization and negotiation knowledge to be passed to future negotiations and to properly document negotiation decisions and responsibilities. The negotiation activities typically fail because they are often based on tacit knowledge and

[11] Ossowski S., *Coordination in Artificial Agent Societies*. Social Structure and its Implications for Autonomus Problem-Solving Agents, No. 1202, LNAI, Springer Verlag, 1999.

these activities are poorly described and modeled. Also as negotiations occur in a closed environment, many external potential interested parties are not aware of them and do not subscribe them. This makes negotiations reach poorer results or fail by disagreement or exhaustion. The integration of formal procedures for modeling, storing and documenting the negotiation activities allows an optimized analysis of the alternative solutions and by adding the analysis of lessons-learned on past activities leads to maximized negotiation results, stronger negotiation capabilities and relationships.

Currently, interoperability among the involved parties in a negotiation is often not reached or maintained due to failure in adapting to new requirements, parties or conditions. The use of an adaptive platform as proposed will result in a seamless, sustainable interoperability which favours its maintenance across time; the ability to reach and interoperate with more parties leads to more business opportunities and to stronger and healthier interactions.

The sequence of this research will comprise the completion of this negotiation framework with the contract management process and a possible renegotiation mechanism.

With respect to the framework middleware, future research shall include handling issues regarding the security and resilience of the stored negotiation data in the cloud, and managing privacy aspects as the negotiating parties should be able to seamlessly interoperate but still to maintain their data free from prying eyes; also several issues need to be solved from non-disclosure of participating parties to secure access to the negotiation process.

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RANDOM WALK HYPOTHESIS IN FINANCIAL MARKETS

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Nicoleta JULA**

Abstract

Random walk hypothesis states that the stock market prices do not follow a predictable trajectory, but are simply random. If you are trying to predict a random set of data, one should test for randomness, because, despite the power and complexity of the used models, the results cannot be trustworthy.
There are several methods for testing these hypotheses and the use of computational power provided by the R environment makes the work of the researcher easier and with a cost-effective approach. The increasing power of computing and the continuous development of econometric tests should give the potential investors new tools in selecting commodities and investing in efficient markets.

Keywords: *random walk, financial market, stock price, statistical test, R*

1. Introduction

When analyzing the market, there are two historical approaches. One theory is based on the randomness of the data and the other supports the predictability of the market, thus meaning a non-random hypothesis.

The random walk is an old concept, which can be traced back to 19th century, when the French broker Jules Regnault[1] published his research in 1863. In 1900, Louis Bachelier[2] wrote his PhD. Thesis on the same theory. The first use of random walk on stock market is attributed to Maurice Kendall[3] and his paper from 1953. The history also records the test performed by the professor Burton G. Markiel[4], when he demonstrated the randomness of the stock market using a flip coin to decide the growth of the closing price of an equity.

There are also researchers that do not agree to the random walk hypothesis in predicting the market behavior. They state that the prices are somehow predictable and one could identify some trends analyzing the historical data. Many studies are presenting tests that support the predictability of the trends in the financial markets, like professors Andrew W. Lo and Archie Craig MacKinlay's book[5].

Returning to the randomness approach, one cannot analyze the market without defining the market efficiency theory. According to Eugene Fama, the "father" of modern empirical finance, in his research "Random Walks in Stock Market Prices "he stated that "in an efficient market, competition among the many intelligent participants leads to a situation where, at any point in time, actual prices of individual securities already reflect the effects of information based both on events that have already occurred and on events which as of now the market expects to take place in the future. In other words, in an efficient market at any point in time the actual price of a security will be a good estimate of its intrinsic value". The idea that you cannot have a profit on an efficient market is not supported by all economists. Some stipulates that you can profit on such a market by selecting / buying leveraged ETFs (exchange trade funds). And, like almost always in trading, big risks can bring big winnings or big loses.

Depending on how much information is taken into account when forming the current price, we can distingue weak, semi-strong and strong efficient markets. A week efficient market is the one which forms the price based on all historical prices. Semi-strong markets bring intro the formation of the price all relevant and public available information. The strong form of the efficient market takes into account not only all the relevant information, but also even insider information, usually not publicly available.

Usually, the market efficiency may be considered a by-product of market involvement of information arbitrageurs. These information arbitrageurs shall buy the assets that are supposed to be undervalued and sell the overvalued one. These agents may have some information that is scares of publicly not so accessible. By doing this, they may be considered to regulate the

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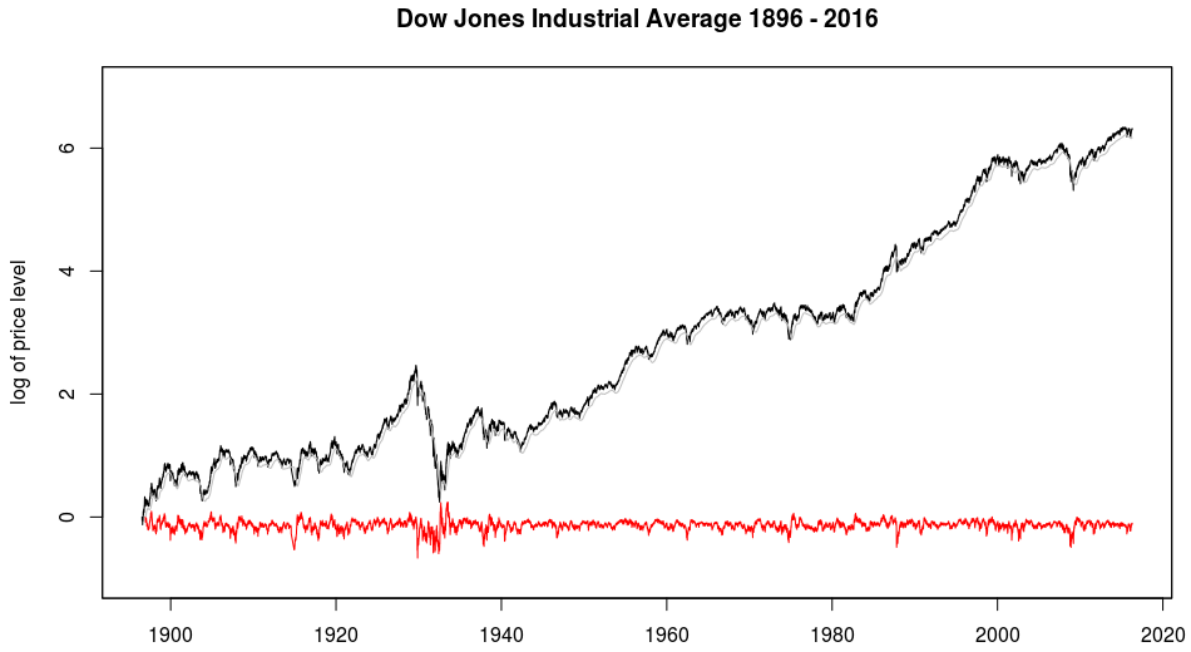
[1] Regnault, Jules, 1863, Calcul des chances et philosophie de la bourse, Paris : Mallet-Bachelier and Castel
[2] Bachelier, L., 1900, Théorie de la spéculation, Gauthier-Villars.
[3] Kendall, M. G.; Bradford Hill, A (1953). "The Analysis of Economic Time-Series-Part I: Prices". Journal of the Royal Statistical Society. A (General). Blackwell Publishing. 116 (1): 11–34. JSTOR 2980947.
[4] Malkiel, Burton G. (1973). A Random Walk Down Wall Street (6th ed.). W.W. Norton & Company, Inc. ISBN 0-393-06245-7.
[5] Lo, Andrew W.; Mackinlay, Archie Craig (2002). A Non-Random Walk Down Wall Street (5th ed.). Princeton University Press. pp. 4–47. ISBN 0-691-09256-7.

price of the assets on that market and the new price should include also these sets of information known by these arbitrageurs. If the markets were perfectly efficient, the existence of the arbitrageurs would be unnecessary. Also, their actions are "boosted" by the existence of the noise traders. These so-called noise traders are the agents who trade based on other motives than new information (for example, an insurance company selling some stocks for paying a large claim).

investors who expect some gain. Stuart Ride explains the difference between a complete random market and the actual one in the Figure 1 below. In this graph, the investors are rewarded (the trand is ascending). The gray line is a compounded 126 day rolling average return, a so-called equity risk premium, the red line shows the compounded excess/residual return of the market, based on the calculations made by Ride. The gray line can be seen as the signal and the red one as a noise, or a Martingale process. Stuart Ride comes with

Figure 1



Source: http://www.turingfinance.com/testing-the-efficient-market-hypothesis-with-r/

2. Random Walk Hypothesis

The random walk hypothesis is a theory that stipulates the price of an equity should be described by a random walk, more specific a sub-martingale process. In probability theory, this martingale[6] process (the term being first used by Ville, in 1939) is used to describe a fair game, in which the past events do not influence the outcome of the current winnings and only the present events matter.

A weak efficient market can be regarded as a random model, because the historical price changes are reflected in the current price. So, this is an argument to test for randomness in the markets. Stuart Ride continues this idea and states that the market is only approximately random. If the market would be completely random, no one should invest. Investors should be somehow rewarded for their risk-taken actions of holding assets. There is the so-called market risk premium and is the reason that there are long term

4 ways of testing the random hypothesis:

1. by predicting or finding statistically significant patterns in the so-called equity risk premium
2. by predicting of or finding statistically significant patterns in the residuals
3. by predicting of or finding statistically significant patterns in the sign of the residuals or in the rank
4. by using non-parametric tests of randomness

Stuard Ride[7] sugests a different approach, meaning running all of the above tests on financial price time series. And this is only possible using dedicated software, like the R environment and the *emh* package.

2.1. The importance of randomness tests

Usually, when investing there are some already called classical approaches. First, MVO (mean variance portofolio optimisation) assumes that the prices are stationary random walks that can be completely determined by their first two moments.

[6] Ville, Jean (1939). Étude critique de la notion de collectif. Monographies des Probabilités (in French). 3. Paris: Gauthier-Villars. Zbl 0021.14601.

[7] http://www.turingfinance.com/testing-the-efficient-market-hypothesis-with-r/.

The next approch is based on Monte Carlo simulations. These stochastic processes suppose to effectively model these totally random prices.

On the market there are also high frequently traders or arbitrageurs who insist that the prices are far from random and patterns can be identified in the price formation in high frequencies. Also information scarcity can be used to anticipate the price trends.

The fundamental analysts argue that in low frequency trading there is not a random price forming, but a strong correlation to the fundamental information about the company issuing the asset/comodity. Also there are the macroeconomic analysts, who also insist that in low frequency trading the economic factors do influence the prices, thus making them not random. Factors such business cicles can be recorded in the prices and making them predictible.

The last, but not the least case is of the technical analysts. In this case, the prices and volumes are not random, but follow some significant patterns, more or less easy identifiable and exploitable by using deterministic indicators.

3. Random Walk tests in R

The *emh* package consists (in the 0.1.0 version) in 6 tests: Wald – Wolfowitz runs test, Durbin – Watson test, Ljung – Box test, Breusch - Godfrey test, Bartell Rank - Based Variance Ratio test and Lo - Mackinlay Variance Ratio test.

Test 1. The Wald – Wolfowitz runs test is one of the most used tests for randomness. It consists in indentifying the number of uninterrupted aequance of identical bits. In financial markets, we translate this series in moments of growth (1s) and moments of decrease in in price of an equity (0s).

The runs test is defined as:

H_0: the sequence was produced in a random manner

H_1: the sequence was not produced in a random manner

The statistic test is $Z=(R-\acute{R})/s_R$

where R is the observed number of runs, Ŕ is the expected number of runs, and s_R is the standard deviation of the number of runs. The values of Ŕ and s_R are computed as follows:

$$\acute{R} = \frac{2n_1n_2}{n_1+n_2} + 1$$

$$s_R^2 = \frac{2n_1n_2(2n_1n_2 - n_l - n_2)}{(n_1+n^2)^2(n_1 \quad +n_2 \quad -1)}$$

with n_1 and n_2 denoting the number of positive and negative values in the series.

Significance Level: α

Critical Region: The runs test rejects the null hypothesis if $|Z| > Z1-\alpha/2$.

Test 2. The Durbin-Watson test (Durbin J., Watson G.S., 1950, 1951) is the most commonly used procedure for identifying first-order autocorrelation of errors in linear regression models.

The test is

$$dw = \frac{\sum_{t=2}^{n}(u_t - u_{t-1})^2}{\sum_{t=1}^{n} u_t^2},$$

where u_t represent the residuals from the regression.

In order to test the hypothesis[8] H_0: $\rho = 0$ (absence of error autocorrelation), the alternative H_1: $\rho \neq 0$ (the presence of the error autocorrelation phenomenon) the bilateral Durbin-Watson test is used. From the Durbin - Watson bilateral test tables, the critical values dL and dU are selected for k - the number of explanatory variables in the model and n - the size of the sample (starting from the significance level - usually 0.05 or 0.01).

- H_0 hypothesis is accepted - no first-order autocorrelation, if $DU \leq dw \leq 4 - dU$
- Reject H_0 if $dw \leq dL$ or $dw \geq 4 - dU$.
- If $dL \leq dw \leq dU$ or $4 - dU \leq dw \leq 4 - dL$, the test is inconclusive.

Test 3. Ljung – Box test, named after Greta Ljung and George Box, finds out if there is any significant autocorrelation in a time series. We should expect the autocorrelation when the financial series has a momentum or a mean-reversion. The test stars with the Ljung – Box statistic:

$$\boldsymbol{Q = n(n+2)\sum_{k=1}^{h}\frac{\hat{\rho}_k^2}{n-k'}}\ \textit{where}$$

N is the dimension of the series, $\hat{\rho}_k^2$ is the autocorrelation of the series at *k* lag, *h* is the number of lags. Under the null hypothesis, the statistics follows a chi-squared distribution.

Test 4. Breusch - Godfrey test is based on LM model and it is used to identify the autocorrelation in the errors in an econometric regression model. It is considered more powerful than Durbin – Watson tests (doesn't have the drawbacks like identifying only AR1).

The procedure consists in obtaining the residuals from the initial regression model. These residuals are forming a new regression:

$$u_t = \alpha_0 + \alpha_1 Z_{1t} + \alpha_2 Z_{2t} + \ldots + \alpha_p Z_{pt} + \varepsilon_t$$

The determination coefficient R^2 is calculated for this new regression and the nR^2 should follow a Chi squared distribution and the null hypothesis (there is no autocorrelation of any order) is rejected for $nR^2 > \chi^2$.

Test 5. Bartell Rank - Based Variance Ratio test is a version of the 1941's John von Neumann Ration Test. This version doesn't require anymore the property

[8] Jula D., Jula N., 2017, MODELARE ECONOMICĂ. MODELE ECONOMETRICE ŞI DE OPTIMIZARE, Editura Mustang, Bucuresti.

of normal distribution of the series. The statistic test is calculated:

$$RVN = \frac{\sum_{i=1}^{n-1}(R_i - R_{i-1})^2}{\sum_{i=1}^{n}(R_i - (n+1)/2)^2}$$

Where R_i is the logarithmic return r_i and *n* is the length of the series. Bartel demonstrated that the (RVN-2)/σ follows a normal distribution, where

$$\sigma^2 = \frac{4(n-2)(5n^2 - 2n - 9)}{5n(n+1)(n-1)^2}$$

Test 6. Lo - Mackinlay Variance Ratio[9] test is used to identify the heteroskedasticity in a series. Not all financial series can be tested with this procedure. According to Reid, "the test is only valid if security price changes have finite variances".

***EMH* package in R**

To test the random walk hypothesis on financial data can be rather time consuming. The today's technology allows the researcher to access a plethora of tools and the R environment proves once again that it is one of the leading source of utensils when dealing with statistic and econometric data. Each of the tests presented above are already implemented and can be used freely by everyone. The *EMH* package developed by Stuard Reid gathers these tests.

This package can be downloaded or installed in R from GitHub:

```
library(devtools)
devtools::install_github(repo="stuartgordonreid/emh")
```

The test of randomness can be performed easily, using the following syntax:

```
results<-emh::is_random(financial_data)
emh::plot_results(results)
View(results)
```

4. Conclusions

As Eugene Fama stated in his iconic article (*Random Walks in Stock Market Prices*), "If the random-walk theory is valid and if security exchanges are "efficient" markets, then stock prices at any point in time will represent good estimates of intrinsic or fundamental values. Thus, additional fundamental analysis is of value only when the analyst has new information which was not fully considered in forming current market prices, or has new insights concerning the effects of generally available information which are not already implicit in current prices. If the analyst has neither better insights nor new information, he may as well forget about fundamental analysis and choose securities by some random selection procedure.". So, one interested in investing on a market should benefit from all the information he can get. Testing a market for random walk helps decide if it is worth the risk of investing.

The future development of this research should focus on testing the model on emerging financial markets, like the Romanian one. The increasing power of computing and the continuous development of econometric tests should give the potential investors new tools in selecting and investing.

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Annex

One can perform the above tests from EMH package test by test in R.

1. For The Wald – Wolfowitz runs test the syntax suggested by Stuard Reid is:

```
test_runs <- function(rets, a = 0.99) {
```

[9] Lo, Andrew W., and A. Craig MacKinlay. "Stock market prices do not follow random walks: Evidence from a simple specification test." Review of financial studies 1.1 (1988): 41-66.

```
# Check and convert the data.
.check_data(data = rets)
binrets <- as_binary(rets)
# Get the numbers of bits.
k <- length(binrets)
k.ones <- count_ones(binrets)
k.zeros <- count_zeroes(binrets)
# Calculate the expectations.
mean <- ((2 * k.ones * k.zeros) / k) + 1
variance <- ((mean - 1) * (mean - 2)) / (k - 1)
# Calculate the number of runs.
k.runs <- test_runs_number(binrets)
# Compute the z score of k.runs.
z.score <- (k.runs - mean) / sqrt(variance)
# Compute the p-value of the z-score.
p.value <- pnorm(z.score)
# Compute the required threshold.
thresh <- abs(qnorm((1 - a) / 2))
# Return the results object.
return(c(k.runs, p.value, z.score,
abs(z.score) > thresh))
}
```

2. The Durbin-Watson test syntax suggested by Stuard Reid is:

```
test_durbinwatson <- function(rets, a = 0.99) {
# Check and convert the data.
.check_data(data = rets)
rets <- as.numeric(rets)
# Now construct the data frame.
k <- length(rets)
y.var <- tail(rets, k - 1)
x.var <- head(rets, k - 1)
data <- data.frame(y.var, x.var)
# Use lmtest to compute the p-values.
colnames(data) <- c("y", "x")
# Fit the linear model.
lmfit <- lm(formula = y ~ x,
data = data)
# Now compute the durbin-watson statistic.
dw <- lmtest::dwtest(formula = lmfit,
alternative = "two.sided")
# Get the test statistic (D) for the test.
stat <- dw$statistic
# Get the p-value for the D statistic.
p.value <- dw$p.value
# Determins the Z-score.
z.score <- qnorm(p.value)
# Compute the required threshold.
thresh <- abs(qnorm((1 - a) / 2))
# Return the results object.
return(c(stat, p.value, z.score,
abs(z.score) > thresh))
}
```

3. Ljung – Box test syntax suggested by Stuard Reid is:

```
test_ljungbox <- function(rets, a = 0.99, n.lags = 15) {
# Number of lags.
k <- length(rets)
rets <- as.numeric(rets)
# The denominator.
```

```
den <- k - seq(1, n.lags)
# Compute the lagged autocorrelations.
autocors <- c()
for (l in 1:n.lags) {
rets.head <- head(rets, k - l)
rets.tail <- tail(rets, k - l)
correl <- cor(rets.head, rets.tail)
autocors <- c(autocors, correl)
}
```

4. Breusch - Godfrey test syntax suggested by Stuard Reid is:

```
test_breuschgodfrey <- function(rets, a = 0.99) {
# Check and convert the data.
.check_data(data = rets)
rets <- as.numeric(rets)
# Now construct the data frame.
k <- length(rets)
y.var <- tail(rets, k - 1)
x.var <- head(rets, k - 1)
data <- data.frame(y.var, x.var)
# Use lmtest to compute the p-values.
colnames(data) <- c("y", "x")
# Fit the linear model.
lmfit <- lm(formula = y ~ x,
data = data)
# To compute the Beusch-Godfrey statistic.
bg <- lmtest::bgtest(formula = lmfit)
# Get the test statistic (D) for the test.
stat <- bg$statistic
# Get the p-value for the D statistic.
p.value <- bg$p.value
# Determins the Z-score.
z.score <- qnorm(p.value)
# Compute the required threshold.
thresh <- abs(qnorm((1 - a) / 2))
# Return the results object.
return(c(stat, p.value, z.score,
abs(z.score) > thresh))
}
```

5. Bartell Rank - Based Variance Ratio syntax suggested by Stuard Reid is:

```
test_bartellrank <- function(rets, a = 0.99) {
# Check and convert the data.
.check_data(data = rets)
rets <- as.numeric(rets)
# Run the bartell's rank test in randtests.
br <- randtests::bartels.rank.test(rets)
# Get the test statistic (D) for the test.
stat <- br$statistic
# Get the p-value for the D statistic.
p.value <- br$p.value
# Determins the Z-score.
z.score <- qnorm(p.value)
# Compute the required threshold.
thresh <- abs(qnorm((1 - a) / 2))
# Return the results object.
return(c(stat, p.value, z.score,
abs(z.score) > thresh))
}
```

6. Lo - Mackinlay Variance Ratio syntax is:
- using vrtest package
#Usage
Lo.Mac(y, kvec)
#Arguments
#y a vector of time series, typically financial return
#kvec a vector of holding periods

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